McNees

Welcome

A Day on Tax Seminar 2026

A changing equation: The issues and innovations shaping today's tax landscape

McNees

A Day on Tax – 2026

2026 local tax update: Statutes and case law



Presented by

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Overview

1. Statutory updates – Acts 53 and 54 of 2026
2. Downs Racing, L.P. v. Luzerne County
3. Borough of West Chester v. PASSHE
4. Sugarloaf Golf Club, Inc. v. Black Creek Township
5. Overbrook Golf Club v. Radnor Township
6. Nicholas v. Keystone Central School District

Acts 53 and 54 of 2026

Statutory updates

Act 53 of 2026 (HB 852)

- Act of Oct. 8, 2026, P.L. 554, No. 53
- Amends Local Tax Enabling Act ("LTEA")
  - Sections 702, 704 and 707(a)-(b)
- Effective: 60 days after approval (approved Oct. 8, 2026)
- Key changes:
  - Expanded notice requirements
  - Expanded collection costs

Act 53 – expanded notice

- Exhaustion – LTEA § 702
  - No action against spouse or spouse's employer until a pre-written-demand notice is sent
- Notice – LTEA § 704
  - At least 15 days before presenting notice and demand
  - Notify delinquent taxpayer, and spouse if proceeding against spouse/spouse's employer
  - Registered or certified mail, restricted delivery
  - Mailing costs added to collection costs

Act 53 – costs of collection

- LTEA § 707(a) – Reasonable costs of delinquency notices and similar procedures
  - Now includes mercantile/business privilege and amusement/admissions taxes
  - Approved by resolution of governing body (or tax collection committee for Chapter 5 taxes)
- Transparency
  - Post resolution in business office and on website
  - Collector may retain reasonable costs; annual itemized accounting
- LTEA § 707(b) – Five-year limit
  - Costs may be assessed, levied, and collected only for five years from the last day of the calendar year the tax was due

Act 54 of 2026 (HB 853)

- Act of Oct. 8, 2026, P.L. 557, No. 54
- Amends Local Tax Collection Law – adds § 20.2
- Fees for collection of delinquent per capita, poll, and occupation taxes
  - Tax collector, taxing district, or designated private entity may impose a reasonable fee for costs
  - Covers delinquency notice and similar collection procedures
  - Approved by resolution of governing body
- Transparency
  - Post resolution in business office and on website; private entity posts costs online
  - Annual itemized accounting
- Five-year limit – costs incurred during five years after the last day of the calendar year the tax was due
- Effective: 60 days after approval

Hotel room rental tax

Downs Racing, L.P. v. Luzerne County

Downs Racing – background

- Downs Racing, L.P. v. Luzerne Cnty., 2026 Pa. Commw. Unpub. LEXIS 66 (Pa. Cmwlth. Feb. 3, 2026) (unreported)
- Third Class County Convention Center Authority Act, 16 P.S. §§ 2399.1-2399.23
  - Tax imposed "on the consideration received by each operator of a hotel . . . from each transaction of renting a room"
  - Rate not to exceed 5%
- Luzerne County enacted 5% tax
- Mohegan Sun Pocono – casino resort with hotel
  - Paid tax on complimentary rooms for years
  - Stopped in 2016 on advice of counsel

Downs Racing – procedural posture

- County assessment: $1,368,081.17 (Jan. 2016 – Aug. 2018)
  - Assumed 100% occupancy at $159 per night
- Informal hearing; County affirmed (Aug. 25, 2020)
- Appeal to C.P. Luzerne
- Stipulated amount at issue: $1,148,796.86 on 136,599 complimentary rooms
- Trial court granted Mohegan summary judgment
  - Consideration requires a "quid pro quo"
  - Complimentary room "is simply a gift“ –no guarantee the recipient will stay at the hotel, visit the casino, or spend money at all
- County appealed

Downs Racing – issues

Issue 1

- Whether the non-monetary value Mohegan receives for complimentary rooms is "consideration" under the Act and Ordinance

Issue 2

- Whether the trial court erred in granting summary judgment by resolving disputed facts and disregarding the County's expert report

Downs Racing – arguments: consideration

County

- Trial court ignored broad statutory definition of “consideration”
  - “receipts, fees, charges, rentals, leases, cash, credits, property of any kind or nature, or other payment”
- Tax value received: foot traffic, loyalty, revenue, a full casino
- Offer codes are "credits," "property," and "payment"

Mohegan

- No consideration received
- Rooms offered without requesting payment
- Marketing expense to increase gaming revenue – already heavily taxed
- Money spent elsewhere not paid in exchange for room

Downs Racing – arguments: facts and expert

County

- Genuine issues of fact precluded summary judgment
  - Whether Mohegan collected tax on the rooms
- Trial court disregarded Dr. Lucas's report
  - Factual question – whether Mohegan received value
  - Based on industry norms

Mohegan

- Only question is legal – whether tax applies
- Dispute over collection is immaterial

Downs Racing – holding

- Affirmed
- County conflated "value" with "consideration"
  - Definitions of "consideration," "patron," "transaction," and "transient" require payment to the operator
  - No quid pro quo – benefits speculative - “the benefits Mohegan may potentially receive are not necessarily given by the occupants of the complimentary rooms, but by patrons of the casino in general”
  - "Value" not in Act; County’s own form asks only for gross receipts
  - Tax (5% of consideration) cannot be computed on intangible benefit received
  - Taxing provisions strictly construed for taxpayer
- Collection of tax is not a material fact
- Existence of consideration is a question of law – expert may not opine

Stormwater charge: Tax or fee?

Borough of West Chester v. PASSHE

West Chester – background

- Borough of W. Chester v. Pa. State Sys. of Higher Educ., 355 A.3d 886 (Pa. Apr. 30, 2026)
- Stream Protection Fee Ordinance (2016), Code ch. 94A
  - Charge on developed properties based on impervious surface
  - Revenue to dedicated Stormwater Fund
  - Credits and appeals available
- Borough invoiced PASSHE and University for North Campus (2017-2019)
  - Refused to pay – charge is a tax; immunity undisputed

West Chester – procedural posture

- Borough petition for review – Commonwealth Court original jurisdiction
  - Declaration that charge is a fee for service
- Demurrer overruled, 215 A.3d 1082 (2019)
- Cross-applications for summary relief
- En banc Commonwealth Court, 291 A.3d 455 (2023) – unanimous for Appellees
  - Relied on DeKalb County v. United States, 108 Fed. Cl. 681 (2013)
  - No discrete benefit; no voluntary, contractual relationship
  - Not a special assessment
  - General tax – Appellees immune
- Borough appealed as of right

West Chester – issues

Whether stormwater charge is a local tax or a fee-for-service

- Specific benefit?
- Voluntary connection?
- Proportionality?

West Chester – arguments: borough

Specific benefit: System relieves Appellees of managing own runoff

- Expert: up to $4.2 million ($178,500 annualized) + 6.76 acres vs. $132,088.68 annual charge

Voluntariness: Holding and developing parcels is a voluntary choice

- High avoidance costs do not make charge involuntary
- Credit and appeal process

Proportionality: Impervious area is the "axiomatic" measure of runoff

- Appellees offered no contrary evidence
- At minimum, fact issues preclude summary relief

West Chester – arguments: appellees

- Test: discrete benefit, as consumer in a marketplace
- Ordinance purpose: public health, safety, and welfare of all
  - Varying degrees of benefit (like a road) do not create a specific benefit
  - System funded by taxes for nearly 100 years
  - Expert report shows only hypothetical future costs
- Alternatively:
  - Ordinance calls charge an "assessment" – special assessment, also immune
  - Not proportional – fund pays for remote projects

West Chester – holding

- Affirmed
- Two-step framework
  - (1) Public or quasi-private capacity?
    - ❑ Public: out of duty, for public benefit, absent contract = tax
    - ❑ Quasi-private: discretionary, private emolument, contract
  - (2) If quasi-private, is charge reasonably proportional to use or value?

West Chester – holding [cont'd]

- Borough acts in public capacity
  - Ordinance findings: MS4/NPDES compliance; public health and safety
  - Benefits inure to the public
- No express or implied contract
  - Owners do not seek out the service; no owner act triggers use
  - "Developed" sweeps in virtually all property
  - Charge reaches properties benefited "indirectly"
  - Credit/appeal process does not establish assent
- Charge is a tax – Appellees immune
- Proportionality and special assessment not reached

Amusement tax on golf courses and authority for interest

Sugarloaf Golf Club, Inc. v. Black Creek Township

Sugarloaf – background and issues

- Sugarloaf Golf Club, Inc. v. Black Creek Twp., No. 2026-00147 (C.P. Luzerne May 15, 2026)
- Ordinance No. 8 of 2025 (enacted Dec. 11, 2025) – 5% amusement tax under LTEA
- Petition for appeal from adoption of amusement tax ordinance; hearing Apr. 21, 2026
- Issues:
  - Authority to tax golf course admissions? (not really an issue)
  - 40%-of-greens-fee limit, 53 P.S. § 6924.311(10)?
  - Interest on unpaid amusement taxes?
  - 30-day effective date, 53 P.S. § 6924.309?

Sugarloaf – arguments

Petitioners

- Ordinance incorrectly taxes full greens fee, not 40%
- Interest not expressly authorized by LTEA
- Effective date violates LTEA

Township

- LTEA allows up to 10% on base, up to 40% of greens fee
- 5% rate facially compliant
- No evidence base exceeds 40% – premature
- For-profit golf courses taxable
- Conceded effective date must be modified

Sugarloaf – decision

- Granted in part, denied in part
- Township has authority to tax admissions to public, for-profit golf courses (again, not an issue)
- Ordinance fails on its face to incorporate 40%-of-greens-fee limit
  - Taxing ordinances must facially conform
  - Ambiguity construed against taxing authority, 1 Pa.C.S. § 1928(b)(3)
- Interest provision (½% per month) invalid
  - No express LTEA authorization
- Effective date must be modified
  - Earliest permissible date: Jan. 10, 2026

Business privilege tax on club dues

Overbrook Golf Club v. Radnor Township

Overbrook – background

- Overbrook Golf Club v. Radnor Twp., 361 A.3d 727 (Pa. Cmwlth. June 10, 2026)
- Member-owned nonprofit social clubs (OGC exempt under I.R.C. § 501(c)(7))
- Assessments (May 12, 2022) on membership dues, fees, and assessments
- Paid under protest; Local Tax Hearing Officer affirmed (Oct. 24, 2022)
- De novo appeal; bench trial Dec. 3-4, 2024
    - Trial court invalidated assessments and ordered refunds

Overbrook – issues and decision below

- Issues
  - Whether Clubs engage in "business" under BPT Code
  - Alternatively, whether trial court erred in applying LTEA § 301.1(f)(7)
- Trial court
  - Clubs are not businesses rendering services
  - LTEA § 301.1(f)(7) bars taxing nonprofit membership dues, fees, and assessments
  - Credited Clubs' CPA – dues are revenue, not business transactions

Overbrook – arguments

Township

- BPT Code: “business” includes providing services to the public "or a limited number thereof"
- “Service” = benefiting another for consideration
- Not limited to for-profit businesses

Clubs

- Nonprofit recreational clubs – not “businesses” and no “business activity”
- Dues are not “gross receipts”

Overbrook – holding

- Affirmed
- BPT Code definition of "business" is circular
  - LTEA: "conducted for profit or ordinarily conducted for profit," 53 P.S. § 6924.501
  - "Business" must offer services and operate for profit
- Clubs not operated for profit
  - Member-owned; one cannot do business with oneself
- Members do not receive "services"
  - Access flows from ownership and membership contracts
- § 301.1(f)(7) not reached

Manufacturing exclusion

Nicholas v. Keystone Central School District

Nicholas – background

- Nicholas v. Keystone Cent. Sch. Dist., 2026 Pa. Commw. LEXIS 132 (Pa. Cmwlth. Aug. 17, 2026)
- Nicholas Meat, LLC – beef processing facility in Logantown
  - 130,000+ square feet; approximately 425 employees
  - 250-650 cattle per day; 12-step process
  - Sold nationally and exported to 26 countries
- BPT assessment over $1.5 million (2014-2022)
- School Board denied manufacturing exclusion and administrative appeals (Oct. 2022)

Nicholas – posture, issues, decision below

- De novo appeal to C.P. Clinton, LTBRA § 8434
  - Three-day trial; affirmed (Feb. 19, 2025)
  - Operations "start and end with beef"
  - Uniformity - No deliberate or purposeful discrimination (why are industrial bakeries not taxed?)
- Issues
  - Post-trial motions required under Pa.R.Civ.P. 227.1?
  - Manufacturing exclusion, 53 P.S. § 6924.301.1(f)(4)?
  - Uniformity Clause, Pa. Const. art. VIII, § 1?

Nicholas – arguments: motion to dismiss

District

- Civil action governed by Rules of Civil Procedure
- Post-trial motions required
- All issues waived

Taxpayer

- Statutory appeal from local agency
  - LTBRA § 8434; 42 Pa.C.S. § 933(a)(2)
- Rule 227.1(g) prohibits post-trial motions

Nicholas – arguments: manufacturing and uniformity

Taxpayer

- Live animals substantially transformed into packaged beef and offal
- "Dead carcass" cases outdated
- Treated differently than bakery in District's regulations
- Barred from cross-examining on comparable taxpayers

District

- Processing, not manufacturing
- Meatpacking precedent controls
- No deliberate or purposeful discrimination

Nicholas – holding

- Motion to dismiss denied; affirmed
- LTBRA appeal is a statutory appeal – Rule 227.1(g) bars post-trial motions
- Not manufacturing
  - Consolidated Dressed Beef (1913, 1914); Weiland (1928); Armour (1949); Allied Foods (1995); Clover Farms Dairy (1995)
  - Butchering an animal, dead or alive, into cuts is not substantial transformation
  - Degree of transformation is dispositive
- No Uniformity Clause violation
  - Bakery transforms inputs; beef processing "starts and ends with beef"

Questions?



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A Day on Tax – 2026

PA property tax update



Presented by

Paul R. Morcom

SALT Group chair

Overview

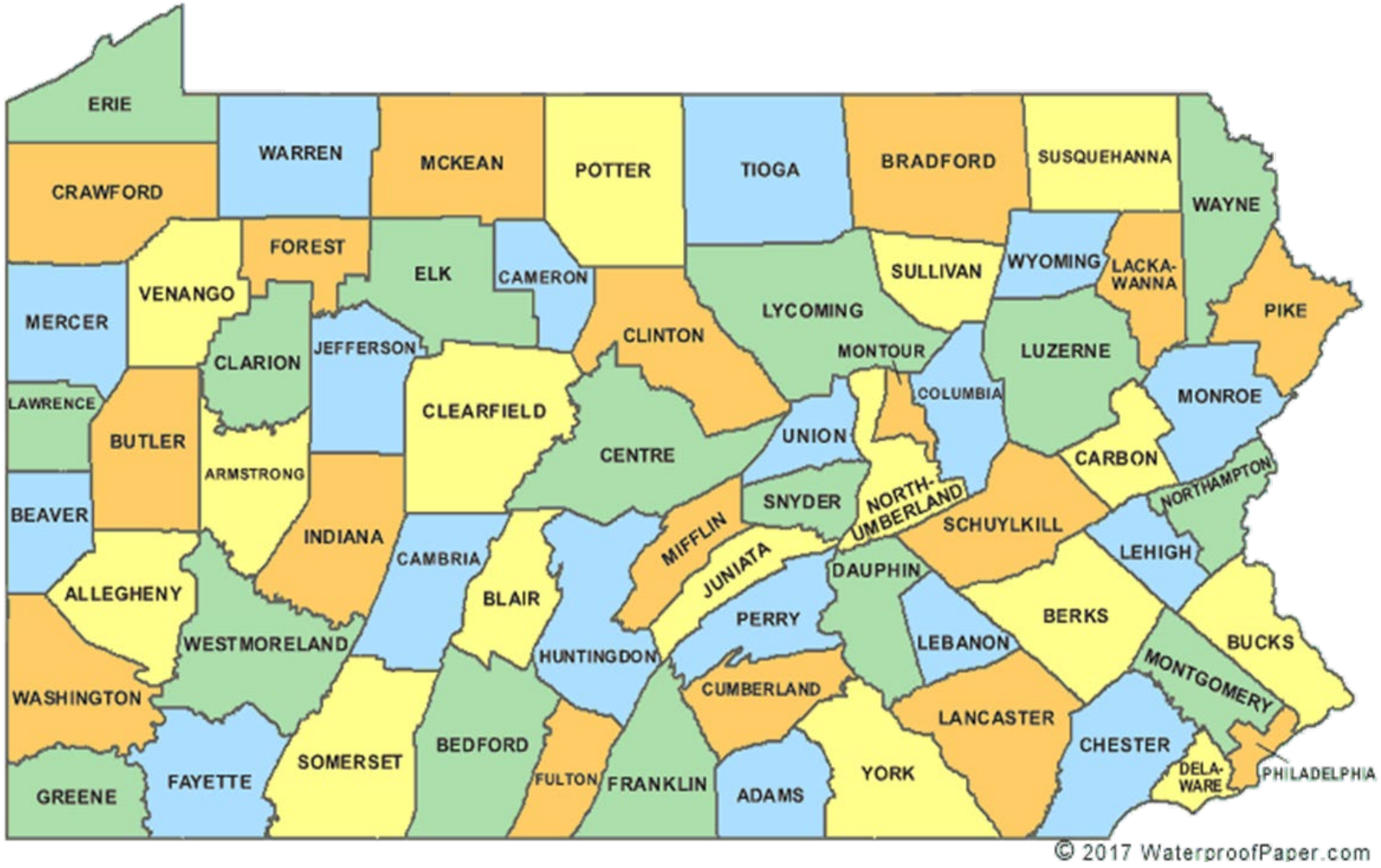
1. Countywide reassessments
2. Taxing jurisdiction appeals
3. Clean & Green
4. Data centers

Countywide reassessments

The base-year problem

- **Pennsylvania is the only state in the United States that allows the indefinite use of a base year by statute**
- **All the major problems in Pennsylvania regarding assessments stem from not doing periodic countywide reassessments**
- **Counties that haven’t reassessed since the 1960s**
  - Butler – 1969
  - Franklin – 1961
  - Crawford – 1969

Pennsylvania counties



County reassessment status (Adams – Juniata)

COUNTY NAME	2021	2022	2023	2024	2025	Last CW	Next CW
ADAMS	87.5	83.9	77.4	72.44	67.5	2011	
ALLEGHENY	63.6	54.5	52.7	50.14	49.3	2012	2032
ARMSTRONG	40.7	45.4	37.4	30.56	24.6	1997	
BEAVER	14.8	14.7	100	77.13	74.6	2023	
BEDFORD	71.7	63.2	59.3	54.52	52.3	2012	
BERKS	45	39.8	36.4	34.37	32.1	1994	
BLAIR	85.9	90.9	85.1	85.8	78	2016	
BRADFORD	23.1	20.9	20	17.32	16.7	1999	
BUCKS	7.3	6.7	6.3	5.86	5.6	1972	
BUTLER	7.1	6.5	6.4	6	6	1969	
CAMBRIA	16.5	14.3	12.9	12.18	11.2	1972	
CAMERON	23.9	20.2	20.3	21.44	19.9	1986	?
CARBON	24.3	20.8	19.9	17.91	17.2	2001	?
CENTRE	21.4	18.5	17.7	17.1	16.4	1995	?
CHESTER	39.5	36	33.9	31.84	30.6	1998	
CLARION	29.1	25.7	13	11.23	100	1975	2026
CLEARFIELD	10.1	13.3	17.4	17.94	19.2	1989	
CLINTON	63.6	58.6	54.8	50.47	51.9	2009	
COLUMBIA	17.3	16	15	14.27	13.6	1992	
CRAWFORD	21.3	19.1	18	16.26	15.8	1969	
CUMBERLAND	85.7	80.9	73.3	67.8	63.9	2011	
DAUPHIN	52.4	46.6	43.3	40.42	38.3	2002	
DELAWARE	72.8	65.8	61.5	57.33	54.6	2020	
ELK	25.1	22	21.6	18.58	18	1986	
ERIE	71.1	63.1	58.1	53.21	50.2	2012	
FAYETTE	51.9	49	46.8	43.03	40.7	2003	
FOREST	14.6	16	13.2	13.05	11.4	1974	
FRANKLIN	9.5	8.6	8.2	7.68	7.2	1961	?
FULTON	26.6	23	22.9	22.89	20.2	1990	
GREENE	45.6	38.8	41.8	38.23	36.3	2003	
HUNTINGDON	15.3	13.9	13.6	12.58	12.5	1978	
INDIANA	94	90.4	90.8	75.32	70.3	2016	
JEFFERSON	27.3	25.5	23.4	20.02	19.1	1987	
JUNIATA	10.7	10.1	9.2	8.11	7.4	1973	2027

County reassessment status (Lackawanna – York)

COUNTY NAME	2021	2022	2023	2024	2025	Last CW	Next CW
LACKAWANNA	8.2	6.8	6.2	5.68	100	1968	2026
LANCASTER	68.1	60.4	56.4	53.43	50	2018	2027
LAWRENCE	60	53.7	50.8	46.96	45.4	2003	
LEBANON	71.9	62.8	58.8	54.15	52.1	2012	
LEHIGH	63.6	56.8	53.2	49.4	47	2012	
LUZERNE	76	69.4	86.8	86.2	87.4	2009	
LYCOMING	56	51.3	48.9	46.94	43.6	2004	2028
MCKEAN	80.6	57.6	55.3	59.43	48.1	1998	
MERCER	14.3	13	12.2	11.11	10.5	1971	2028
MIFFLIN	28.5	25.6	23.2	20.91	20.7	1999	
MONROE	60.5	56.2	50.1	45.47	44	2019	
MONTGOMERY	39.6	35.5	32.9	30.76	29.8	1998	
MONTOUR	55.4	50.4	47	46.23	44.8	2006	
NORTHAMPTON	21.7	19.4	18.2	17.01	16.1	1995	
NORTHUMBERLAND	12.2	10.9	11	9.63	9.5	1972	2028
PERRY	71.1	66.2	61.2	57.7	100	2011	2026
PHILADELPHIA	92.6	100	93.3	100	94.3	2025	
PIKE	12.1	10.4	10.2	9.18	8.9	1996	2029
POTTER	22.9	18	17.5	16.54	16.1	1977	2029
SCHUYLKILL	26.2	22.9	20.5	18.86	100	1997	2026
SNYDER	11.9	10.5	10.5	9.85	9.2	1973	
SOMERSET	23.6	21.1	20.5	18.38	18.1	1998	
SULLIVAN	55.1	50.9	45.3	43.64	40.5	2004	
SUSQUEHANNA	22.1	19.6	21.7	17.74	16.3	1993	
TIOGA	51.6	47.2	100	83.79	80.2	2023	
UNION	55.6	52.2	49.7	46.84	42.9	2006	2028
VENANGO	65.8	57.5	56	51.02	48.7	2004	
WARREN	19	17	15.5	13.89	100	1989	2026
WASHINGTON	84.3	75.3	72	67.41	67.9	2015	
WAYNE	57	100	75.3	72.34	67.1	2022	
WESTMORELAND	11	10	9.3	8.88	8.7	1972	?
WYOMING	14.2	13.4	11.8	11.46	11.1	1988	
YORK	65.9	56.9	53.5	50.46	48.7	2004	

Proposed legislation: Senate Bill 567

Senate Bill 567

- Introduced July 31, 2025 by Fontana out of Allegheny County
- Mandates a cycle of property reassessments every 5 years
- 10 to 15 counties a year
- Prescribes a reassessment schedule for all counties except Philadelphia (AVI)

Funding and enforcement

- Allows a per parcel fee of $20 per year or 1 mill tax to pay for reassessment
- Penalty for not following schedule
  - State withholds liquid fuels tax revenue (used for road and bridge repairs)

Uniformity

Taxing jurisdiction appeals

Constitutional uniformity

PA Const. Art. VIII, § 1 – Uniformity of taxation

- “All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.”

Taxing district appeals

53 Pa. C.S. § 8855

- “A taxing district shall have the right to appeal any assessment within its jurisdiction in the same manner, subject to the same procedure and with like effect as if the appeal were taken by a taxable person with respect to the assessment . . .”

Valley Forge Towers – the holding

Valley Forge Towers Apts., 163 A.3d 962 (Pa. 2017)

- "[R]eal property is the classification . . . all real estate in a taxing district is constitutionally entitled to uniform treatment"
- Uniformity Clause does not permit taxing authorities to treat property sub-classifications differently
- "[T]his prohibition applies to any intentional or systematic enforcement of the tax laws, and is not limited solely to wrongful conduct"

Selection methods

- Properties with a recent sale price (Realty Transfer Tax reports)
- Properties where the school district might gain a certain dollar amount of additional taxes in a successful appeal
- Properties where the school district claims that the properties selected are undervalued by a certain dollar fair market value threshold

Downingtown: The Supreme Court rules

Taxing jurisdiction appeal update – Pa. Supreme Court,
May 19, 2026

Overview

1. Case snapshot and bottom line
2. Facts and procedural history
3. Issues on appeal
4. Holdings
5. Dissents
6. Takeaways

Case snapshot

- **Downingtown Area Sch. Dist. v. Chester Cnty. Bd. of Assessment Appeals, 356 A.3d 802 (Pa. 2026)**
  - 45 and 46 MAP 2024 (consolidated)
  - Argued Sept. 11, 2025 – Decided May 19, 2026
  - Appellant: Downingtown Area S.D. | Appellee: Marchwood Apartments Owners LLC
  - J. Mundy, joined by J. Wecht, J. Brobson, and J. McCaffery (4–3)
  - Dissents: J. Donohue and J. Dougherty, each joined by C.J. Todd and the other dissenter
  - Commonwealth Court vacated; remanded for remaining preserved issues

Bottom line

- Monetary threshold for selecting § 8855 appeals does not, without more, violate the Uniformity Clause
- Record did not show S.D. applied its $10,000 policy arbitrarily or discriminatorily
- Equal Protection challenge rejected
- Taxpayer win in Commonwealth Court (2023) reversed – School District win

Downingtown

Facts and procedural history

Facts

Policy 605.1 (since 2012)

- Appeal only if ≥ $10,000/year in additional tax, aggregated across all taxing districts
- No cap on number of appeals
- No distinction by property type or use
- Past appeals: industrial, farm, commercial, residential, apartment complexes

Implementation – tax year 2020

- Consultant (Lukens, Valbridge) found 100+ of ~28,000 parcels met threshold
- Provided list of 15 – a “manageable” number
- Marchwood sold June 2019 for $82M; assessed at $32,758,019
- Solicitor flagged sale; staff verified; business manager added as 16th appeal
- Projected ~$240,000/year in additional tax (~$200,000 to S.D.)
- No single-family homes among the 16

Procedural history

Board of Assessment Appeals

- Denied appeal as to Marchwood

Court of Common Pleas

- FMV stipulated: $78,825,000 (2020); $81,750,000 (2021–22)
- Policy purely economic, type-neutral; Equal Protection rejected; Board reversed

Commonwealth Court (303 A.3d 1104, 2023)

- Divided panel reversed – taxpayer win

Supreme Court

- Allocatur granted, 320 A.3d 661 (Pa. 2024); vacated and remanded

Commonwealth Court

Majority – "random application of a monetary threshold"

- Appealed 16 knowing many more met threshold – "piecemeal implementation"
- Declined Lowe's "for the sole reason that its counsel was aggressive"
- No explanation for adding Marchwood
- Consultant had no "hard and fast rule" beyond maximizing return

Dissent – P.J. Cohn Jubelirer

- Policy valid and validly applied
- Unclear S.D. knew of other qualifying properties
- Marchwood added because of recent sale
- Lowe's decision reflected dark-store risk, not attorney demeanor

Downingtown

The Supreme Court decision

Issues

- Is a monetary threshold permissible at all?
- Must S.D. appeal “all potentially underassessed properties” to comply with Uniformity Clause?
- Was S.D.’s implementation of its policy arbitrary on this record?
- Does the policy violate Equal Protection?
- Non-uniform because other Chester County S.D.s use different methods? (remanded)

Issue 1: Monetary threshold

School District and amici

- Keeps appeals from being a net drain on public treasury
- Consultant, appraiser, expert, filing, and attorney fees
- Correcting underassessments protects other taxpayers from higher millage
- “Suppressive appeals” timed for low points in value
- Appealing every property an “insurmountable task” for poor and rural districts

Taxpayer

- Cumulative millage differs by municipality
- Underassessment needed to hit $10,000 varies: $316,947 (Wallace/W. Bradford) vs. $255,096 (Downingtown Borough)
- Creates subclassifications treated differently
- Amicus PAA: use assessment-ratio threshold instead

Holding – issue 1

- Monetary threshold, without more, does not violate the Uniformity Clause
- No prohibited subclass by type, use, neighborhood, or owner residency → enhances uniformity by bringing most nonuniform assessments in line with CLR
- Responsible, cost-benefit management of public funds
- Differing millage is product of local law; “rough equalization” tolerates variation
- Tax-liability-deficit metric fits at least as well as underassessment metric
- Distinguished recently-sold-only policy in GM Berkshire

Must all qualifying properties be appealed?

- S.D.: finite resources; 15 a manageable number
- Taxpayer: 15–16 limit designed to avoid judicial scrutiny

Holding

- Commonwealth Court effectively required “all or none” – impractical, no basis in Clause’s text or history
- Declined to extend “similarly situated taxpayers” language of Downingtown (2006)
- Evasion argument rejected – concern was losing all appeal spending if § 8855 struck down
- Unnecessary to decide whether S.D. (vs. consultant) knew of other properties

Issue 2: Was the policy applied arbitrarily?

Lowe's

- Included only due to parcel-number typo
- Counsel aggressively pursued dark-store theory
- Holding: genuine financial risk, not pretext

Adding Marchwood

- $82M sale flagged, verified, worth the expense
- Based on money, not type, use, or residency
- Two neutral procedures in one year permitted

No "hard and fast rule"

- Picking 15 with greatest return is itself a rule
- Districts "stand on the solidest ground" when they document methods
- Burden on taxpayer (Fisher Controls)

No residential appeals

- Commercial tilt reflects values, not classification
- Purposeful treatment, not disparate impact
- Expert ignored condition and Act 319; 3,500 sq. ft. cutoff a time-saver

Equal Protection and remand

Equal Protection

- Taxpayer relied on Allegheny Pittsburgh Coal (U.S. 1989)
- Repackaged uniformity argument
- Equal protection is the “floor” under the Uniformity Clause
- “Welcome stranger” analysis does not carry over to facially neutral appeal policies

Remand

- Differences among Chester County S.D.s not within grant of allocatur
- Commonwealth Court to address remaining preserved issues first
- If no relief warranted – reinstate trial court judgment
- Taxpayer retains right to seek further review

Dissents

J. Donohue (C.J. Todd, J. Dougherty)

- Majority reverses Valley Forge – non-discrimination over revenue maximization
- Revenue-maximizing threshold will never reach single-family homes
- Doing indirectly what Valley Forge forbids
- Single-family homes: 84.2% of properties, 0 appeals

J. Dougherty (C.J. Todd, J. Donohue)

- Monetary thresholds create impermissible subclasses (Clifton, Mount Airy #1)
- Selecting purely to maximize return unconstitutional
- Tax-liability deficit not valid measure of nonuniformity
- Differential impact can establish violation
- Again calls for more frequent countywide reassessments

Takeaways

- Type-neutral monetary thresholds survive – the question left open by GM Berkshire now answered
- S.D.s need not appeal every qualifying property
- Cost-benefit and risk judgments are permissible selection factors
- Document the methodology – “solidest ground”
- Burden stays on taxpayer to prove purposeful discrimination
- Watch: remand; Coatesville (held pending Downingtown); King of Prussia Ass. allocatur

Open land

Clean & Green

Clean & Green

Eligibility and purpose

- Need at least 10 contiguous (sharing common border, or touching) acres
- Could qualify as Agricultural, Recreational, or Forest Reserve
- Used to preserve open land
- Only pertains to assessed land value re preferential assessment

Valuation and risks

- Land value is determined on a Federal basis (could result in an 80% plus reduction in assessed value)
- If you change use of the property when enrolled, could be subject to 7 years of rollback taxes plus interest
- Lots of pitfalls and traps for the unwary
- Talk to an attorney who knows about Clean & Green before enrolling or before doing anything to a property that is already enrolled

Data centers

Food for thought

- Appeal office property values
- Keep track of assessed value on property that is classified as exempt
  - Could help you in case of sale of property
- You get what you pay for with appraisers



Valuation

- Cost approach
- Income approach
- Incentives to local taxing jurisdictions for zoning changes
- Realty transfer taxes

Questions



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McNees

A Day on Tax – 2026

Pennsylvania tax update:
Legislation, guidance, recent court decisions, and current topics

Presented by
Sharon Paxton, Ryan Gonder, and Paul Morcom



Sales tax update

Local sales tax situs – Philadelphia and Allegheny County

- New Fiscal Code § 8043 (Philadelphia)
  - Notwithstanding the PICA Act, a sale at retail is deemed consummated at the same location as for state sales tax purposes under Article II (except as provided in Article II-A for certain leased or rental vehicles or crafts and mobile telecommunications services)
- New Fiscal Code § 8044 (counties of the second class)
  - Same rule for the Allegheny County local sales tax
- Applies to tax years beginning after December 31, 2025
- Practical effect: Philadelphia (2%) and Allegheny County (1%) local sales taxes move from an origin-based (vendor location) rule to the destination-based rule used for the state tax

Local sales tax situs – compliance issues

- Vendors that collect the 6% state sales tax must collect and remit Philadelphia's 2% and Allegheny County's 1% local sales tax on taxable sales to customers in those counties
- Became law July 12, 2026; retroactive to tax years after December 31, 2025
    - Department will not begin enforcing the new rules until October 1, 2026
    - Enforcement date is an administrative forbearance, not a statutory effective date
- Local tax is now based on the point of destination (where the product or service is delivered), not the vendor location.
- State sales tax rules and state and local use tax rules are unchanged
    - Purchasers still owe use tax when tax is not collected

Sales and Use Tax Bulletin 2026-01

- Covers vehicles for which PennDOT would not issue a Certificate of Title at purchase (“Salvage Vehicles”)
- Classification
  - All vehicles are tangible personal property
  - PennDOT collects tax at titling only for “vehicles” under 61 Pa. Code § 31.41
  - A vehicle that cannot be titled or registered falls outside §§ 31.41–31.50
- Seller responsibility
  - Retail sales are sales of tangible personal property
  - Sellers in the business must obtain a sales tax license, collect the 6% tax, file returns, and remit tax

Bulletin 2026-01 – nontaxable sales and insurers

- Nontaxable sales
  - Sales for resale (licensed dealers, insured-to-insurer total loss transfers, licensed salvors)
  - Isolated sales under 61 Pa. Code § 32.4 (purchaser owes use tax)
  - Sales for export – delivery outside Pennsylvania or by common carrier
  - Purchaser must provide a REV-1220, which the seller retains
- Insurance companies
  - Total-loss surrender to an insurer is presumed a sale for resale
  - If insured retains the vehicle, two sales occur – tax due on the retained value
  - Registered insurers collect tax on direct sales; unregistered insurers with de minimis activity make isolated sales

Bulletin 2026-01 – auctions, facilitators, and brokers

- Auctioneer rules of 61 Pa. Code § 31.23 apply – tax on full price, with no deduction for commission
- Marketplace facilitators must collect tax
- Auction brokers bidding for Pennsylvania purchasers, or where delivery occurs in Pennsylvania, are resellers
    - Must register and collect tax on resales, including auction and broker fees and delivery charges
- Private or isolated sales: report directly to the Department; purchasers file use tax through myPATH
- Ten examples: total losses, retained vehicles, auction sales, insurer direct sales, rebuilders, parts dismantlers, and auction brokers

Other current sales tax topics

- Closing agreements
- Sales tax bad debt refund claims
- Bulk sales
- Common appeal issues
- Issues expected to be litigated

Corporate net income tax update

Corporate net income tax update

- 2026 corporate net income tax (CNIT) rate: 7.49 percent.
- Rate changes matter for NLC modeling, return positions, and provision workpapers.
- Confirm enacted-rate inputs for reversal periods.
- Pennsylvania remains a separate-company reporting state.

Tax year	CNIT rate
2027	**6.99%**
2028	**6.49%**
2029	**5.99%**
2030	**5.49%**
2031 and thereafter	**4.99%**

Corporation Tax Bulletin 2026-01

- Issued September 10, 2026; effective for tax years beginning on or after January 1, 2025.
- Establishes key guidelines on Section 163(j).
- Act 45 of 2025 fixed Pennsylvania conformity to Section 163(j) to the version in effect on December 31, 2024.
- Later federal changes made by the One Big Beautiful Bill Act do not apply for Pennsylvania CNIT Section 163(j) purposes.
- Separate-company calculation is required, including intercompany and third-party interest.
- Track pro rata allocation and carryforwards when Section 163(j) and Pennsylvania related-party interest addback both apply.

Corporation Tax Bulletin 2024-01 – sourcing

- Addresses sales other than tangible personal property and services under 72 P.S. Section 7401(3)2.(a)(17), as amended by Act 53 of 2022.
- Applies to tax years beginning after December 31, 2022.
- Key categories: intangible-property receipts, contract rights, securities held primarily for sale to customers, lending receipts, credit-card receivables, and otherwise-undescribed intangible receipts.
- Retain support for fair market value, use location, customer location, borrower location, billing address, and commercial domicile.
- Alternative apportionment remains the backstop when statutory sourcing does not fairly represent Pennsylvania activity.

Act 45 federal decoupling – return and workpaper issues

- Act 45 of 2025 decouples Pennsylvania corporate net income tax from selected federal changes made by the One Big Beautiful Bill Act.
- Research and experimentation expenditures: Pennsylvania addback, followed by 20 percent annual Pennsylvania deductions until recovered.
- Qualified production property and Internal Revenue Code Section 168(n): Pennsylvania addback and separate Pennsylvania tracking.
- Business interest expense: Pennsylvania freezes conformity to Internal Revenue Code Section 163(j) as it existed on December 31, 2024.
- Practice point: identify the federal change first, then confirm whether Pennsylvania conforms, decouples, or requires separate tracking.

2026 updates to Corporation Tax Bulletins 2019-02 and 2019-03

- Bulletin 2019-02: Global Intangible Low-Taxed Income (GILTI) becomes Net Controlled Foreign Corporation Tested Income (NCTI) federally for 2026 and later years.
- Bulletin 2019-02: Foreign-Derived Intangible Income (FDII) becomes Foreign-Derived Deduction Eligible Income (FDDEI) federally for 2026 and later years.
- Pennsylvania treatment of GILTI/NCTI and FDII/FDDEI remains unchanged; the revision is primarily a naming update for Pennsylvania purposes.
- Bulletin 2019-03: Pennsylvania's Internal Revenue Code Section 163(j) guidance now applies only to tax years beginning before January 1, 2025.
- For tax years beginning on or after January 1, 2025, use Corporation Tax Bulletin 2026-01 for Pennsylvania Section 163(j) treatment.

CNI case tie-in – *Dow Chemical Co. v. Commonwealth*

- Published Commonwealth Court decision, December 22, 2025; 351 A.3d 293.
- Issue: whether Alcatel III's prospective-only treatment of Nextel II controls when the taxpayer challenges an unpaid assessment rather than seeking a refund.
- Holding: Alcatel III controls regardless of refund or assessment posture; the Department's assessment remained valid.
- Current status: exceptions were submitted en banc in October 2026; a decision in 2027 is likely.
- Practical point: assessment posture did not unlock retroactive relief. Preserve constitutional arguments, but model collection risk.

Personal income tax update

Working Pennsylvanians Tax Credit

- Added by Act 45 of 2025, § 15, effective November 12, 2025
- Applies to taxable years beginning after December 31, 2024 – first available on 2025 returns
- Eligibility
  - Taxpayer claimed the federal earned income tax credit (26 U.S.C. § 32) for the same taxable year
  - “Taxpayer” means an individual subject to PA personal income tax under Article III of the Tax Reform Code
- Amount: 10% of the federal EITC received for the same taxable year, with a cap of $805

Working Pennsylvanians Tax Credit – claiming the credit

- DOR will calculate the tax credit automatically if a copy of Federal Form 1040 is included with the PA personal income tax return
- Easiest way to claim the credit is to file the Federal and PA tax returns online at the same time
- Refundable – excess over liability is refunded to the taxpayer

Estimated tax threshold – change for 2026

- For the 2026 taxable year, the income threshold – excluding income already subject to withholding – requiring a declaration of estimated tax was increased to $14,000 for individual taxpayers, trusts, and estates. This threshold will continue to increase annually, reaching $20,000 by 2028.
- Due dates unchanged

Authorizing a deduction against the personal income tax for donations to a child's Trump Account

- House Bill 2869
- Rep. Donna Scheuren (Montgomery County)
- Introduced October 5, 2026

Recent court decisions

Cases at a glance

Case	Court	Decided	Subject
Hackett v. Commonwealth	Commonwealth Court (*en banc*)	Dec. 8, 2025	PIT; business expense deductions
Dow Chemical Co. v. Commonwealth	Commonwealth Court	Dec. 22, 2025	CNIT; NLC; uniformity
AmerisourceBergen Sourcing, LLC v. Commonwealth	Commonwealth Court	Dec. 24, 2025	Confidentiality of amount at issue
General Motors Co. v. Commonwealth	Commonwealth Court	Dec. 24, 2025	Confidentiality of amount at issue
East Coast Vapor LLC v. Commonwealth	Commonwealth Court (*en banc*)	Apr. 24, 2026	Tobacco Products Tax Act
In re Three Pa. Skill Amusement Devices; POM v. DOR	Pennsylvania Supreme Court	June 15, 2026	Skill games; Gaming Act; § 5513

Hackett v. Commonwealth

- Taxpayer's exceptions to panel decision (Hackett I) affirming the BF&R denial of reassessment of 2014 PIT; stipulated facts
- Taxpayer was sole proprietor of Rides2Work (R2W), a carpooling website
  - Intended to charge for the service, but never did; shut down in 2015
  - Reported no R2W income and deducted $109,600 in R2W expenses
- Department disallowed the deduction – R2W was not a "commercial enterprise" under TRC § 301(c)

Hackett – issues and lower decisions

- Issues
  - Must a “commercial enterprise” earn receipts from sales to render goods or services in the marketplace?
  - Must a business earn receipts for its net losses to count in net profits under 61 Pa. Code § 103.12(b)?
- Board of Appeals: denied reassessment
- BF&R: denied – taxpayer did not meet the three-part “commercial enterprise test” (gross profits; manifest profit objective; regularity and continuity)
- Commonwealth Court panel (Hackett I): affirmed
  - Under Morgan v. Commonwealth, a commercial enterprise renders goods or services to others in a marketplace
  - R2W charged no fees and had no gross receipts

Hackett – arguments on appeal

Taxpayer

- Issue 1: panel used an outdated, narrow definition of “marketplace”; concept contemplates future sales; ambiguity favors the taxpayer
- Amicus (CEI): start-ups often provide goods or services at little or no cost
- Issue 2: regulations do not require receipts; gross profits are not needed for net profits; regulation is ambiguous or invalid

Commonwealth

- Issue 1: Morgan requires rendering goods or services for remuneration; commerce requires “give-and-take” – here there was “just give”
- Statute not ambiguous; if it were, regulation deserves deference
- Issue 2: regulation says conditions “must” apply, including gross profits; new businesses can amortize start-up costs

Hackett – decision

- Exceptions overruled; judgment for the Commonwealth
- Issues were thoroughly addressed in Hackett I
    - No error in reliance on Morgan
    - No error in interpretation of “commercial enterprise” and “marketplace” or their application to the stipulated facts
- Statutory Construction Act rules logically extend to terms drawn from case law

Dow Chemical Co. v. Commonwealth

- Petition for review of BF&R order sustaining denial of reassessment of 2013 CNIT; stipulated facts.
- 2013 NLC deduction capped at greater of 20% of taxable income or $3 million.
  - Pre-NLC taxable income: $18,345,672; carried-over losses: $575,641,128.
- Anticipating Nextel, Dow took an uncapped NLC deduction of $18,345,672 and reported zero Pennsylvania taxable income and paid no 2013 CNIT.
- Department limited the deduction to $3,669,134 (20%) and assessed CNIT of $1,466,186.
- Board of Appeals denied; BF&R continued the appeal pending Nextel, then denied – assessment properly used the 20% cap.

Dow – issue and background

- Issue: Does Alcatel III (Nextel II applies only prospectively) control when the taxpayer challenges an unpaid assessment rather than seeking a refund?
- Nextel I and II (2007): NLC cap violated Uniformity Clause; Supreme Court severed only the flat-dollar cap.
- General Motors I and II (2001): GM II applied Nextel II retroactively and affirmed refund without a cap.
- Alcatel I, II, and III (2014): Alcatel III overruled GM II.
    - Nextel II applies only prospectively.
    - All three Chevron Oil v. Huson factors must be considered.
    - Taxes collected before the decision were not unconstitutional.

Dow – arguments on appeal

Dow

- Retroactivity decided case by case, weighing all three Chevron factors.
- Nextel, GM, and Alcatel were refund cases; Dow challenges an assessment before payment.
- No Commonwealth reliance interest in tax never paid.
- Collecting the tax violates the Uniformity Clause; strike the assessment.
- Relied on *Sands Bethworks.*

Commonwealth

- Under Alcatel III, Nextel II applies only prospectively.
- Dow's request for retroactive relief for 2013 must be rejected.
- Dow took an uncapped NLC deduction contrary to the statute.

Dow – decision

- BF&R affirmed.
- Alcatel III decided retroactivity of Nextel II "across the board" – regardless of refund or assessment posture.
    - No need to re-examine Chevron factors for each taxpayer and year.
    - Alcatel III weighed the equities globally.
- NLC provision was constitutional when the 2014 assessment issued; Dow "owes exactly what the Department previously assessed."
- Dow was in fact seeking retroactive relief; *Sands Bethworks* distinguished.
- Declined to address whether treating refund and assessment cases differently creates non-uniformity.
- Exceptions were submitted *en banc* in October 2026; opinion in 2027 is likely.

AmerisourceBergen Sourcing, LLC v. Commonwealth

- Consolidated appeals from BF&R orders on CNIT for 2016–2019
- Before the court: Amerisource's application for relief to redact the amount of tax at issue from the Commonwealth's status reports
  - Initial orders required the "best estimate of the amount at issue"
  - Amerisource filed redacted and unredacted reports; Commonwealth refused to redact
- Issue of first impression: is the amount of tax at issue confidential taxpayer information, at least early in an appeal?
- BF&R redacts dollar amounts from posted decisions (61 Pa. Code § 703.52)

AmerisourceBergen – arguments

Amerisource

- Fiscal Code § 731 and TRC § 274 make “any information” from returns and reports confidential
- “Official purposes” disclosure must be involuntary and necessary (Mellon National Bank; Graham Farm Land)
- Status report disclosure is neither
- Amount at issue is confidential

Commonwealth

- Office of Attorney General is engaging in official tax administration or tax collection purposes by representing the Commonwealth in these appeals
- Confidentiality must be weighed against the open courts mandate (Pa. Const. art. I, § 11)
- Common-law presumption of openness of judicial records

AmerisourceBergen – decision

- AmerisourceBergen's application for redaction of the amount of tax at issue from status reports filed with the Court was granted
- Statutes broadly protect the information, and the Attorney General generally acts for official purposes
- Disclosure was involuntary – made at the court's direction ("orders are not suggestions")
- Requiring necessity is the better practice; disclosure not necessary at this stage
    - Appeals in their infancy; most settle; no identified need and no prejudice
- Not always confidential – disclosure becomes necessary once the matter proceeds to factual development
- Commonwealth to file redacted and unredacted reports within 30 days
- Going forward: file redacted and unredacted versions and comply with 204 Pa. Code § 213.81
- Appeal pending in PA Supreme Court

General Motors Co. v. Commonwealth

- Consolidated appeals of CNIT for 2018–2020; argued with AmerisourceBergen
- GM omitted the amount at issue from status reports and sent an undocketed letter to the Prothonotary
  - Commonwealth's status reports included the amounts
- Commonwealth sought to docket GM's letters as public case records to make them publicly accessible; GM argued the amount is confidential under Fiscal Code § 731 and TRC § 408(b)
- Decision: application denied based on AmerisourceBergen
  - Denial "of no moment" – information already public in the Commonwealth's reports
  - Taxpayers must follow 204 Pa. Code § 213.81, not informal practice
- Appeal pending at PA Supreme Court

East Coast Vapor LLC v. Commonwealth

- Published Commonwealth Court *en banc* decision.
- Petition for review of BF&R order on Tobacco Products Tax Act (TPTA) assessments; binding joint stipulation.
- Harrisburg vape store mixes ingredients into custom e-liquid blends sold only to in-store consumers.
- Department assessed other tobacco products (OTP) tax, penalties, and interest measured by the blends' sale price.
  - Department website said tax on custom blends is based on ingredient cost.
- Issues
  - Does the 40% tax apply to sales to in-store consumers?
  - Is the tax measured by sale price or ingredient cost?
  - Do the assessments violate the state and federal constitutions?

East Coast Vapor – issues and board decisions

- Board of Appeals (May 19, 2022): denied.
  - Custom blends are a "liquid or substance placed in or sold for use in an electronic cigarette" (TPTA § 1201-A).
  - Under § 1202-A(b), if the seller does not collect the tax from the retailer, the tax is imposed on the retailer at purchase.
  - No jurisdiction over constitutional arguments.
- BF&R: denied.
  - No exemption shown; plain-language argument meritless.
  - Insufficient evidence that tax should be measured by ingredient cost.
  - Could not decide constitutional challenges (*Parsowith*).
- Issues:
  - Whether the 40 percent tax applies to sales to in-store consumers;
  - Whether tax is measured by sale price or ingredient cost; and
  - Whether the assessments violate state or federal constitutions.

East Coast Vapor – arguments on appeal

East Coast

- § 1202-A(a.1) imposes tax when the e-cigarette is "first sold to a retailer" – not a consumer.
- TPTA must be strictly construed.
- § 1202-A(b) does not apply – East Coast does not purchase a "tobacco product" when it buys ingredients.
- Department was effectively creating a 40% sales tax.
- Alternatively, tax should be based on ingredient cost; assessments unconstitutional.

Commonwealth

- East Coast is a manufacturer and dealer/seller of a taxable product – custom-blended e-liquid.
- TPTA is structured so that tax is collected on all tobacco products for public health purposes of deterring the use of products that contain nicotine.
- Customers are "retailers" as defined in the TPTA.
- Alternatively, there is a transfer from East Coast as manufacturer to East Coast as retailer.
- § 1202-A(b) applies whenever tax is not collected.

East Coast Vapor – decision

- BF&R reversed – Commonwealth's position "strained and impracticable."
- § 1202-A(a.1) unambiguously imposes tax "at the time the electronic cigarette is first sold to a retailer."
- Treating consumers as "retailers" is "absurd" – they buy for personal use, not resale.
- Self-transfer theory rejected as a "tortured interpretation of an unambiguous statute."
- Business model "exploits a loophole," but the remedy is legislative amendment.
- Did not reach measure-of-tax or constitutional issues.
- No appeal filed by Commonwealth.

In re Three Pennsylvania Skill Amusement Devices; POM of Pennsylvania, LLC v. Department of Revenue

- Two appeals on the "Pennsylvania Skill Amusement Device" (POM software)
  - Resembles a slot machine: three spinning reels and a pay table; base game determined by chance
  - After a loss or a win under 105%, player may play "Follow Me," a 25-round memory game returning 105% of the wager
- Opinion by Justice Wecht; Justice Donohue concurred in the result; Justice Brobson (joined by Justice Mundy) concurred and dissented

Skill games – procedural posture and issues

POM (2 EAP 2024)

- After Philadelphia seizures, POM sought declaratory and injunctive relief
- Department counterclaimed: device is a slot machine; POM is an unlicensed manufacturer and supplier; 34% tax on gross terminal revenue applies
- Issue: does the Gaming Act regulate unlicensed slot machines?

Three Devices (50 MAP 2024)

- State Police seized three devices, $525, and receipts from a Dauphin County bar; forfeiture sought under 18 Pa.C.S. § 5513(b)
- Issues: does a hidden “skill” element prevent a device from being a gambling device?
- Should gambling statutes be read in pari materia to define “slot machine”?

Skill games – lower court decisions

Commonwealth Court – POM (2019)

- Device meets Gaming Act definitions of “slot machine” and “skill slot machine”
- But the Gaming Act regulates only licensed machines in licensed facilities
- Left legality open under § 5513

Dauphin County C.P. (2023)

- Base game predominantly chance-based
- A “patient and skillful player could win at least 105%” on every play
- Not a gambling device under the predominant factor test; return of property ordered

Commonwealth Court – Three Devices (2023)

- Affirmed
- Follow Me game means device is not a “slot machine”
- Declined to read Crimes Code in pari materia with Gaming Act

Skill games – arguments on appeal

Commonwealth / Department

- POM manufactures and supplies slot machines without a license (§§ 1317.1(e)(1), 1518(a)(4))
- Board approval cannot be what makes a device a slot machine
- Device is a slot machine under § 5513(a)(1) or a gambling device per se
- Follow Me is a “fig leaf” – “there for the lawyers”

POM / Appellees

- Definition covers only devices “approved by the Pennsylvania Gaming Control Board”
- § 1518 applies only to licensed entities and facilities
- Commonwealth must prove gambling use; Follow Me likened to Simon
- “Chuck E. Cheese defense” – ticket-redemption games would be illegal

Skill games – decision

- Commonwealth Court reversed in both appeals; remanded
- Unified scheme: “slot machine” in § 5513(a)(1) is the Gaming Act definition
- Gaming Act reaches unlicensed activity – contrary view “absurd”
- Board approval not required – “approved by the Pennsylvania Gaming Control Board” modifies only “other device” (last-antecedent rule)
- Device is a slot machine, skill slot machine, or hybrid slot machine (“take your pick”)
    - Act 42 of 2017 eliminated the predominant factor test for such devices
- “To be used for gambling purposes” modifies only “any device”
- Chuck E. Cheese concern “well-taken” in theory, but POM device “is rather unlike those at Chuck E. Cheese”

Skill games – safe harbor and separate opinions

- Order stayed 120 days – no adverse law enforcement action in reliance on the opinion through approximately October 13, 2026
- Jurisdiction and Gaming Control Board indispensable-party questions left for remand
- Justice Donohue (concurring)
    - Joined Gaming Act holdings; concurred in result in forfeiture appeal
    - Would apply the predominant factor test – chance predominates, so device is a gambling device per se
- Justice Brobson, joined by Justice Mundy (concurring and dissenting)
    - Joined reversal in Three Devices
    - Would affirm in POM: licenses unavailable for machines in unlicensed facilities; that activity is illegal gambling under § 5513

Questions?



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Automating Sales Tax Recovery

Saveware





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About Us

- Former reverse-auditor at PA firm
- Reviewed too many AP invoices by hand
- Left Penn State to co-found Saveware



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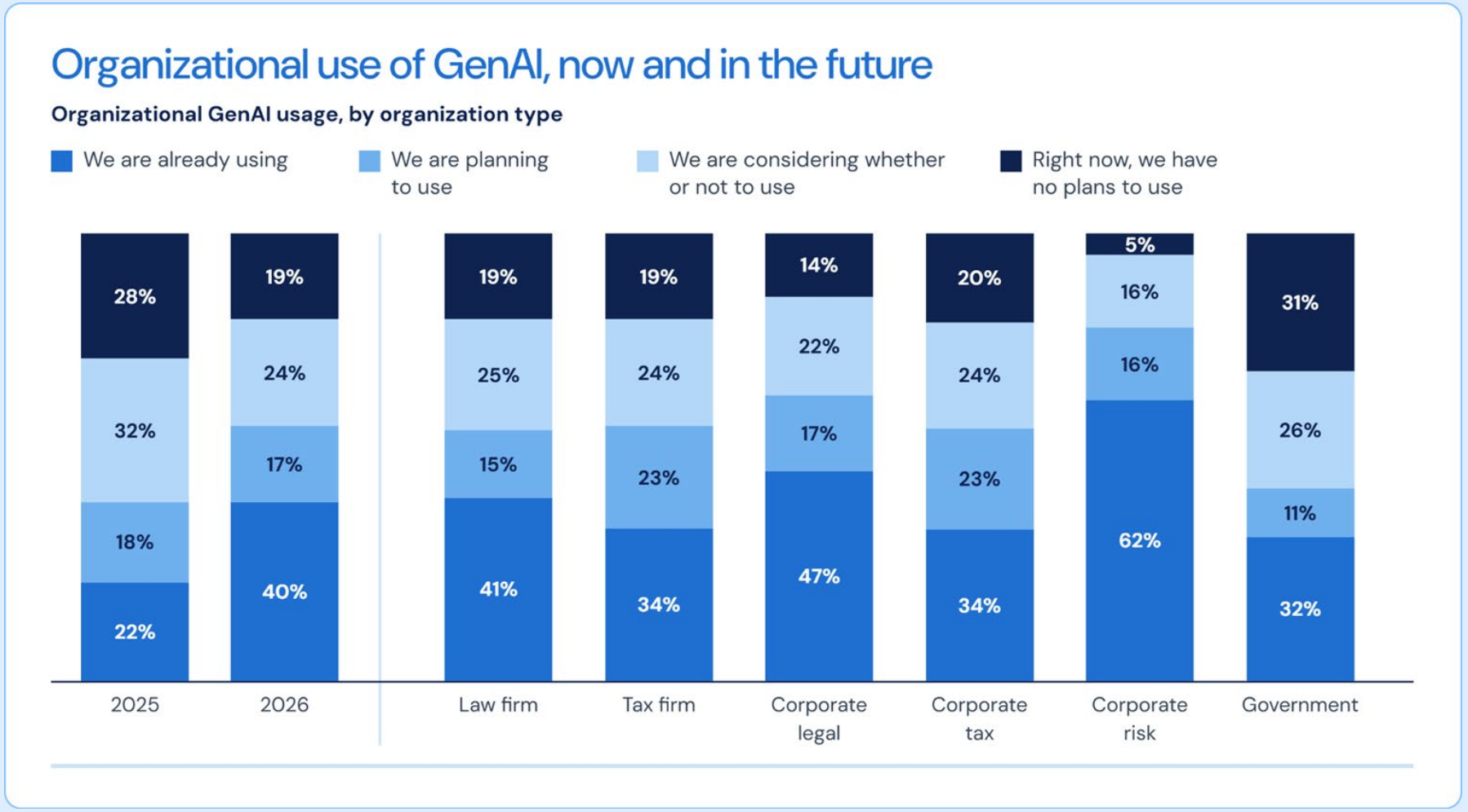
About Us

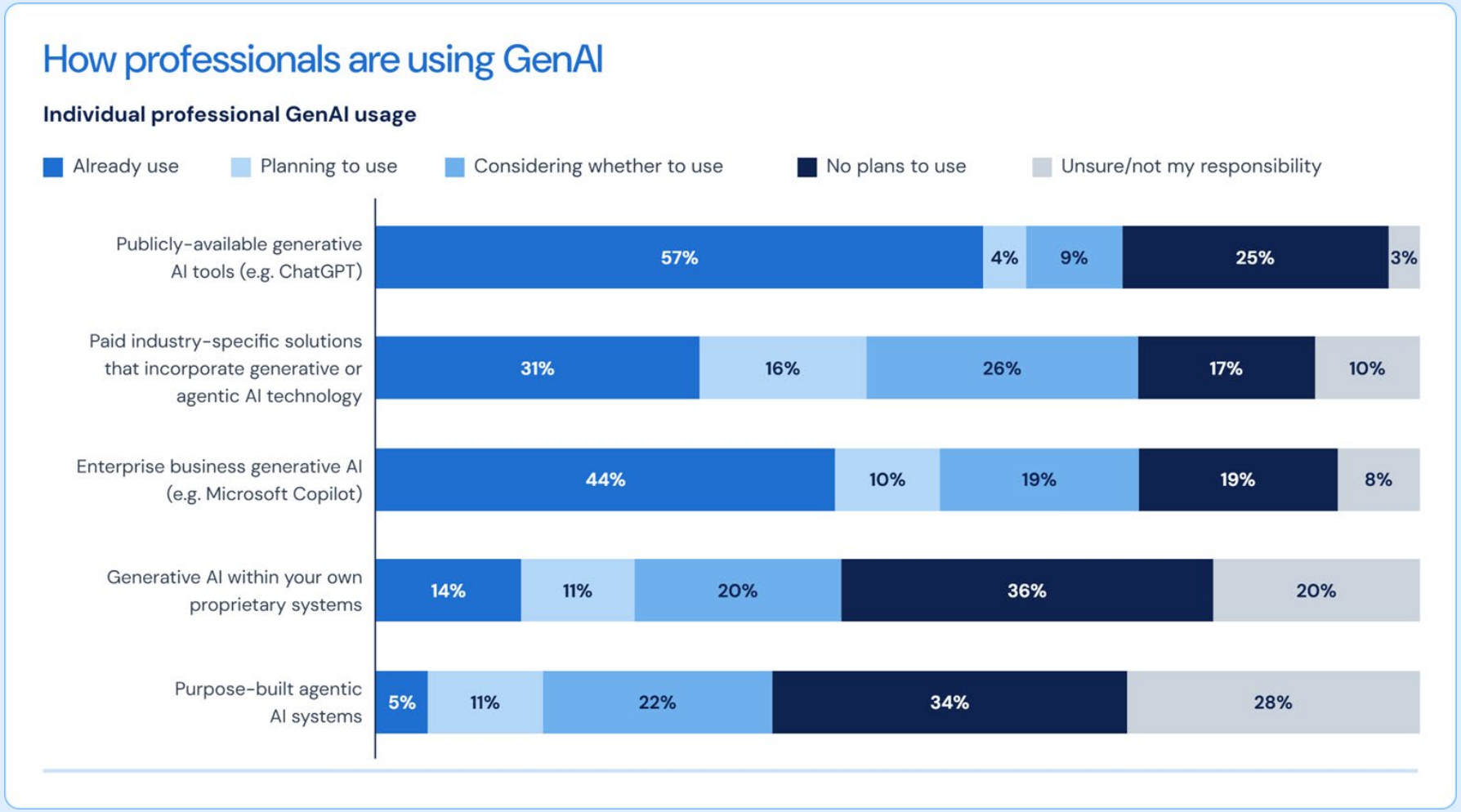
- Former Co-Founder of the Aigensei workflow platform
- Former AI Lead at Y Combinator-backed startup
- AI/Tech Nerd

AI Adoption in the Legal Industry



Source: Thomson Reuters 2026 State of Tax Professionals Report

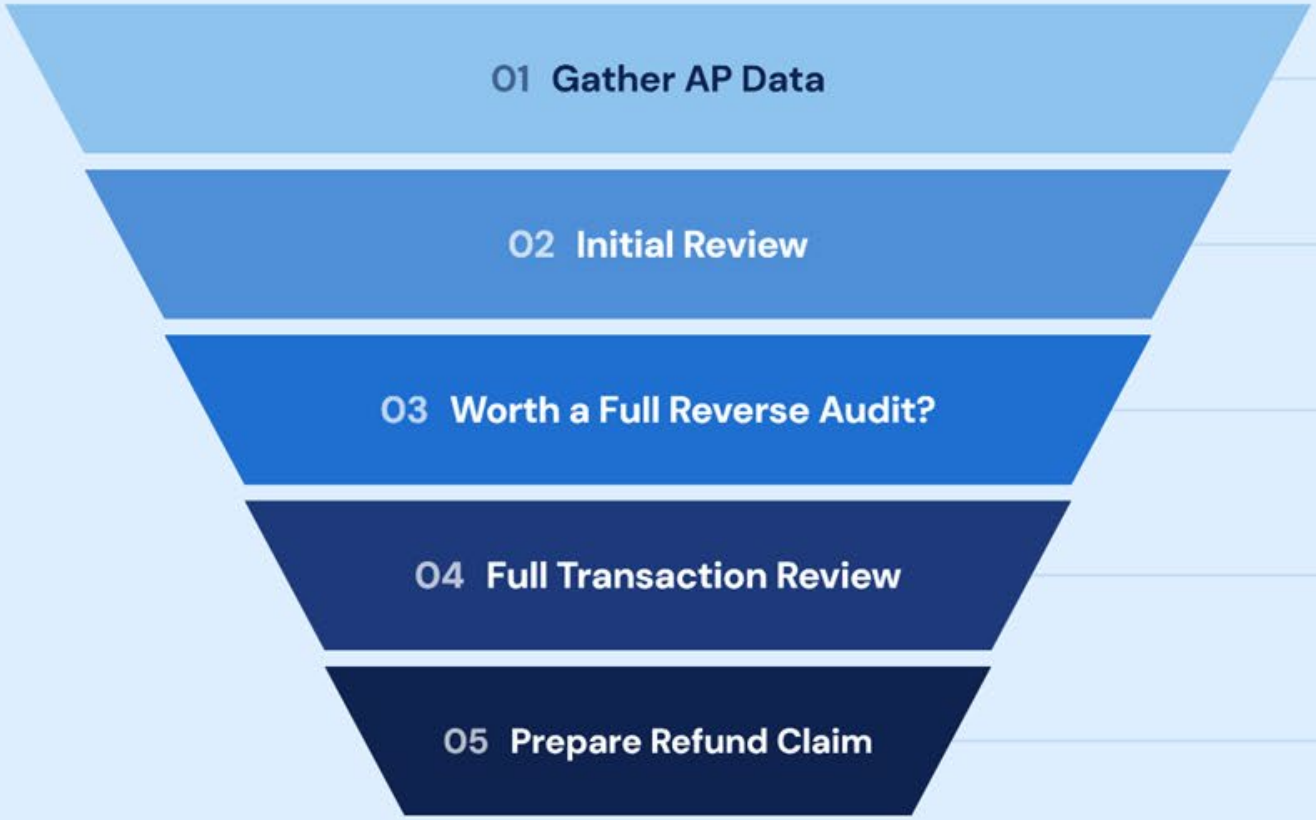
AI in Practice



Source: Thomson Reuters 2026 State of Tax Professionals Report

Today's Reverse Audit

The Process



Manual step = done by hand today

Paper, remote access, or a file dump

- Request and obtain AP data from client
- Scan paper invoices
- Pull invoices from client portal

Size the opportunity, pick vendors and categories

- Sample spend
- Analyze invoices by hand
- Identify overcharging vendors
- Estimate refund potential

Go / no-go on a full reverse audit

- Decide whether a reverse-audit is worth pursuing

Review thousands of invoices for refund candidates

- Schedule up to tens of thousands of spreadsheet cells
- Research transactions
- Research taxability statutes and rulings

Schedule transactions, prove exemption and payment

- Finalize refund spreadsheets
- Prove invoices were paid
- File claim

Today’s Solutions

The Problem

Invoice by Invoice

- Manual data entry
- Manual reconciliation
- Manual invoice retrieval
- Manual taxability research

Recovery Practices are Bandwidth-Constrained

- Engagements require months of manual transaction review
- Labor caps client capacity
    - Locks out smaller clients

What We Heard

1. Getting our hands on the invoices
2. Data preparation / Data entry
3. Transaction / Taxability Research



Product Demo



Reverse-Audit Automations

From raw AP data to refund



Automations You Can Take Home

Top generative AI use cases by industry

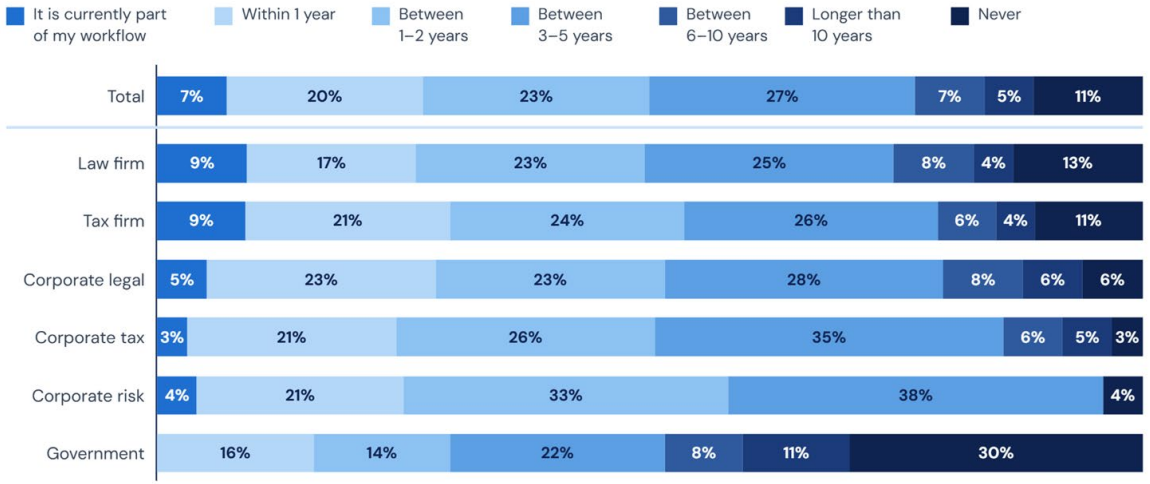
Legal		Tax & Accounting		Risk & Fraud	
1.	Legal research (80%)	1.	Tax research (69%)	1.	Document summarization (86%)
2.	Document review (74%)	2.	Document summarization (57%)	2.	Document review (74%)
3.	Document summarization (73%)	3.	Document review (55%)	3.	Risk assessment & reporting (71%)
4.	Brief or memo drafting (59%)	T-4	Accounting/bookkeeping (53%)	4.	Knowledge management (66%)
5.	Correspondence drafting (55%)	T-4	Tax advisory (53%)	5.	Correspondence drafting (63%)
6.	Contract drafting (49%)	T-4	Tax return preparation (53%)	6.	Extracting contract data (57%)

Source: Thomson Reuters 2026



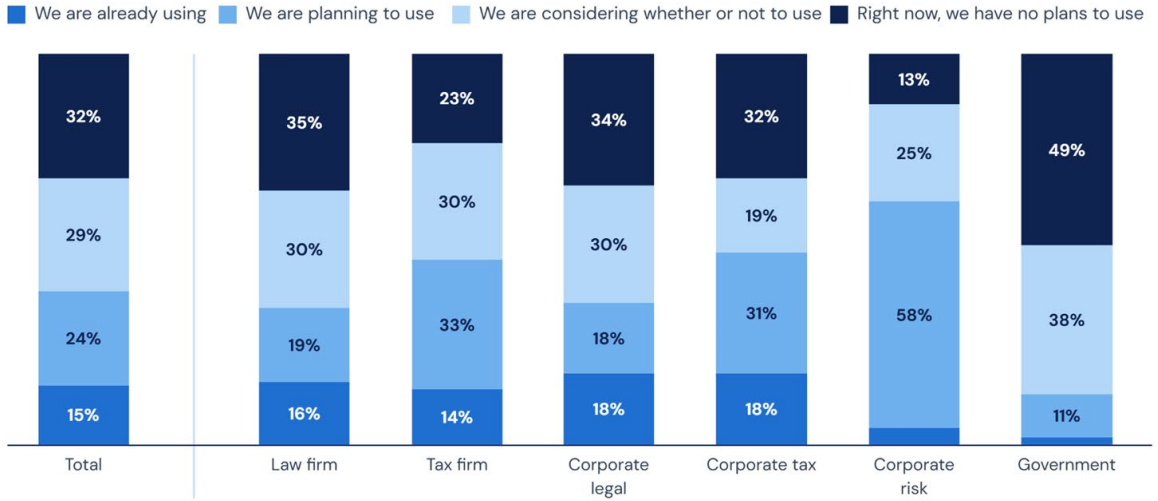
AI Adoption Trends & Projections

Estimated time until agentic AI is central to organization's workflow



Agentic AI's use on the rise

Organizational agentic AI usage, by organization type



Source: Thomson Reuters 2026 State of Tax Professionals Report

Thank You

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McNees

A Day on Tax – 2026

Estate planning update

Presented by:

Vance Antonacci



Types of estate plan documents

- Financial power of attorney
- Healthcare power of attorney/living will
- Last will and testament
- Revocable trusts
- Irrevocable trusts



Pennsylvania inheritance tax

- Applies to all PA residents
- Tax rates
  - 0% for spouses
  - 0% for charities
  - 4.5% for children and grandchildren
  - 12% for siblings
  - 15% for all other transferees (including nieces and nephews)
- Life insurance is exempt from the tax
- Real estate in another estate is exempt from the tax
  - LLC trap

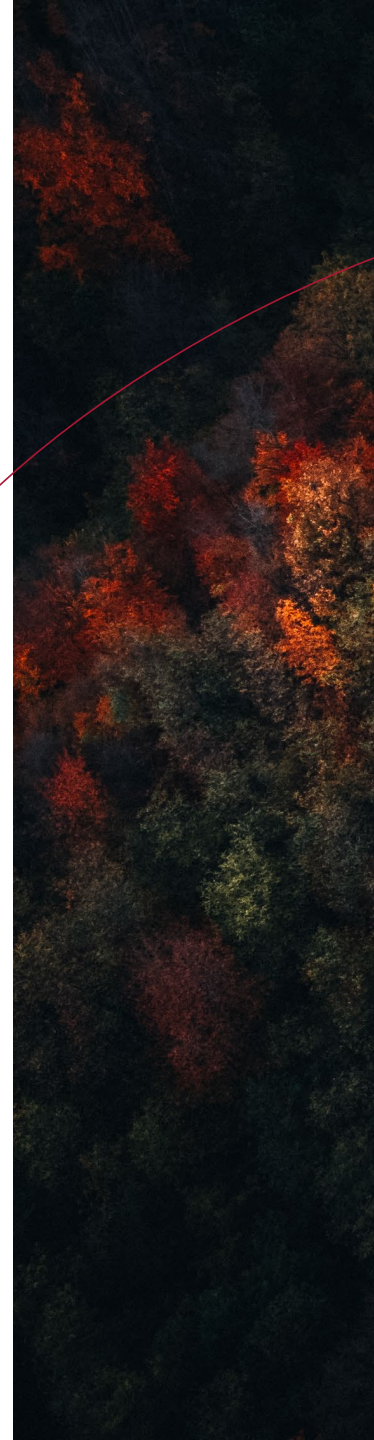
Federal estate tax summary

- Gift tax
- Estate tax
- Generation-skipping transfer tax
- Exemptions for each are $15M per person
- Exemptions adjust for inflation each year



Current trends in planning

- Leaving Pennsylvania
- Lifetime gifting
- QCD for IRAs
- Income tax basis planning





One Big Beautiful Bill

- Itemized deduction limitation (35/37 rule)
- Extends 2017 income tax rates and most other provisions of the 2017 Tax Act
- Charitable deductions
  - $1,000 deduction for taxpayers who do not itemize ($2,000 for married filers)
  - 0.5% “AGI Floor” for deductions for taxpayers who itemize

Questions

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A Day on Tax – 2026

Employee benefits update



Presented by:

Renée Lieux

Legislation:

Student loan repayment: Tax-free employer payments of $5,250 per year toward employee student debt are permanent.

Moving expenses: The exclusion for qualified moving expenses is eliminated. Moving expense reimbursements are taxable.

The Saver's Match
(effective 2027)

- **What it is:** SECURE 2.0 added the Saver's Match (IRC § 6433), which replaces the nonrefundable Saver's Credit with a *federal* matching contribution deposited directly into the saver's retirement account.
- **Amount:** Up to 50% of qualified retirement savings contributions, with a maximum match of $1,000 per individual per year, phased out based on modified adjusted gross income ($71,000 married; $35,500 single).
- **Eligible vehicles:** Non-Roth IRAs and employer plans such as 401(k), 403(b), and 457(b) plans.
- **Plan treatment:** The match is treated as an elective deferral (or IRA contribution). It does not count toward the § 402(g), § 414(v), or § 415(c) limits and is disregarded for nondiscrimination testing and top-heavy testing.
- Participant must file Form 8880-A with their federal tax return.



Health plans: PBM fee disclosure final rule

Covers large self-insured plans: Generally employers averaging 100+ employees or plans with 100+ participants. Fully insured plans are excluded.

PBMs and affiliated brokers/consultants must disclose rebates, spread compensation, clawbacks, and price protection payments.

Initial disclosure before a contract is entered, renewed, or extended; semiannual (or quarterly on request) reporting afterward.

Plan fiduciaries get an annual audit right with an auditor they select.

A PBM contract is not “reasonable” under ERISA without these disclosures, so the plan fiduciary must actually review them.

Fiduciary risk and litigation trends

DOL 2026 enforcement projects

- Cybersecurity
- Barriers to mental health and substance use disorder benefits
- Protecting benefit distributions
- Retirement asset management
- Surprise billing
- Criminal abuse of contributory benefit plans



Alternative assets in 401(k) plans:

DOL proposed a process-based prudence safe harbor for selecting investments, including funds with private equity or private credit (March 2026), as part of implementing Executive Order 14330.

DOL Proposed Regulations

- Provides safe harbor for a fiduciary's duty of prudence
  - Performance
  - Fees
  - Liquidity
  - Valuation
  - Performance benchmark
  - Complexity
- Affords the plan "significant deference"

Does not address administrative issues inherent in alternative assets.

Anderson v. Intel Corp. Investment Policy Committee
(9th Cir. 2025)

Allegations: Former Intel employees alleged that the trustees of Intel's custom target-date and global diversified funds breached the duty of prudence by allocating plan assets to hedge funds and private equity, and breached the duty of loyalty by favoring investments that benefited Intel Capital.

- The Court held that:
  - Prudence is judged by process at the time of the decision, not by results. A plaintiff relying on underperformance or fees must compare the funds to a "meaningful benchmark" with similar aims.
  - Equity-heavy retail funds were not valid comparators for Intel's disclosed risk-mitigation strategy. "ERISA fiduciaries are not required to adopt a riskier strategy simply because that strategy may increase returns."
  - General attacks on hedge funds and private equity as an asset class fail; prudence is assessed in the context of the whole portfolio.

Johnson v. Quest Diagnostics

(3rd Cir. 2026)

Allegations: Plaintiffs alleged that the plan's fiduciaries breached their duties under ERISA by retaining two particular investment options: the Fidelity Freedom Funds and the Invesco Global Real Estate Fund.

The Court noted that:

- So long as a plan fiduciary analyzes that underperformance and evaluates the fund's underlying strategy, there may be sound reasons to hold on to the fund during a period of weaker returns. The key question is whether the fiduciary did that analysis.
- ERISA fiduciaries need not pick the best investment to satisfy their duty of prudence.
- We must scrutinize the Committee's process, because applying the duty of prudence is "largely a process-based inquiry."
- Quest's process was sound. The Committee wisely hired an outside advisor but remained actively involved, meeting with fund sponsors and having Mercer review specific investments, including the challenged Funds. The Committee did its duty, following a prudent process.

Matula v. Wells Fargo
(8th Cir. 2026)

Allegations: A Wells Fargo employee challenged the company's use of approximately $2 million in forfeited, unvested 401(k) matching contributions to offset its own employer contributions rather than to pay plan expenses. The plan gave Wells Fargo sole discretion to use forfeitures to offset contributions, pay plan expenses, or make corrective adjustments.

The Court held that:

- The plaintiff lacked Article III standing. His counsel conceded that no personal injury to his account was alleged and no specific expenses he paid were identified.
- ERISA requires a particularized injury to the plaintiff personally, not theoretical plan-level harm.

Collins v. Northeast Grocery

(2d Cir. 2025)

Allegations: Four former Tops Market and Price Chopper employees alleged that fiduciaries of the Northeast Grocery 401(k) Savings Plan, which offered 28 investment options, failed to follow a prudent process and to act in participants' exclusive interest. Plaintiffs had not invested in the challenged options.

The Court held that:

- Defined contribution participants must plausibly plead an individual injury to have Article III standing to seek monetary relief.
- Participants lack standing to challenge options in which they did not invest and suffered no loss; standing is "not dispensed in gross."

Silva v. TE Connectivity Corp.

(E.D. Pa., No. 2:26-cv-08320)

Allegations: A participant in the TE Connectivity Retirement Savings and Investment Plan (about 15,000 participants and about $3 billion in assets) alleged a breach of fiduciary duty under two theories:

- Recordkeeping fees: The plan paid an average of $71 per participant per year (2020 to 2025), compared with a $27 average for comparable plans. Empower allegedly charged the Bechtel plan $22 to $26 for the same or more services.
- Forfeitures: Of $12.66 million in forfeitures, $11.04 million (about 87%) offset TE Connectivity's fixed Basic Match and only $1.62 million paid plan expenses, while participants paid $9.67 million in expenses.

Class action complaint filed October 30, 2026; no ruling yet.

Erickson v. Lockton, Inc.

(W.D. Mo., No. 4:26-cv-00847)

Allegations: Lockton, a broker and benefits consultant, is also the sponsor and named fiduciary of its own employee welfare plan. Two participants allege that it violated ERISA when it selected the plan's participant-paid voluntary benefits (life, LTD, AD&D, accident, critical illness, long-term care) and was paid by the products it chose.

DOL voluntary-plan safe harbor:

- No contributions are made by the employer
- Participation is completely voluntary
- Employer's role is strictly limited and non-endorsing
  - Permitting the insurer to publicize the program
  - Collecting premiums via payroll deduction
  - Remitting premiums to the insurer
  - The employer must not negotiate terms, influence benefit design, or present the program as employer-sponsored
- No employer compensation

Class action complaint filed October 1, 2026; no ruling yet.

Platt v. Sodexo
(9th Cir. 2025)

Allegations: A participant challenged the plan's monthly tobacco surcharge for lacking a "reasonable alternative standard" and required notice, and brought a fiduciary breach claim. Sodexo moved to compel arbitration under a provision it unilaterally added to the plan in 2021.

The Court held that:

- An employer cannot create a valid arbitration agreement by unilaterally amending an ERISA plan; the relevant party must consent.
- For § 502(a)(1)(B) and (a)(3) claims, the participant is the consenting party and did not consent without sufficient notice. For § 502(a)(2) claims, the plan consented through Sodexo's broad amendment authority.

Munson v. Macy's
(S.D.N.Y., filed Oct. 2026)

Allegations: A participant alleges that Macy's, as fiduciary of its Enhanced Benefits Program, breached the duties of prudence and loyalty by offering voluntary supplemental health insurance (accident, critical illness, hospital indemnity) that participants paid for from their wages, at premiums inflated by commissions paid to its broker, Aon.

- Commissions and fees averaged 36.7% of premiums from 2019 to 2024, about $13.2 million of $36.1 million paid. They reached 65.1% on critical illness coverage in 2019.
- When the plan switched carriers in 2022, commissions jumped to 62.8%, which the complaint calls "heaped" commissions and "churning."
- Comparable plans allegedly pay 10% or less in broker compensation, and enrollment materials described the coverage as offered "at discounted group rates."

Class action complaint filed October 3, 2026; no ruling yet.

Barbich v. Northwestern University
(N.D. Ill. 2026)

Allegations: Current and former employees alleged that Northwestern breached its ERISA fiduciary duties by failing to prudently select and monitor the welfare plan's PPO options and to disclose material information. They alleged that the Premier PPO cost more without commensurate benefits compared to the Value PPO (a "dominated" option), causing overpayment.

The Court held that:

- Northwestern's motion to dismiss for lack of standing and failure to state a claim was denied (April 2, 2026).
- Plaintiffs' overpayment allegations were sufficient at the pleading stage.

Questions

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A Day on Tax – 2026

Trust fund recovery penalty

Presented by
Timothy M. Finnerty, Esq., CPA



Agenda

- Federal trust fund recovery penalty: overview
- Trust fund taxes
- Trust fund recovery penalty — IRC § 6672
- Statutory requirements
- The “responsible person”
- Willfulness element
- Common defenses
- Treatment of volunteers of charitable organizations
- Review of court cases

Trust fund recovery penalty: Overview

Payroll taxes held in trust

- FICA and income taxes withheld from employee pay are “trust fund taxes.”
- IRS has no recourse against the employee for unpaid trust fund taxes.
- IRC § 7501(a) obligates the withholding party to pay over the tax and treats it as held in a special trust fund for the government.

Why problems arise

- Struggling business in a difficult economy.
- Limited resources.
- “Borrowing” withheld funds to keep operating.
- Core question: Who pays if the employer cannot?

IRC § 6672: Collection device or “penalty”?

What it does

The Government need not rely on traditional corporate veil-piercing concepts. Section 6672 creates a direct personal-liability collection tool.

Known names

100% penalty
Responsible person penalty
Trust fund penalty
Trust fund recovery penalty
§ 6672 penalty

Two elements

Responsible person + willfulness requirement.

Broad application

Several persons can be liable at once, and the IRS can use the potential assessment to compel compliance.

Trust fund taxes: What is in, and what is out

Included

- Federal income taxes withheld from employees.
- Employee share of FICA taxes, including Social Security and Medicare.
- Third-party taxes imposed on a person other than the person required to collect and pay over the tax.

Generally outside § 6672

- Employer share of FICA.
- FUTA.
- Corporate income taxes.
- Independent-contractor payments.
- Employer portion of accrued interest on unpaid taxes.

When the company cannot or does not pay its trust fund taxes, who is liable?

Trust fund recovery penalty — IRC § 6672

Personal liability

- Individuals involved in a business can be personally liable for the business's failure to properly collect and remit employment taxes.
- The penalty equals 100% of unpaid trust fund taxes for each quarter.
- The penalty is a collection device, not an additional tax.

Collection mechanics

- IRS Policy Statement P-5-60: IRS will collect the taxes only once, from the business, responsible persons, or a combination.
- § 6672 penalty is abated to the extent of collection from the business or another responsible person.
- Liability can be joint and several; the IRS need not first collect from the business.

IRC § 6672 statutory requirements

General rule

Any person required to collect, truthfully account for, and pay over any tax who willfully fails to collect, truthfully account for, or pay over the tax is liable for a penalty equal to the amount of tax evaded, not collected, or not accounted for and paid over.

Preliminary notice requirement

No penalty is imposed under § 6672(a) unless the Secretary notifies the taxpayer in writing by mail or in person that the taxpayer will be subject to assessment. The notice must precede notice and demand by at least 60 days.

The “responsible person”

First step

Determine whether the individual had the duty, status, and authority to account for, collect, and pay trust fund taxes.

Broad reach

Any person who can effectively control the employer’s finances may be in scope.

IRC § 6671(b)

The term “person” includes an officer or employee of a corporation, or a member or employee of a partnership, who is under a duty to perform the act in respect of which the violation occurs.

Analysis focuses on the individual’s duty, status, and authority in the context of the business—especially company finances.

The “responsible person”: Practical authority questions

Authority to control

- Determine the order of payment to creditors?
- Control the disbursement of funds?
- Control the allocation of corporate funds?
- Exercise ultimate authority over expenditures?

Scope of “person”

- More than one individual can be responsible.
- Liability is joint and several.
- The § 6671(b) list is not exclusive.
- Can include shareholders, directors, officers, employees, creditors, and bookkeepers.
- A person need not actually perform the duties.

Period-by-period analysis is required.

“Responsible person”: General factors

Factor 1

Power to avoid default in payment of tax

Factor 2

Power to control allocation of funds to creditors

Factor 3

Ultimate authority over expenditures

Factor 4

Control over the corporation’s financial decisions

Factor 5

Final word over what bills or creditors are paid, and when

Factor 6

Power to compel or prohibit allocation of corporate funds

Specific factors from IRM 5.17.7.1.2

Common factors

- Officer, director, principal shareholder, partner, or LLC member.
- Duties in the bylaws.
- Authority to sign checks.
- Control of financial affairs.
- Authority to determine which creditors are paid.
- Control of payroll disbursements.
- Control of voting stock.
- Signature on employment tax returns.

Crucial test

Whether the person has the “effective power to pay the taxes owed.” A person has that power if he or she can exercise significant control over the company’s financial affairs, whether or not that control is actually exercised.

Status, duty, authority

Significant control generally relates to the person’s status, duty, and authority in the business.

Not a “responsible person”

Typical facts

- Individual lacks independent authority to make decisions.
- Individual acts only under the dominion and control of others.
- Especially true if not a business owner.

IRS Policy Statement 5-14

In general, non-owner employees who act solely under the dominion and control of others, and who cannot make independent business decisions, will not be asserted the trust fund recovery penalty.

Willfulness requirement

Rule

Under § 6672(a), the failure to collect or pay over trust fund taxes must be willful.

Definition

Intentional, deliberate, voluntary, reckless, or knowing—not accidental. No evil intent or bad motive is required.

Creditor preference

Willfulness is the voluntary, conscious, and intentional decision to prefer other creditors over the United States.

Government must show awareness of outstanding taxes and a deliberate choice not to pay, or reckless disregard of an obvious nonpayment risk.

Willfulness requirement: Fact patterns

Deliberate preference

- Responsible person makes a deliberate choice to pay other creditors instead of the government.
- Responsible person uses trust fund taxes to cover general operating expenses.

Reckless disregard

- Failure to segregate the trust fund taxes.
- Gross negligence in monitoring whether taxes are paid.
- Failure to investigate and correct after obtaining knowledge of unpaid trust fund taxes.
- Conduct showing the person clearly should have known there was significant nonpayment risk.

Common defenses to the trust fund recovery penalty

Defense 1
Reasonable cause

Defense 2
Lack of financial control

Defense 3
Lack of discretionary authority

Defense 4
Lack of knowledge of unpaid taxes

Defense 5
Negligence, confusion, or mistaken belief leading to nonpayment

Defense 6
Timing defense: not responsible at time of non-payment

Volunteers and nonprofits: IRS policy

IRS Policy Statement 5-14

The penalty shall not be imposed on unpaid, volunteer members of a § 501 board of trustees or directors to the extent such members are solely serving in an honorary capacity, do not participate in day-to-day or financial operations, and/or do not have knowledge of the failure on which the penalty is imposed.

Policy point: unpaid status alone is not enough; the role must be genuinely honorary and detached from financial operations.

Volunteers and nonprofits: Statutory exception

Section § 6672(e)

- Be acting in an honorary capacity.
- Not participate in day-to-day operations or financial operations.
- Not have actual knowledge of the failure to pay taxes.

Backstop rule

If this rule results in no one being held to be a responsible party, then it does not apply.

Practice point

The IRS is following the Policy Statement and not the statute.

Court cases: Third Circuit control and job-loss pressure

Brounstein v. United States

- President and assistant treasurer assessed TFRP.
- Bylaws gave management and control authority, but he was not in exclusive financial control.
- Signed most checks at his boss' direction and feared job loss if he paid the IRS.
- *Responsible persons cannot prefer their own continued employment over the trust beneficiary.*

Greenberg v. United States

- Controller deemed responsible and liable for TFRP.
- Board member, secretary, shareholder, and accounting staff supervisor.
- Signed checks approved by boss.
- Agreed to pay taxes later to keep doors open; IRS check bounced; resignation came too late.
- Lesson: *if boss directs nonpayment, do not retain check-signing authority.*

Court cases: Accounting firm and finance director exposure

Quattrone Accountants v. IRS

- Accounting corporation hired by client was deemed a responsible person.
- Paid normal monthly bills without client approval.
- Calculated payroll and distributed paychecks.
- Had signature stamp for checks.
- Secured loan for delinquent payroll taxes but funds were used to pay other creditors.
- Individual at accounting firm was also assessed TFRP.

Johnson v. United States

- Finance director held responsible; acted as own attorney and initiated litigation.
- IRS assessment presumed correct; individual bears burden to show error.
- Had check-signing authority and prepared tax returns.
- Aware of delinquency; told president taxes had to be paid but kept signing checks to others.
- Feared being fired, but did not pay IRS directly.

Court cases: Part-time bookkeeper/accountant

Bax v. United States

Part-time bookkeeper/accountant found to be a responsible party.

Key facts

- Established accounting records and was among the founding members of the company.
- Handled financial activity for a company providing GED education and training.
- Had a written indemnity agreement with the company president.
- President supported the claim that Bax had no decision-making role, but did not explicitly state Bax acted under another officer's direction.
- Had check-signing authority and prepared/signed tax returns.
- Reviewed payment lists that omitted IRS and saw IRS notices.
- Did not meet the burden of persuasion that he was not responsible.

Caution: do not remain on the account as a signatory when taxes are not being paid.

Court cases: Passive investor’s spouse

Fitzpatrick v. Commissioner

Spouse of passive investor was assessed TFRP; assessment overturned in Tax Court.

Background

- Wine bar in Jacksonville, Florida.
- Two investors formed company: one active operator and one passive investor.
- Passive investor’s wife helped administratively while caring for disabled child.

Activities

- Established accounts and hired Paychex.
- Signed payroll checks and delivered mail.
- Transferred funds at owners’ direction and wrote some checks.
- No post-high-school education or financial background.

Why she prevailed

- Paychex stopped making electronic IRS payments after insufficient funds.
- Owners and wife did not know; manager used operating cash for COD vendors.
- IRS cursory review assessed most people except passive investor.
- Check-signing authority alone did not establish effective financial authority.

Questions



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A Day on Tax – 2026

Tax practitioner’s practical guide to reviewing M&A agreements



Presented by:

J. Tyler Moser, Esq.

Agenda

1. What to do when you receive a purchase agreement
2. How to address and draft provisions relating to the following issues:
   - Withholding tax
   - Tax representations
   - Interim operating tax covenants
   - “Tax matters” covenants
   - Tax indemnity
   - Ancillary documents

You've received a purchase/merger agreement... What do you do?

Most importantly → Understand the transaction

- What is the transaction?
- Who do we represent?
- Are there any desired tax goals for the parties (*e.g.,* tax-free, basis step-up, etc.)?
- What is the target's (sell-side) structure?

Reach out to Corporate to get general background on the transaction

- Is there a term sheet or letter of intent (LOI)?
- Any other contemplated transactions in connection with the purchase/merger transaction that we need to be aware of?
  - Restructuring transactions prior to the purchase/merger? "Rollover" transactions?

Any preferences or business agreements with respect to tax points?

- Will there be pre-closing tax indemnity? Stock deal? "RWI" deal? Tax refunds or transaction tax benefits?
- Who to contact at the client to directly discuss any tax points?
- Is there a structure chart of the target?
- Is there a steps chart for the transaction, or are we expected to prepare one?
- Who's doing tax diligence? ***Typically, an accounting firm***

You've received a purchase/merger agreement... What do you do? (cont'd)

Get a sense of what's in the draft agreement

- Whose draft is it?
  - Are we marking up an auction draft? Are we preparing an auction/initial draft? Is it based on a precedent?
- What is the general approach in marking up the purchase agreement?
  - Middle of the road? Pro seller or Pro buyer?
- Does it correctly reflect the contemplated transaction? Generally described in the Article I / II (or sometimes Recitals) of the agreement.
- If receiving a draft from opposing counsel, get direction from Corporate on whether to prepare an issues list for the client or go directly to a markup

Important sections for tax practitioners:

- Definitions
- Purchase price adjustments
- How do unpaid taxes impact the purchase price?
- Tax representations
- Diligence and indemnity/survival
- Tax covenants
- Governing conduct of parties with respect to tax matters (*e.g.,* tax returns and tax contests/audits)
- Transfer taxes, tax refunds, and other post-closing tax matters
- Indemnification (pre-closing tax indemnity)

Withholding tax

The right to tax withholding

If the withholding agent fails to withhold, the withholding agent may have secondary liability

- Buyer: Always want to include tax withholding as a right
- Seller: Always want to limit or have an opportunity to mitigate withholding amount

Because withholding tax would reduce the sale proceeds that the Seller receives, the Seller will (at least) want notice if the Buyer plans to withhold and require the Buyer to cooperate to reduce such withholding tax

- Middle-of-the-road approach is to give notice other than with respect to (i) withholdings resulting from the Seller/payee's failure to furnish appropriate tax form at closing, or (ii) payments treated as compensation for income tax purposes.

Consider whether withholding is anticipated or if this provision is primarily a risk allocation

- With domestic targets, material withholding is generally not expected if proper tax forms are furnished at closing.
- With foreign targets, try to confirm in advance whether there is any potential withholding in the relevant foreign jurisdiction and the magnitude of such withholding.

The right to tax withholding (cont'd)

Sample provision

Tax Withholding. Buyer (or its agent, as applicable) **shall be entitled to deduct and withhold** from the amounts payable pursuant to this Agreement and the other Transaction Documents such amounts as Buyer (or its agent, as applicable) reasonably determines Buyer (or its agent, as applicable) is required to deduct and withhold with respect to the making of such payments under any provision of U.S. federal, state, local, or foreign tax Law and instead shall pay such amount to the applicable Governmental Authority. To the extent that amounts are paid to the applicable Governmental Authority, such amounts withheld shall be treated for all purposes of this Agreement and the other Transaction Documents as having been paid by Buyer to the recipient in respect of which such deduction and withholding was made by Buyer (or its agent, as applicable). **[IF SELLER:** Except with respect to withholding pursuant to Seller's failure to deliver the certificate described in **[section requiring FIRPTA certificate or W-9]** and withholding with respect to any payment treated as compensation subject to payroll Taxes for U.S. income Tax purposes, Buyer shall (i) **[use commercially reasonable efforts to]** promptly provide Seller with written notice of any amounts that Buyer (or its agent, as applicable) intends to deduct or withhold from any amounts payable pursuant to this Agreement in advance of the payment thereof, (ii) **[cooperate in good faith with the Seller and the applicable payee to seek to eliminate or reduce any such withholding or deduction]**, and (iii) provide Seller with **[a reasonable opportunity to provide any applicable certificates, forms or other documentation that would eliminate or reduce the requirement to deduct or withhold under applicable law]**.

Tax representations

Tax representations

Representations serve as a diligence tool and basis for indemnification

Gives the buyer some level of assurance that the buyer is not assuming an unexpected liability after the acquisition

Reps move in conjunction with diligence

Any tax exposure identified in diligence?

Are NOLs factored into purchase price?

- Buyer might want a rep that NOLs equal or exceed $x as of a particular date (or seller might want to disavow certain attributes/amounts) or not currently subject to Section 382 limitation

Scope of tax reps varies greatly depending on the particulars of the deal

Asset deals generally have only a few tax reps related to the business or assets being sold

- If buyer is obtaining RWI, buyer will generally want to have detailed and expansive reps
- Consider scheduling burden on the seller and potential impact on RWI coverage, if items were to be scheduled out
- Ring-fencing
- No application for post-closing period



Sample tax representations and warranties

1. All Tax Returns required to be filed by or with respect to each Company Entity have been duly, timely, and properly filed (taking into account any valid extensions), and all such Tax Returns are true, complete, and correct in all respects. All Taxes **[that are shown to be]** due and payable by or with respect to each Company Entity **[on such Tax Returns]** have been duly and timely paid, **[or are being contested in good faith and for which adequate reserves have been established on the balance sheet of the Company Entities consistent with Accounting Practices]**.

2. No Company Entity is required to file any Tax Returns in any jurisdictions other than those set forth in Section [__] of the Disclosure Schedule, and no written claim has been made by any Governmental Authority in a jurisdiction in which a Company Entity does not file Tax Returns that such Company Entity is or may be subject to Tax by that jurisdiction.

3. There are no Encumbrances for Taxes upon the assets of any Company Entity, **[except for Permitted Encumbrances]**.

4. No extensions or waivers of statutes of limitations have been given (which statutory period, as extended or waived, remains open) or requested (which request remains outstanding) with respect to any Taxes or Tax Return of any Company Entity.

5. There are no outstanding requests for any Tax ruling from any Governmental Authority relating to any Company Entity nor has such a Tax ruling ever been received. No “closing agreement” as described in Section 7121 of the Code (or any corresponding or similar provision of state, local or foreign Tax law) has been entered into or issued by any Governmental Authority with any Company Entity.

Sample tax representations and warranties (cont'd)

6. No power of attorney has been executed by, or on behalf of, any Company Entity with respect to any matter relating to Taxes which is currently in force.

7. All Taxes required by applicable Law to be withheld by or with respect to any Company Entity have been collected or withheld and either paid to the appropriate Governmental Authority or set aside and, to the extent required by Law, held in accounts for such purpose. Each Company Entity has complied in all material respects with information reporting provisions of applicable Law.

8. There are no pending or ongoing, **[or to the Knowledge of the Company]** threatened, actions, suits, claims, audits, examinations, investigations, or other legal or administrative proceedings by any Governmental Authority against any Company Entity with respect to Tax Returns of any such Company Entity. No deficiency for any Tax has been asserted in writing or assessed by a Governmental Authority against any Company Entity.

9. No Company Entity is party to, or bound by, any Tax allocation, Tax indemnity, Tax sharing or similar agreement or arrangement with any Person, **[other than any agreement or arrangement not primarily related to Taxes and entered into in the ordinary course of business]**.

10. [All sales, use and value added Taxes required to be collected by any Company Entity have been collected and remitted to the appropriate Governmental Authority, and properly completed exemption certificates for all exempt transactions have been furnished by or with respect to each Company Entity.]

Sample tax representations and warranties (cont'd)

11. No Company Entity is or has **[been a party to any "reportable transaction," as defined in Code Section 6707A(c)(1) and Treasury Regulations Section 1.6011-4]** / **[engaged in any "listed transactions" within the meaning of Treasury Regulations Section 1.6011-4(b)(2)]**.

12. [Each Company Entity has complied in all material respects with all applicable statutes and regulations relating to the reporting and paying over of unclaimed or abandoned funds and property.]

13. No Company Entity (A) has been a member of an affiliated group (within the meaning of Section 1504(a) of the Code or any similar group defined under a similar provision of state, local or foreign Law) filing a consolidated federal income Tax Return (other than a group the common parent of which was any Company Entity) or (B) has any liability for the Taxes of any Person under Treasury Regulations Section 1.1502-6 (or any similar provision of state, local or foreign Law), as a transferee or successor or by contract (other than any contract the principal purpose of which is not Taxes) (or otherwise)].

14. No Company Entity is a party to any joint venture, partnership, or other arrangement or contract that is treated as a partnership for U.S. federal income tax purposes.

15. No Company Entity will be required to include any **[material]** item of income in, or exclude any **[material]** item of deduction from, taxable income for any Post-Closing Tax Period as a result of any (a) change made prior to the Closing in the method of accounting for a Tax Period ending prior to the Closing Date, (b) "closing agreement" as described in Section 7121 of the Code (or any corresponding or similar provision of state, local or foreign income Tax law) or any agreement with a Governmental Authority entered into or executed prior to the Closing, [(c) intercompany transaction or excess loss account described in Treasury Regulations under Section 1502 of the Code (or any corresponding or similar provision of state, local or foreign Tax law) made or established prior to the Closing], (d) installment sale or open transaction disposition made on or prior to the Closing Date, (e) prepaid amount or advance payments received or deferred revenue received or accrued prior to the Closing outside of the ordinary course of business, (f) use of an improper method of accounting for a taxable period ending on or prior to the Closing Date, **[(g) election under Code Section 108(i), (h) application of Section 952(c)(2) of the Code, (i) application of Section 951 or Section 951A of the Code with respect to income earned or recognized or payments received prior to the Closing, or (j) a "gain recognition agreement" under Section 367(a) of the Code]**.

Sample tax representations and warranties (cont'd)

16. [No Acquired Company will be required to pay Taxes after the Closing Date as a result of an election under Section 965(h) of the Code.]

17. [Within the past two years, the Company has not been a "distributing corporation" or a "controlled corporation" in a distribution intended to qualify for Tax-free treatment under Sections 355 or 361 of the Code.]

18. The Company has not been **[a United States real property holding corporation within the meaning of Code Section 897(c)(2) during the applicable period specified in Code Section 897(c)(1)(A)(ii)] / [a partnership in which fifty percent or more of the value of the gross assets consist of "United States real property interests" (as defined in Section 897(c) of the Code) and ninety percent or more of the value of the gross assets consist of "United States real property interests" (as defined in Section 897(c) of the Code) plus cash or cash equivalents, as described in Treasury Regulation Section 1.1445-11T(d)]**.

19. [The provisions of Section 197(f)(9) of the Code and the Treasury Regulations will not prevent any intangible assets of the Company from qualifying as "amortizable section 197 intangibles" within the meaning of Section 197 of the Code in the hands of Purchaser.]

20. [None of the Company Entities has elected to be classified as a corporation under Code Section 7701. Each Company Entity is (A) a partnership, (B) an entity that is disregarded as separate from its owner or (C) a tax transparent entity, in each case, for purposes of income tax in each federal, state, local and foreign jurisdiction to which such Company Entity is subject and has been such since the date of formation.]

21. Seller and/or Company Entities have made available to Buyer prior to the date hereof true, correct and complete copies of (A) all income and other material Tax Returns for each Company Entity filed in the **[three/five]** preceding Tax Periods (or in each Tax Period since the formation or incorporation, as applicable, of Seller and each Company Entity, if shorter) and (B) examination reports with respect to, and statements of deficiencies assessed against or agreed to by, Seller and/or each Company Entity for the **[three/five]** preceding Tax Periods (or in each Tax Period since the formation or incorporation, as applicable, of Seller and each Company Entity, if shorter).

Sample tax representations and warranties (cont'd)

22. [Neither the Company nor any of its Subsidiaries have claimed the "employment retention credit" within the meaning of Section 2301 of the CARES Act or any other Tax credit applicable to employment Taxes under the Families First Coronavirus Response Act.]

23. [The unpaid Taxes of the Company Entities for periods (or portions thereof) ending on or prior to the Balance Sheet Date do not exceed the accruals for current Taxes set forth on the Balance Sheet, and since the Balance Sheet Date, none of the Company Entities has engaged in any transaction, or taken any other action, other than in the ordinary course of business, that would materially impact any Tax asset or Tax liability of the Company Entities.]

24. All material transactions or arrangements made by the Company Entities have been made on arm's-length terms and the processes by which prices and terms have been arrived at have, in each case, been properly documented in all material respects to the extent required by Applicable Law. No written notice or inquiry or adjustment has been made by any Taxing Authority in connection with any such transactions or arrangements.

25. No Company Entity owns (directly or indirectly) stock or a warrant in any corporation that is (or was at any time during the course of such ownership) a passive foreign investment company, as defined in Section 1297 of the Code.

Sample tax representations and warranties (cont'd)

S corporation reps

1. The Company is, and has always been, an S corporation within the meaning of Section 1361(a)(1) of the Code. The Company is, and has always been, treated as an S corporation for state income Tax purposes in all states in which it files, or is required to file (or filed, or was required to file) income Tax Returns. The Company will be an S corporation up to and including the Closing Date.

2. The Company does not have any subsidiaries other than subsidiaries which are and have always been since the date of formation (A) "qualified subchapter S subsidiaries" (as defined in Section 1361(b)(3)(B) of the Code) for U.S. federal income tax purposes or (B)(i) entities treated as partnerships, (ii) entities disregarded as separate from the Company **[or (iii) a tax transparent entity]**, in each case, for purposes of income tax in each federal, state, local and non-U.S. jurisdiction to which the Company or such subsidiary is subject. **[The Company has received a letter from the Internal Revenue Service, addressed to the Company, in which the Internal Revenue Service acknowledges acceptance of the S Corporation election effective from the first taxable year of the existence of the Company.]**

3. The Company has, and has always had, only a single class of stock of a corporation within the meaning of Treasury Regulations Section 1.1361-1(l), and the Options are not, and have never been, treated as a second class of stock of a corporation under Treasury Regulations Section 1.1361-1(l)(4)(iii).

4. None of the Company or any of its Subsidiaries that was a QSub or the shareholders of the Seller have ever filed a Tax Return in a manner inconsistent with the S Corporation election or a Company's Subsidiary's QSub election. The Company, its Subsidiaries and the shareholders of the Seller have prepared all Tax Returns, information reporting statements and books and records of the Company and its Subsidiaries relating to Tax in a manner consistent with the requirements of Subchapter S of the Code.

5. Neither the Company nor any shareholder of the Company has ever notified a Governmental Authority of an intent to revoke the Company's S Corporation Election.

6. Neither the Company nor any of its Subsidiaries have, in the past five years, acquired assets from another corporation in a transaction in which the Company or its Subsidiaries' basis in the acquired assets was determined, in whole or in part, by reference to the Tax basis of the acquired assets (or any other property) in the hands of the transferor.

Sample tax representations and warranties (cont'd)

Ring-fencing: Advantageous when representing the Seller

- **Version 1:** No representation or warranty set forth in this Section **[Tax reps]** shall be deemed to apply directly or indirectly with respect to any taxable period (or portion thereof) after the Closing Date. The representations and warranties set forth in this Section **[Tax reps]** and so much of Section **[Employee benefits reps]** as relates to Taxes are the only representations and warranties in this Agreement with respect to Tax matters, and any claim for breach of representation or warranty with respect to Tax matters shall be based on the representations and warranties made in this Section [**Tax reps]** or so much of Section **[Employee benefits reps]** as relates to Taxes and shall not be based on the representations and warranties set forth in any other provision of this Agreement. **[For the avoidance of doubt, no representation or warranty is made as to the availability or usability of any net operating Losses, Tax basis or other Tax attributes.]**

- **Version 2:** No representation or warranty set forth in this Section **[Tax reps]** shall be deemed to apply directly or indirectly with respect to any taxable period (or portion thereof) after the Closing Date. It is agreed and understood that no representation or warranty is made in respect of Tax matters in any Section of this Agreement other than this Section **[Tax reps]** and **[Employee benefits reps]**.

“Interim” tax covenants

Interim tax covenants

Prohibits the seller/target from taking certain actions between signing and closing

- Consider the timing between signing and closing and how that would impact what actions should be restricted
  - ❑ Not relevant if simultaneous signing and closing

Conduct of business (until closing)

During the period from the Agreement Date to the Closing Date, except (1) as set forth in Section [ ] of the Company Disclosure Schedule, (2) as **[Parent/Buyer]** shall otherwise consent in writing (such consent not to be unreasonably withheld, conditioned or delayed), (3) as expressly contemplated by this Agreement **[or the Restructuring]**, and (4) as required by Law, the Company covenants and agrees that it shall not take any of the following actions:

(x) make, change or revoke any Tax election, change or adopt any annual Tax accounting period, change or adopt any method of Tax accounting, file any amended Tax Return, enter into any "closing agreement" as described in Section 7121 of the Code (or any corresponding or similar provision of state, local or foreign income Tax law), settle or compromise any claim, investigation, audit, controversy or assessment relating to Taxes, enter into any Tax sharing or similar agreement (other than an agreement entered into in the ordinary course of business, the primary purpose of which is not related to Taxes), surrender any right to a refund of Taxes or waive or extend the statute of limitations with respect to any Tax or Tax Return, **[IF SELLER**: in each case, to the extent that such action could reasonably be expected to increase the Tax liability or adversely affect the Tax positions or Tax Returns of Buyer (or its direct or indirect owners)**]**

- ❑ **Consider adding a "materiality" / "outside ordinary course of business" / "MAE" qualifier if representing the Seller**

“Tax matters” covenants

“Tax matters” covenants

"Tax matters" sections can encompass a lot of different concepts depending on the deal:

- Tax return filing obligations and allocation of taxes of straddle period
- Tax refunds
- Tax contests
- Transfer taxes
- Limitation on post-closing tax actions
- Tax indemnity (including pre-closing tax indemnity)

Keep in Mind...

- Buyer owns the entity after closing, but taxes can still be a contractual responsibility of Seller under the purchase agreement.
- Be highly aware of the scope of indemnity as you negotiate these provisions.
- What party should control the preparation of tax returns in light of indemnity obligations (or lack thereof)?
- What party should control any tax contests or audits?

“Tax matters” covenants

Who prepares and files tax returns with respect to pre-closing tax periods and straddle periods that are required to be filed after closing?

- Need to think about who is controlling the entity after the acquisition and whether the target is a pass-through entity or not
- Income versus non-income tax returns (especially in the context of pass-through entities)
- Whether prepared in a manner consistent with the past practice
- Straddle period returns are generally prepared by the buyer

Review and comment rights

- What happens if there is any dispute with regard to a tax return item?
- Usually a separate provision about tax allocation/returns re Straddle Period (discussed in next section of this presentation)
- Generally don't see tax return filing provision in a pure asset sale

Version 1: Tax Returns. [Subject to Section [ ]], Buyer shall prepare and timely file (or cause to be prepared and timely filed) all Tax Returns of the Company Entities (excluding, for the avoidance of doubt, any Tax Return of Seller) for any taxable period ending on or before the Closing Date that are due (taking into account any valid extensions properly obtained) after the Closing Date or for any Straddle Period. All Tax Returns to be prepared pursuant to this Section shall be **[prepared in a manner consistent with the past practice of the applicable Company Entity and without a change of any election or any accounting method, except as otherwise required by Law or this Agreement]**.

“Tax matters” covenants (cont’d)

Version 1: Tax Returns. [Subject to Section [ ], Buyer shall prepare and timely file (or cause to be prepared and timely filed) all Tax Returns of the Company Entities (excluding, for the avoidance of doubt, any Tax Return of Seller) for any taxable period ending on or before the Closing Date that are due (taking into account any valid extensions properly obtained) after the Closing Date or for any Straddle Period. All Tax Returns to be prepared pursuant to this Section shall be **[prepared in a manner consistent with the past practice of the applicable Company Entity and without a change of any election or any accounting method, except as otherwise required by Law or this Agreement]**. Seller and Buyer agree that the methodology set forth in **[Straddle Period Section]** will, where applicable, be used for preparing all Tax Returns for Straddle Periods, and that, **[in the case of income Tax Returns for the Company for Straddle Periods, the Company shall use the interim closing of the books method under Section 706 of the Code and Treasury Regulations Section 1.706-4, applying the “calendar day” convention as if the Company had filed a separate Tax Return for the period ending as of the close of business on the Closing Date]**.

Version 2: Pre-Closing Period Tax Returns. The Shareholder Representative shall have the exclusive authority to prepare and file (at the Shareholder Representative's expense), or cause to be prepared and filed, all **[Income Tax Returns]** of the Company for all Taxable periods ending on or prior to the Closing Date (the “Pre-Closing Period”) that are required to be filed prior to the Closing Date. All other Tax Returns for any Pre-Closing Period shall be prepared and timely filed, or caused to be prepared and timely filed, by Parent. Any Tax Return prepared, or caused to be prepared, by Parent shall be prepared in a manner consistent with the past practices of the Company, except as otherwise required by applicable Law.

Sample provisions: Straddle provisions

Allocation of taxes for Straddle Period

In the case of Taxes that are payable with respect to a taxable period that begins on or before and ends after the Closing Date (each such period, a **"Straddle Period"**), the portion of any such Taxes that are treated as Pre-Closing Taxes for purposes of this Agreement shall be:

(i) in the case of Taxes based upon or measured by income, gross receipts or sales, equal to the amount which would be payable if the taxable period ended at the end of the Closing Date; and

(ii) in the case of Taxes other than those specified under clause (a) above, equal the amount of such Taxes for the entire period multiplied by a fraction the numerator of which is the number of days in the period ending on the Closing Date and the denominator of which is the number of days in such Straddle Period.

Sample provisions: Dispute resolution

Right to review/comment and dispute resolution

All Tax Returns described in the first sentence of this Section (other than customary payroll Tax Returns prepared in the ordinary course) shall be provided to Seller for its review and comment no less than 30 Business Days prior to filing of such Tax Return (or, if any such Tax Return is due within thirty (30) days of the Closing Date, as soon as reasonably practicable following the Closing Date to permit Seller a reasonable period of time to review). Buyer shall consider in good faith any comments that are provided by Seller no later than 15 Business Days following Seller's receipt of such draft Tax Return. The Parties shall cooperate diligently and in good faith to resolve any dispute regarding the comments of Seller to any such Tax Return **[; provided, however, if for any reason the Parties are unable to promptly resolve such dispute, such dispute shall be promptly resolved by the Accounting Firm in accordance with Section [ ], mutatis mutandis]**. If the Accounting Firm is unable to resolve such dispute prior to the due date for the filing of the applicable Tax Return, then (i) Buyer may cause the applicable Company Entity to file such Tax Return in accordance with its reasonable position, and (ii) if the Accounting Firm subsequently determines that such Tax Return should be amended, the applicable Company Entity shall file an amended Tax Return reflecting the resolution of the Accounting Firm. Except to the extent taken into account in the Closing Purchase Price (as finally determined), including in the calculation of Net Working Capital, Indebtedness or Company Transaction Expenses, Seller shall pay to Buyer an amount equal to any Taxes shown to be due and payable on any Tax Return prepared pursuant to this Section [ ] (for any Straddle Period, to the extent of the amount that is allocated to the Pre-Closing Tax Period as determined pursuant to Section [ ]) upon the later of (x) two (2) days before the due date (taking into account extensions) for the payment of any such Tax and (y) the date upon which the Accounting Firm resolves all applicable disputes with respect thereto.

“Tax matters” – Tax refunds

Sets forth Seller's entitlement to the tax refunds attributable to a pre-closing tax period of the target

- *e.g.,* overpayment of taxes to the extent not taken into account in the purchase price
- Closing is a strict cutoff line
- Seller may ask for tax refunds arising from the deductions generated by the company transaction expenses borne by Seller

Generally, if not providing pre-closing tax indemnity, the seller shouldn't expect entitlement to pre-closing tax refunds

If Buyer, need to make sure that Seller is required to return the refund amount if the refund is later disallowed

- Whether Buyer is required to file for refund

Sample provisions: Tax refunds

Version 1: Any Pre-Closing Refunds received or used by Buyer or any Company Entity (or any Affiliate of the foregoing), to the extent not included as an asset (or an offset to a liability) in the computation of Closing Net Working Capital, shall be for the benefit of Seller, and the applicable Company Entity shall pay such Pre-Closing Refund (less any Taxes actually imposed thereon or reasonable out-of-pocket expenses incurred to obtain such refund) to Seller within 30 days after such receipt. Provided, however, that, to the extent a Pre-Closing Refund that gave rise to a payment hereunder is subsequently disallowed by a Governmental Authority, Seller shall return such amounts to the Company (for prompt repayment to the applicable Governmental Authority). **[If Seller: at Seller's request, Buyer agrees to, and agrees to cause its affiliates (including, following the Closing Date, the Company Entity) to, use commercially reasonable efforts to obtain any Pre-Closing Refunds and permit Seller to participate in the efforts to obtain any Pre-Closing Refunds.]**

Version 2: To the extent not reflected in the Closing Net Working Capital, any Tax refunds received by Parent or Surviving Corporation that relate to any Pre-Closing Period or any Straddle Period shall be for the account of the Equity Holders and Parent shall (or shall cause the Surviving Corporation to) pay over within ten (10) Business Days after actual receipt of such Tax refunds in cash (net of all expenses incurred in obtaining such Tax refunds) to the Exchange Agent, for distribution to the Equity Holders in accordance with their Pro Rata Shares, the aggregate of each such holder's Pro Rata Share of such refund. **[If Buyer: For the avoidance of doubt, nothing in the Agreement requires Purchaser to file any Tax Return or to amend any Tax Return to create or increase any Tax refund.]**

At Seller's request, Buyer agrees to, and agrees to cause its Affiliates (including, following the Closing Date, the Company Entity) to, use commercially reasonable efforts to obtain any Pre-Closing Refunds and permit Seller to participate in the efforts to obtain any Pre-Closing Refunds.

“Tax matters” – Tax contests

Obligation to notify the other party if the target is audited or assessed taxes for a pre-closing tax period

- If on the buyer side, need to make sure delay doesn't relieve the seller of any indemnification obligation unless the seller is materially and actually prejudiced by such delay

Who controls the contest

- If the seller has the obligation to indemnify for pre-closing taxes, the seller would want to control such contest
- If the seller opts not to control or fails to control, then the buyer can control
- Buyer would generally control contests relating to straddle periods
- Requirement to keep the non-controlling party reasonably informed
- Right to participate at the party's own cost
- No settlement without the consent of the non-controlling party

Buyer shall promptly (but in no event later than 30 days after such receipt or so becoming aware) notify Seller in writing upon receipt by Buyer, any Company Entity or any of their respective Affiliates of notice of any Tax Claim or otherwise becoming aware of such Tax Claim; **[provided, however, that no delay on the part of Purchaser in giving any such notice shall relieve Seller of any indemnification obligation hereunder unless (and then solely to the extent that) Seller is prejudiced by such delay]** ;**[provided further that the Sellers shall not be permitted to assume the defense of or control of any Tax Contest until the Purchaser receives a written acknowledgement from the Sellers (or the Sellers' Representative) under which the Sellers agree to indemnify the Purchaser Indemnified Parties against all Losses that may result to the Purchaser Indemnified Parties from such Tax Contest]**.

“Tax matters” – Tax contests – Sample provisions (cont’d)

In the case of any Tax Claim in respect of a Company Entity that relates solely to Pre-Closing Tax Periods other than Straddle Periods, Seller may exercise control over the conduct of such Tax Claim at its own expense, provided, that (i) Buyer shall have the right, at its expense, to participate in any such Tax Claim, (ii) Seller shall provide Buyer with a timely and reasonably detailed account of each stage of such Tax Claim, and (iii) Seller shall not pay, settle, compromise, discharge, litigate or otherwise dispose of any item subject to such Tax Claim without obtaining the prior written consent of Buyer, which consent shall not be unreasonably withheld, conditioned or delayed. Buyer, at its own cost and expense, may control and contest any Tax Claim for which Seller would otherwise have the right to control under this Section [ ] if Seller declines or fails to control such Tax Claim; provided, that if Buyer exercises its right to control any Tax Claim under the preceding clause, Buyer shall provide Seller with a timely and reasonably detailed account of each stage of such Tax Claim.

[Similar mirroring language re Purchaser's right to control Tax Claim]

“Tax matters” – Transfer taxes

Transfer taxes are generally transfer, documentary, sales, use, stamp, registration, and other such Taxes and fees (including any penalties and interest) incurred in connection with the acquisition transaction

- State-level taxes
- Confirm whether Seller owns any real property and if it is being transferred

Parties can agree on how to share the transfer taxes

- Unless there are material transfer taxes, parties generally share transfer taxes 50/50
- Confirm the client's preference on the sharing of the transfer taxes

Should try to be practical

- Try to confirm the magnitude of transfer taxes sooner rather than later
- Consider if there will be particularly short return filing times.
- Accounting firms are generally in a better position to estimate the magnitude of transfer taxes and due dates of returns
- Consider whether any non-U.S. (indirect) transfer taxes

All transfer, documentary, sales, use, stamp, registration, **[value added]**, recording, and other such similar Taxes and fees (including any penalties and interest) incurred in connection with this Agreement and the other Transaction Documents (including any real property transfer Tax and any other similar Tax), **[including for the avoidance of doubt with respect to the Restructuring,]** as well as any related Tax Return preparation and filing costs, (collectively, "Transfer Taxes") shall be paid **[fifty percent (50%) by Seller and fifty percent (50%) by Buyer]**. Each Tax Return with respect to Transfer Taxes will be prepared and filed by the Party that customarily has primary responsibility for filing such Tax Return pursuant to applicable Law. Such non-filing Party will advance to the filing Party its portion of any such Taxes or other fees reflected on such Tax Return (and its one-half portion of the costs and expenses related to the preparation of such Tax Return) at least one (1) day prior to the due date (giving effect to any extensions) for payment thereof. The Parties will each timely sign and deliver (or cause to be timely signed and delivered) such certificates or forms as may be necessary or appropriate (and will each otherwise cooperate) to establish any available exemption from (or otherwise reduce) any such Taxes or fees. The Parties shall cooperate in good faith to minimize, to the fullest extent possible under applicable Law, the amount of any such Transfer Taxes.

“Tax matters” – Limitations on buyer’s post-closing actions

If the seller has an obligation to indemnify for pre-closing taxes, the seller would want to limit the buyer's ability to take certain tax actions with respect to pre-closing tax periods

- Prevent the buyer from “cleaning up” any prior tax reporting and triggering pre-closing tax indemnity without the prior consent of the seller

Tax actions could include:

- Amending and re-filing tax returns for a pre-closing tax period
- Filing a tax return in a jurisdiction that the target had not previously filed in a pre-closing tax period
- Initiating or entering into a voluntary disclosure agreement or program
- Extending the statute of limitations with respect to pre-closing taxes

If on the buyer side, need to confirm with the client whether they have an issue with any of the restrictions

- This could be a heavily negotiated issue if there is a tax issue that the buyer wants to clean up after the closing

Sample Seller-Favorable Post-Closing Covenant (via definition)

“Seller Tax Matter” means: (i) amending, re-filing or supplementing any Tax Return of any Company Entity with respect to a taxable period ending on or before the Closing Date; (ii) filing any Tax Return of any Company Entity in any jurisdiction if the Company Entity did not file a comparable Tax Return involving similar Tax items in such jurisdiction in the immediately preceding taxable period; (iii) other than as specifically contemplated under Section [ ] but subject to clause (ii) above, filing any Tax Return of any Company Entity with respect to a taxable period ending on or before the Closing Date;

“Tax matters” – Sample post-closing limitation clauses

Sample Seller Post-Closing Limitation

causing or permitting the change or adoption of any accounting method or convention or Tax position that shifts taxable income from a taxable period (or portion thereof) beginning after the Closing Date to a taxable period (or portion thereof) ending on or before the Closing Date or that shifts deductions or losses from a taxable period (or portion thereof) ending on or before the Closing Date to a taxable period (or portion thereof) beginning after the Closing Date; **[(v) initiating or entering into any voluntary disclosure agreement or program, or similar disclosure process, with any Governmental Authority regarding any Tax (whether asserted or unasserted) or Tax Return (whether filed or unfiled) of the Company Entities with respect to a taxable period ending on or before the Closing Date]**; (vi) making any Tax election with respect to any Company Entity with an effect on or before the Closing Date;

Sample Seller-Favorable Post-Closing Limitation

surrendering any right to claim a Pre-Closing Refund; (viii) extending or waiving any statute of limitations relating to any Tax or Tax Return of any Company Entity with respect to a taxable period ending on or before the Closing Date; or (ix) taking any action outside of the ordinary course of business that could create a Tax liability for any Company Entity or the Principals on the Closing Date (other than as expressly contemplated by this Agreement).

Seller Tax Matters. Except pursuant to a “determination” within the meaning of Section 1313(a) of the Code (or any similar or corresponding provision of state, local or foreign Law), Buyer shall not (and shall not permit any Person, including the Company Entities, to) take, cause, agree to or otherwise initiate any Seller Tax Matter without the prior written consent of Seller, which consent shall not be unreasonably withheld, conditioned or delayed.

FIRPTA and Section 1446(f)

FIRPTA (Foreign Investment in Real Property Tax Act of 1980)

- U.S. Seller? Not really an issue, as IRS Form W-9 or a FIRPTA certificate is generally given without issue
- Non-U.S. Seller?
  - Is Target a corporation or partnership? Domestic or foreign?
  - Try to determine if the asset is (likely to be) a FIRPTA asset — what business is the Target engaged in?
- Spend some time with the regulations under Section 1445 (and Section 897)
  - Treasury Regulation §1.1445-2

Compare with Section 1446(f) withholding

- Applicable only in a sale of partnership interest (including a disguised sale and a redemption)
- Several exceptions to withholding — Treasury Regulation §1.1446(f)-2

Tax indemnity

Pre-closing tax indemnity

If Target is publicly traded, no indemnity

Survival of Reps and Warranties

- Generally, statute of limitations + 30/60/90 days
- Consider whether tax reps should be "Fundamental Reps"
  - Generally, Fundamental Reps get longer survival periods and are subject to fewer limitations
  - Generally tax reps are not included; check with Corporate

Limitations on indemnity

- Tax rep claims can be subject to more limitations than pre-closing tax indemnity claims
- Discuss how corporate will treat limitations generally, and help them understand if/how/why tax should be treated differently

Pre-closing tax indemnity (cont'd)

Reps and warranty insurance (RWI)

- Insurer covers the liabilities and makes the buyer whole
  - The seller could also be on the hook to the extent not covered by the RWI policy (*e.g.,* retention / beyond coverage limit)
- Parties can agree on the sharing of the cost of the policy cost/premium
- Insurer conducts a separate diligence but often piggybacks on the buyer's diligence
- RWI policies generally do not cover any known taxes or tax exposure

Indemnification procedures

- Consider how tax contests should be treated
  - Usually, separately dealt with in the tax matters section, rather than the general Third-Party Claims provisions

Calculation of losses

- Consider effect of tax “benefits” or “refunds”
  - Can be complicated to trace — consider practical implementation of any language

Sample M&A provision - Net of tax benefit

Calculation of Losses

a) The amount of any Losses of any Indemnitee under this Article [ ] shall be (i) reduced by the amount, if any, (A) received by the Indemnitee from any third Person (including any third Person alleged to be responsible for any such Losses (whether pursuant to any indemnification or similar agreement or otherwise) or any insurance company or other insurance provider) (such amount being referred to herein as a "Third-Party Reimbursement"), in respect of the Losses suffered thereby and (B) of all Tax benefits actually realized by the Indemnitee (no later than **[three (3) years/one(1) year]** after the date of the incurrence of the indemnified Loss) through a reduction in cash Taxes paid or payable as a result of (and that would not have arisen but for) such Losses incurred or suffered by the Indemnitee and (ii) increased to take account of any Tax cost actually incurred by the Indemnitee arising from (and that would not have arisen but for) the receipt of the indemnity payment hereunder (grossed up for such increase). If, after receipt by an Indemnitee of an indemnification payment hereunder, such Indemnitee receives a Third-Party Reimbursement in respect of the same Losses (whether in whole or in part) for which indemnification was made and such Third-Party Reimbursement was not taken into account in assessing the amount of indemnification, then the Indemnitee shall promptly turn over all or the relevant portion of such Third-Party Reimbursement to the Indemnitor up to the amount of the indemnification paid pursuant hereto. Each Indemnitee shall use commercially reasonable efforts to obtain all Third-Party Reimbursements available to it.

Sample provision - Pre-closing tax indemnity

For the buyer, pre-closing tax indemnity is critical

– Can be a defined term "Pre-Closing Taxes" or included as one of “Excluded Liability” or in the indemnification section as a standalone item

Asset Sale: (A) any Taxes arising in connection with the Business or with respect to the Purchased Assets, or any of the Ancillary Documents, for any taxable periods (or portions thereof) ending on or prior to the Closing Date (as pro-rated in the manner provided by Section [ ]), (B) any liability of the Seller (or its Affiliates) for Taxes attributable to any taxable period, (C) any liability of the Seller for the unpaid Taxes of any Person under Treas. Reg. Sec. 1.1502-6 (or any similar provision of state, local, or non-U.S. law), as a transferee or successor, by contract, or otherwise, (D) Transfer Taxes that are the responsibility of the Seller pursuant to Section [ ], and (E) any portion of any pre-Closing payroll, social security, unemployment, withholding Taxes, or other Taxes of the Company with respect to any Pre-Closing Tax Period deferred pursuant to the CARES Act, IRS Notice 2020-65, or otherwise;

Stock/Partnership Interest Sale: (A) any Taxes of the Company Entities for any Pre-Closing Tax Period (determined for any Straddle Period in accordance with the principles set forth in Section [ ]), (B) all Taxes of any Person for which any of the Company Entities is liable under Treasury Regulations §1.1502-6 (or any similar provision of state, local or federal Law), as a transferee or successor or under any Tax Sharing Agreement, in each case of this subsection (B) where attributable to an event or transaction occurring prior to the Closing (for the avoidance of doubt**[, excluding, in each of (A) and (B) of this paragraph, any Taxes to the extent the amount of the liability was specifically reserved for as a liability in the Closing Working Capital Statement)], [(C) any Taxes of Sellers (other than any Transfer Taxes for which Purchaser is responsible pursuant to Section [ ] or any Taxes included in the Additional Payment) or any direct or indirect member or owner of Holdings for any taxable period]**, (D) any Taxes attributable to the Restructuring (other than any Transfer Taxes for which Purchaser is responsible pursuant to Section [ ], (E) any portion of any pre-Closing payroll, social security, unemployment, withholding Taxes, or other Taxes of the Company with respect to any Pre-Closing Tax Period deferred pursuant to the CARES Act, IRS Notice 2020-65, or otherwise;

Sample provision - Limitation on tax indemnity

If you are the Seller, you may want to include the following provision:

Limitations on tax indemnity. Notwithstanding anything to the contrary in this Agreement, no Seller nor any Principal shall have any liability under this Agreement, including under this Article [ ], with respect to any Taxes (or any Losses arising out of, resulting from, or with respect to such Taxes); (i) resulting from any transaction or event taken at the direction of Buyer or any of its Affiliates on the Closing Date following the Closing outside of the ordinary course of business and not specifically contemplated by this Agreement; (ii) taken into account as a direct or indirect adjustment in the calculation of the Closing Purchase Price (as finally determined), including through Net Working Capital, Indebtedness, or Company Transaction Expenses; and (iii) resulting solely from any breach or non-performance by Purchaser or any of its Affiliates of any covenant or agreement contained in this Agreement relating to Tax matters. Nothing contained in this Section shall be construed to create (or expand) matters with respect to which the Principals have an indemnification obligation under Article [ ].

Sample provisions - RWI

Seller tries to have RWI be the exclusive remedy for tax reps and pre-closing taxes:

a) All claims by Buyer Indemnitees will be asserted and resolved in compliance with the procedures set forth in the R&W Insurance Policy, subject to Section [ ] below. Any objections by the provider under the R&W Insurance Policy for any indemnification claim brought by a Buyer Indemnitee, as well as the resolution of any disputes related thereto, will also proceed in accordance with the procedures set forth in the R&W Insurance Policy. Except for Fraud and breaches of the Fundamental Representations and Tax Representations in Section **[reps re tax classification of entities and goodwill]**, the Buyer Indemnitees will look solely to the R&W Insurance Policy for any breaches of the representations and warranties in this Agreement.

b) For breaches of the Fundamental Representations and the Tax Representations in Section **[reps re tax classification of entities and goodwill]**, the Buyer Indemnitees will first look to the R&W Insurance Policy and then be entitled to indemnification from the Seller only to the extent that (a) the insurer under the R&W Insurance Policy has (i) denied such insurance claim in whole or in part (and, in the event of a partial denial, only to the extent of such denied amount) unless primarily due to (x) Buyer's or the Group Company's failure to comply with the terms of such R&W Insurance Policy or (y) the exclusion provided in Section [ ] of the R&W Insurance Policy, or (ii) deemed such insurance claim to be excluded from coverage under the terms of the R&W Insurance Policy or (b) the amount of related Damages exceeds the coverage limits of the R&W Insurance Policy. For the avoidance of doubt, the Buyer Indemnitees will look solely to the R&W Insurance Policy for any Damages indemnifiable under Section **[pre-closing tax indemnity]**, except to the extent that such Damages arise from a breach of the Tax Representations in Section **[reps re tax classification of entities and goodwill]**.

***As a Buyer, we should actively request the corporate team for the draft RWI policy for our review/comment

Definitions relating to taxes

“Current Assets” and “Current Liabilities” - Do these include unpaid taxes?

- There is no 'wrong' answer, but consider (a) the effect on escrow and (b) how taxes are just different from other working capital items
- Consider how it interacts with pre-closing tax indemnity

Unpaid taxes included in “Indebtedness”

- Buyer would want to include in the Indebtedness section to make sure that the purchase price takes that into account as a liability that it is assuming and ultimately reduces the purchase price that seller receives
- "(k) all accrued and unpaid Taxes for any Pre-Closing Tax Period (including any Taxes with respect to deferred revenues arising, or prepaid amounts received, prior to the Closing Date, regardless of when recognized for income Tax purposes);"
- Deferred payroll taxes: "(l) any portion of any payroll, social security, unemployment, withholding Taxes, or other Taxes of the Company or any Company Subsidiary with respect to any Pre-Closing Tax Period deferred pursuant to the CARES Act, IRS Notice 2020-65, or otherwise;“

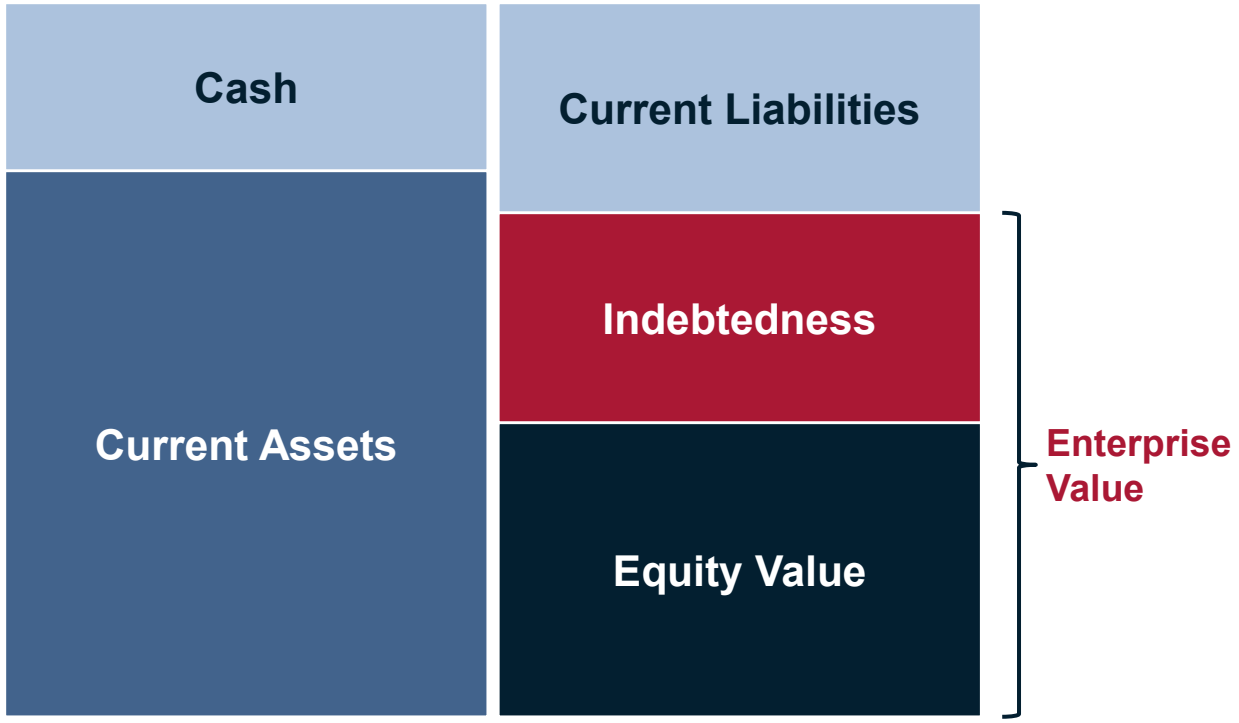
“Losses” — Taxes included? (similar point for "Liability")

Definitions relating to taxes (cont'd)

Understand how purchase price is calculated

- Typically, purchase price that seller receives = base purchase price — indebtedness + net working capital + cash — unpaid transaction expenses
  - Subject to post-closing adjustments to "true-up"
- Net working capital is generally [current assets — current liabilities]

Think of it as follows:



Definitions related to taxes (cont'd)

"Pre-Closing Tax Period" means (i) any Tax Period ending on or before the Closing Date and (ii) the portion of any Straddle Period beginning on the first day of such Straddle Period and ending at the close of business on the Closing Date.

"Post-Closing Tax Period" means (i) any Tax Period beginning after the Closing Date and (ii) the portion of any Straddle Period beginning the day after the Closing Date and ending on the last day of the Straddle Period.

"Straddle Period" means any Tax Period beginning before the Closing Date and ending after the Closing Date.

"Tax" means, whether disputed or not, (a) any federal, state, local or foreign income, profits, license, severance, occupation, windfall profits, capital gains, capital stock, transfer, registration, social security (or similar), production, franchise, gross receipts, payroll, sales, employment, use, property (real or personal), excise, value added, estimated, stamp, alternative or add-on minimum, withholding, lease, service, service use, recording, documentary, intangibles, conveyancing, gains, unemployment, disability, net worth, escheat, abandoned property, environmental, premium, real property gains, or other tax, including any interest and penalties imposed with respect to such amounts [and (b) any liability for the payment of any amounts of the type described in clause (a) above relating to any other Person as a result of being party to any agreement, (including, but not limited to, tax sharing or allocation contract, or an agreement to indemnify such other Person), being a successor or transferee of such other Person, or being (or ceasing to be) a member of the same affiliated, consolidated, combined, unitary or other group with such other Person].

"Tax Return" means any return, declaration, report, claim for refund or information return or statement (including schedules or any related or supporting information) required to be filed with any Tax Authority relating to Taxes, including any amendment thereof.

Other substantive points

Purchase price allocation

- Sale of partnership interest vs. asset sale
  - For partnerships, think about Section 751 (and associated recapture) if you represent the seller
    - Tax basis vs. book basis
  - For asset sale, allocation in accordance with Section 1060
    - May want to do the detailed allocation for basis allocation purposes even if sale of partnership interest
- Non-compete
  - Section 197 intangible for buyer --> amortizable over 15 years
  - For seller, amount received in exchange for non-compete is compensatory, so taxed as ordinary income
- Agreed by the parties before or after closing? Methodology or actual dollar allocation?
- Which party prepares the draft first? What happens if the parties disagree on the allocation?
- Partnership-specific issues
- Rev. Rul. 99-5 (Situation 1)
- Disregarded entity becomes a partnership -> Asset sale followed by contribution by buyer and seller
- Rev. Rul. 99-6
- Partnership becomes a disregarded entity -> Sale of partnership interest for seller and asset purchase by buyer
- Section 754 election
- Buyer gets a step-up in tax basis for the underlying assets
- Entity-level taxes under the partnership audit rules
- Is it adequately covered as a pre-closing tax? Otherwise, partners in the post-closing period could economically bear tax liabilities arising from an audit
- Push out election? Ability to elect out?
- Section 1446(f) withholding on ECI
- Partnership continuation

Other substantive points

Transaction tax benefit

- Tax benefit arising from "transaction tax deductions"
  - Transaction tax deductions are generally deductions arising from costs and expenses arising from the transaction that are economically borne by the seller
  - Theory is that seller should be entitled to tax benefits arising from costs that it economically bore
- Business point, but tax lawyers get heavily involved in the details
- Buyer may agree to pay the transaction tax benefit amount upfront (either as a separate payment or part of purchase price)
- If paid on an "as realized" basis:
  - What is the period over which the transaction tax benefits are paid?
  - How is it calculated? "With and without" method? Assumed tax rate?
  - Would Buyer actually benefit from the deductions?
    - Buyer and/or Target has a significant amount of NOLs

Ancillary documents

Ancillary documents

→ **Disclosure schedules**

→ **Escrow agreement**

- Typically, the key issue is who owns the escrow funds for tax purposes
  - Generally, the Buyer is the tax owner
  - Installment sale treatment
  - Tax distribution
- Tax form provisions

→ **LLCA/LPA for acquisition vehicle**

- Who are the parties? Will there be co-investors?
- Understand the economics between the members/partners
- RWI policy
- "Synthetic pre-closing tax indemnity" — is the client sufficiently covered?
- Carefully review the exclusions
- Consider interaction between disclosure schedule and exclusions
- FIRPTA certificates/IRS Form W-9
- Rollover agreement
- Make sure to consider the impact of the rollover on the transaction structure
- Tax treatment provisions

Closing thought

→ **Don’t rely completely on precedent**

- Ensure your agreement has the terms needed and that you understand your provisions and definitions
  - If you're deviating from precedent, KNOW why
  - If your precedent has something you don't understand, ask the practitioner who worked on the precedent

→ **Remember to use resources you have at your disposal**

→ **Consider your audience when explaining any tax concerns**

→ **Be practical in your advice**

→ **Always confirm terms/definitions**

Questions

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