LOCAL PROPERTY TAX – FREEZE ACT – FREEZE ACT APPLIES ONLY TO FINAL JUDGMENTS OF VALUE – WHEN THE FAIR MARKET VALUE OF THE PROPERTY WAS NOT AT ISSUE IN A HEARING, ZERO ASSESSED VALUE IN A DECISION GRANTING THE PROPERTY THE PUBLIC USE EXEMPTION IS NOT A FINAL DETERMINATION OF VALUE FOR THE FREEZE ACT TO ATTACH

Tax Court: Hackensack City v. Bergen County; Docket No. 012823-1994, opinion by Andresini, J.T.C., decided October 24, 2017. For plaintiff - Kyle Weber (O'Donnell McCord, P.C., attorneys); for defendant - Santo T. Alampi (Santo T. Alampi, L.L.C., attorney).

Defendant, Bergen County, applied for application of N.J.S.A. 54:51A-8 ("the Freeze Act") to two tax years based on a 1994 County Board of Taxation's ("the Board") judgment granting the property the public use exemption. The specific question raised by the motion was whether the Board's finding that the property (originally assessed at $3,530,000.00) was exempt from taxation and assessed at "0" was in fact a final judgement of value subject to application of the Freeze Act. The court denied application of the Freeze Act to the 1995 and 1996 tax years. The court concludes that the zero assessment in the Board's decision was not a determination of value because no evidence of fair market value of the property was proffered during the Board hearing or at trial, so there was no final judgment of value for the Freeze Act to attach.

(15 Pages)

TAXATION-TRUSTS AND ESTATES-DIRECTOR OF TAXATION'S ESTATE TAX ASSESSMENT THAT EXCEEDS FEDERAL DEATH TAX ALLOWANCE AFFIRMED—DIRECTOR NOT BOUND BY IRS DETERMINATIONS THAT CONTRADICT FEDERAL PRECEDENT.

Tax Court: Estate of Ruth M. Oberg v. Director, Division of Taxation: Docket No. 000240-2015, opinion by Nugent J.T.C., decided on October 24, 2017. For plaintiff - Andrew DeMaio (Neff Aguilar LLC, attorneys); for defendant - Heather Lynn Anderson (Christopher S. Porrino, Attorney General, attorney).

Court rules in favor of Estate on Taxation's motion for summary judgment seeking dismissal of complaint for lack of subject matter jurisdiction since the evidence supports the presumption that Estate's protest was received by Taxation. Substantively, the court affirms the assessment finding Taxation is statutorily authorized under N.J.S.A. 54:38-1 to assess estate tax in excess of the federal death tax allowance as reported by Estate on its federal tax return form 706 accepted by the IRS as filed. Further, Taxation is not bound by IRS closing letter where the underlying IRS determinations contradict federal precedent, specifically; (1) Taxation properly disallowed alternate valuation date elected by Estate on form 706 filed beyond the time permitted by federal law, and (2) Taxation properly included proceeds of loan in gross estate where record lacks evidence that loan transaction between decedent and daughter constituted valid federal estate tax avoidance self-cancelling installment note ("SCIN"). Cross-motions for summary judgment granted in part, and denied in part.

(33 pages)

LOCAL PROPERTY TAX – PARSONAGE EXEMPTION – AWARD OF PARSONAGE EXEMPTION IS NOT PREDICATED ON THE OWNERSHIP OR TAX-EXEMPT STATUS OF THE PLACE AT WHICH THE CLERGYMAN RESIDING AT THE PARSONAGE OFFICIATES AT RELIGIOUS SERVICES

Tax Court: Congregation Chateau Park Sefard v. Township of Lakewood; Docket No. 010868-2016, opinion by DeAlmeida, P.J.T.C., decided October 20, 2017. For plaintiff - John F. Casey (Chiesa, Shahinian & Giantomasi, P.C., attorneys); for defendant - Lani M. Lombardi (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys).

The court concludes that the parsonage exemption set forth in N.J.S.A. 54:4-3.6 is not contingent on the ownership or exempt status of the building in which the occupant of the parsonage officiates at worship services. The relevant statute sets forth in plain terms the criteria for a parsonage exemption, none of which concerns the ownership or tax-exempt status of any building other than the parsonage itself. To infer any such requirements where none exists in the statute would constitute a trespass on legislative authority by this court. In reaching this conclusion, the court determines that the holding in Borough of Chester v. World Challenge, Inc., 14 N.J. Tax 20, 27 (Tax 1994), that the parsonage exemption is "a derivative exemption" requiring the "association of the parsonage with an exempt church" refers to the "church" in the sense of a religious congregation and not as an exempt building.

(15 Pages)

STATE CORPORATION BUSINESS TAX

Tax Court: Preserve II, Inc. v. Director, Div. of Taxation, Docket No. 010921-2013; Pulte Homes of NJ, L.P. v. Director, Div. of Taxation, Docket No. 010920-2013; Pulte Communities of NJ, L.P. v. Director, Div. of Taxation, Docket No. 010922-2013 opinion by Sundar, J.T.C., decided October 4, 2017. For plaintiff – Leah Robinson and Open Weaver Banks (Sutherland, Asbill & Brennan, L.L.P., attorneys); for defendant – Michael J. Duffy (Christopher S. Porrino, Attorney General of New Jersey, attorney).

Held: Defendant correctly deemed that Preserve II, Inc., a foreign corporate limited partner, had nexus with New Jersey within the limits of the Constitution as required by the Corporation Business Tax ("CBT") statute, and is thus liable for CBT for tax years 2005-2007. For the same reason, defendant's denial of the limited partner's claim for refunds of CBT for those tax years was not unreasonable, arbitrary or capricious. Nor was its denial of the limited partner's claim for preferential tax treatment as an investment company erroneous. As a consequence of these findings, the court negates defendant's assessment against the two plaintiff partnerships, including the interest and penalties. The court also vacates defendant's imposition of underpayment penalties for 2005 and 2006, and amnesty penalties for 2005-2007 as improper.

(54 Pages)

PROPERTY TAX – VETERANS' EXEMPTIONS – SURVIVING SPOUSES – WIDOW – WIDOWHOOD

Tax Court: Rosanna Pruent-Stevens v. Township of Toms River, Docket Number 010172-2016; opinion by Brennan, J.T.C., decided October 2, 2017. For plaintiff - Todd W. Heck (Testa, Heck, Testa & White, P.A., attorneys); for defendant - Anthony Merlino (Kenneth B. Fitzsimmons, Township Attorney, on the briefs); Steven J. Colby for *Amicus Curiae* State of New Jersey (Christopher S. Porrino, Attorney General of New Jersey, attorney).

The court determined that the terms "widow" and "widower" define a person and not a marital status. The surviving spouse of a 100% disabled veteran is eligible for the veteran's exemption during widowhood or widowerhood, if he or she meets the requirements set forth in N.J.S.A. 54:4-3.31, which includes a certification that the surviving spouse "has not remarried." The court concludes that there is sufficient ambiguity as to whether this term "has not remarried" indicates a present or past marital status. The court determined that the legislative intent was that it represented present marital status. As such, a surviving spouse's exemption is available during periods when the surviving spouse is not married. The court also determined that fundamental fairness requires that consideration of a surviving spouse's marital status should not commence until the VA has determined the veteran's 100% disability. If at that time the surviving spouse is unmarried, the eligibility requirement has been met.

(28 Pages)

LOCAL PROPERTY TAX – N.J.S.A. 54:4-54 – CORRECTION OF ERRORS; ASSESSMENT AGAINST OR PAYMENT ON WRONG PROPERTY; REFUND
Tax Court; Hanover Floral Co. v. East Hanover Township; Docket No. 018815-2012; opinion by Bianco, J.T.C., decided September 29, 2017. For plaintiff – L. Jeffrey Lewis (McKirdy and Riskin, P.A., attorneys); for defendant – Jason A. Cherchia (O'Donnell McCord, P.C., attorneys).

A taxpayer's payment of taxes on a lot not under taxpayer's ownership is a "mistake" within the meaning of N.J.S.A. 54:4-54, meriting a refund of the current year taxes as well as the three prior years. The Tax Court acknowledged that the relief awarded to taxpayer is limited by Cerame v. Township Committee of Middletown, 349 N.J. Super. 486 (App. Div. 2002); noting the court's disagreement with that portion of the Cerame holding.

(18 Pages)

LOCAL PROPERTY TAXATION – CHAPTER 91 (N.J.S.A. 54:4-34) – BANKRUPTCY

Tax Court: 975 Holdings, LLC v. Egg Harbor City, Docket No. 010346-2016; opinion by Cimino, J.T.C., decided June 20, 2017; released for publication: August 4, 2017. For plaintiff - Salvatore Perillo (Perskie, Nehmad & Perillo, attorneys); for defendant – James J. Carroll, III.

The taxpayer purchased the property in a bankruptcy asset sale pursuant to 11 U.S.C. § 363(f). The prior owner acting as a debtor-in-possession failed to respond to a Chapter 91 request. N.J.S.A. 54:4-34. Taxpayer argues that both the fact that the prior owner was in a bankruptcy proceeding and that the property was purchased through a section 363(f) sale somehow excuses noncompliance with Chapter 91. Chapter 91 allows the tax assessor to request information from certain taxpayers. Failure to respond to a Chapter 91 request can result in the municipality raising such issue as a defense.

The taxpayer's predecessor was a debtor-in-possession and the obligation to file a response to the Chapter 91 request did not fall upon a bankruptcy case trustee. Thus, the taxpayer is saddled with the failure of the prior owner as a debtor-in-possession to file a Chapter 91 response. Additionally, a debtor-in-possession can exercise the power of a bankruptcy trustee to sell property "free and clear" of "any interest" that any entity has in such property. However, a Chapter 91 defense is not an interest, but rather an affirmative defense. For failure to comply with a Chapter 91 request, the assessment appeal is limited to a reasonableness hearing.

(11 pages)

DOMESTIC PARTNERSHIP ACT - ESTATE TAX – SAME-SEX COUPLES – DOMESTIC PARTNERSHIP ACT DOES REQUIRE THAT A SURVIVING SAME-SEX DOMESTIC PARTNER BE TREATED AS A SURVIVING SPOUSE FOR ESTATE TAX PURPOSES – THE EQUAL PROTECTION RIGHTS OF SAME-SEX COUPLES ARE PROTECTED BY THE AVAILABILTY OF SAME-SEX MARRIAGE AND SAME-SEX CIVIL UNIONS, BOTH OF WHICH TREAT SURVIVING SAME-SEX PARTNERS AS SURVIVING SPOUSES FOR PURPOSES OF THE ESTATE TAX – PLAINTIFF MUST BEAR THE TAX CONSEQUENCES OF HAVING ELECTED NOT TO ENTER INTO A CIVIL UNION WITH DECEDENT, WHO DIED UNEXPECTEDLY A FEW DAYS BEFORE THE COUPLE'S PLANNED MARRIAGE.

Tax Court: Rucksapol Jiwungkul, Executor, Estate of Maurice R. Connolly, Jr. v. Director, Division of Taxation; Docket No. 009346-2015, opinion by DeAlmeida, P.J.T.C., decided May 11, 2016. Release for publication: June 23, 2017. For plaintiff - Robyne D. LaGrotta (LaGrotta Law, LLC, attorneys); for defendant - Anna Uger (Christopher S. Porrino, Attorney General of New Jersey, attorney).

The court held that the Domestic Partnership Act does not require that plaintiff, the surviving same-sex domestic partner of decedent, be treated as a surviving spouse for purposes of the Estate Tax. The plain language of the Act does not provide for such treatment, which is, in effect, an exemption from the tax. Plaintiff's equal protection rights are protected by the availability of same-sex marriage and same-sex civil unions, both of which treat surviving same-sex partners as spouses for purposes of the Estate Tax. Plaintiff elected not to enter into a civil union and must bear the tax consequences of his decision. Because decedent died unexpectedly a few days before his planned marriage to plaintiff, decedent and plaintiff were not spouses at the time of decedent's death for purposes of the Estate Tax.

(Pages 23)

STATE CORPORATION BUSINESS TAX

Tax Court: BMC Software, Inc. successor by merger to BMC Software Distribution, Inc. v. Director, Div. of Taxation, Docket No. 000403-2012; opinion by Sundar, J.T.C., decided May 24, 2017. For plaintiff – Michael A. Guariglia and David J. Shipley (McCarter & English, L.L.P., attorney); for defendant – Michael J. Duffy (Christopher S. Porrino, Attorney General of New Jersey, attorney).

Held: Defendant correctly deemed payments made by subsidiary to parent under a Parent-Subsidiary License Agreement, which required subsidiary to pay 55% of gross proceeds from sale of parent's pre-written software and maintenance contracts as royalty for use of parent's proprietary software products, as intangible expenses/costs for purposes of the addback provisions of N.J.S.A. 54:10A-4.4. However, a deduction for the same is nonetheless allowable because plaintiff credibly showed that such payments were substantively equivalent to similar unrelated third party transactions involving the same subject and object (sale of license contracts and service contracts). Thus, denying a deduction for such payments is unreasonable. Plaintiff's summary judgment motion on this issue is therefore granted. Plaintiff's claim that defendant incorrectly threw-out certain receipts from the denominator of the apportionment fraction in determining subsidiary's income allocable to New Jersey is not ripe for summary judgment since facts in this regard are undeveloped.

(32 Pages)

GROSS INCOME TAX –INCOME ON I.R.C. §338(h)(10) DEEMED SALE OF ASSETS OF NEW JERSEY S CORPORATION TAXABLE AS NEW JERSEY SOURCE INCOME FOR GROSS INCOME TAX PURPOSES. RETROACTIVE S ELECTION CURED SHAREHOLDERS' FAILURE TO TIMELY FILE CONSENT TO TAX. UNDERPAYMENT PENALTY ABATED.

Tax Court; Xylem DeWatering Solutions, Inc., et als., v. Dir., Div. of Taxation, Docket No. 011704-2015; Xylem Dewatering Solutions, Inc. v. Dir., Div. of Taxation, Docket No. 000056-2016; John M. Paz v. Dir., Div. of Taxation, Docket No. 000057-2016, opinion by Fiamingo, J.T.C., decided April 7, 2017. For plaintiff – David J. Shipley and Aliza Sherman (McCarter & English, attorneys); for defendant – Michael J. Duffy (Christopher S. Porrino, Attorney General of New Jersey, attorney).

Plaintiffs challenged the defendant's imposition of tax pursuant to N.J.S.A. 54:10A-5.23(d) for the Trustee of the Grantor Trusts failure to timely file S Corporation shareholder consent to tax required by N.J.S.A. 54:10A-5.22; the calculation of New Jersey source income on the I.R.C. §338(h)(10) deemed sale of assets of the S Corporation; and the imposition of the underpayment penalty. Plaintiffs and defendant cross-moved for summary judgment. Plaintiffs also moved for costs in accordance with N.J.S.A. 54:51A-22. The court held that the retroactive election filed by the Trustee of the Grantor Trust shareholders cured the failure to file such consents in a timely manner and granted plaintiffs' motion for summary judgment denying defendant's assessment of additional corporate business tax pursuant to N.J.S.A. 54:10A-5.23(d). The court further held that notwithstanding the characterization of the income taxable to the non-resident shareholders on the deemed sale of assets of a New Jersey S corporation pursuant to I.R.C. §338(h)(10) as net gain from the disposition of property for New Jersey Gross Income Tax purposes, McKesson Water Prods. Co. v Director, Div. of Taxation, 23 N.J. Tax 449 (Tax 2007); aff'd 408 N.J. Super. 213 (App. Div.); certif. denied, 200 N.J. 506 (2009) controlled. Thus, the income on the deemed sale of assets was "non-operational" income allocable to New Jersey as the domiciliary state and New Jersey source income for Gross Income Tax purposes. The penalties on the underpayment were abated due to the lack of certainty in the regulations and lack of judicial guidance. Plaintiff's motion for costs was denied.

(27 pages)

SUMMARY JUDGMENT – CORPORATE BUSINESS TAX – CORPORATE BUSINESS TAX ACT – BUSINESS TAX REFORM ACT – VALIDITY OF REGULATIONS – TAX AVOIDANCE – LEGISLATIVE INTENT – INVESTMENT COMPANY – INVESTMENT CONTRACT ANALYSIS – SECURITY - FLOW-THOUGH ENTITY.
Tax Court: Manheim NJ Investments, Inc. v. Director, Division of Taxation; Docket No. 015083-2014, opinion by Andresini, J.T.C., decided February 27, 2017. For plaintiff - Marc A. Simonetti (Eversheds Sutherland (US) LLP, attorneys); for defendant- Michal J. Duffy (Christopher S. Porrino, Attorney General of New Jersey, attorney).

The court granted plaintiff's motion for partial summary judgment and denied defendant's cross motion for partial summary judgment, declaring N.J.A.C. 18:7-1.15(b)(9) ultra vires and void. The court concluded that the Director, Division of Taxation, exceeded its authority under N.J.S.A. 54:10A-27 to prescribe and issue regulations consistent with the Corporations Business Tax Act when it amended N.J.A.C. 18:7-1.15 to exclude companies that invest in certain flow-through entities from investment company treatment. The court found that the Division did not have authority to narrow an already comprehensive definition of "investment company" set forth by the Legislature in N.J.S.A. 54:10A-4(f) and excluding companies that invest certain flow-through entities from contravenes the generally accepted definition of "securities" as used in N.J.S.A. 54:10A-4(f) and defined by New Jersey Courts.

The court denied summary judgment as to whether plaintiff is entitled to investment company treatment under N.J.S.A. 54:10(a)-4(f) and -5(d). Whether a partnership interest is a security is subject to an investment contract analysis, which turns on a factual finding that plaintiff did not exercise managerial control over the partnership. Summary judgment is not appropriate here because the parties dispute whether plaintiff exercised control over a New Jersey partnership.

(22 pages)

STATE TAXATION – TRANSFER INHERITANCE TAX – AT OR AFTER DEATH – APPLICABILITY OF N.J.S.A. 54:34-1.1

Tax Court: Estate of Mary Van Riper v. Director, Division of Taxation, Docket No. 008198-2016; opinion by Cimino, J.T.C., decided February 23, 2017. For plaintiff - James J. Curry; for defendant – Heather Lynn Anderson (Christopher S. Porrino, Attorney General of New Jersey, attorney).

Seven years prior to death, the Van Ripers (the transferors) transferred the marital home to an irrevocable trust. Per the terms of the trust, the transferors could reside in the property until death. At death, the property would be transferred to a niece. The estate asserts the transfer to the niece is not subject to taxation per N.J.S.A. 54:34-1.1 since the transfer to trust occurred more than three years prior to death. The court held that the transfer is indeed subject to taxation as an "at or after death" transfer since the transferors did not completely dispose of all rights or powers over the marital home until death. By holding the string of being able to reside in the property until death, the transferors retained for themselves and did indeed exercise the right and power to enjoy the property. Accordingly, the "at or after death" exemption set forth in N.J.S.A. 54:34-1.1 does not apply.

(23 pages)

CORPORATION BUSINESS TAX – PROPERTY ALLOCATION FRACTION – RECEIPTS ALLOCATION FRACTION – TAXPAYER DID NOT OBTAIN SUFFICIENT BENEFITS AND BURDENS OF OWNERSHIP IN ASSETS SUBJECT TO SALE-LEASEBACK TRANSACTION FOR THOSE ASSETS TO BE TREATED AS TAXPAYER'S PROPERTY FOR PURPSOSES OF THE ALLOCATION OF TAXPAYER'S INCOME TO NEW JERSEY.

Tax Court: General Foods Credit Investors #3 Corporation v. Director, Division of Taxation; Docket No. 011330-2015, opinion by DeAlmeida, P.J.T.C., decided February 22, 2017. For plaintiff Charles P. Hurley (Norton Rose Fulbright US, LLP, attorneys, Andrea L. D'Ambra, local counsel); for defendant Michael J. Duffy (Christopher S. Porrino, Attorney General of New Jersey, attorney).

The court held that plaintiff did not obtain sufficient benefits and burdens of ownership of assets subject to a sale-leaseback transaction between plaintiff and New Jersey Transit for those assets to be treated as plaintiff's property for purposes of the property allocation fractions used to calculate plaintiff's Corporation Business Tax liability. See N.J.S.A. 54:10A-6(A). Plaintiff purchased the assets from New Jersey Transit solely to make use of their federal tax benefits and transferred back to New Jersey Transit through a sublease all other significant benefits and burdens of ownership. In light of this conclusion, the court held that imputed rental income from those assets should not be included in plaintiff's receipts allocation fractions. See N.J.S.A. 54:10A-6.

(24 pages)

STATE & LOCAL TAXES – ADMINISTRATION & PROCEDURE – JUDICIAL REVIEW. REAL PROPERTY TAXES – ASSESSMENT & VALUATION – VALUATION OF REAL PROPERTY. EVIDENCE – TESTIMONY – EXPERT WITNESSES.

Tax Court: VBV Realty, LLC v. Scotch Plains Township; Docket Nos. 014829-2011; 014463-2012; 014151-2013, opinion by Novin, J.T.C., decided January 3, 2017; Released for publication February 10, 2017. For plaintiff – Jennifer S. Manheim (Selesner & Polifron, P.A., attorneys); for defendants – Robert F. Renaud (Palumbo, Renaud & DeAppolonio, LLC, attorneys).

The court concluded that when an expert witness has failed to verify the integrity and accuracy of the market data that forms the basis of the expert's opinions, the opinions and conclusions are entitled to little weight. Our Legislature has mandated that any person offered as a witness in a local property tax appeal proceeding before the Tax Court shall be competent to testify about comparable sales from information or knowledge obtained from the owner, seller, purchaser, lessee or occupant, or the broker or brokers, or attorney or attorneys who negotiated or who are familiar with such transactions. Although public websites and real estate marketing and listing service websites can be a valuable tool in the appraisal community for identifying prospective comparable properties, it is the process by which an appraiser verifies the accuracy of that data and information that is one of the hallmarks of a sound opinion of value. Thus, data and information which has not been verified, confirmed, or corroborated with individuals possessing firsthand knowledge of or familiarity with a market transaction is of little value to the court. In addition, adjustments made to comparable sale or lease transactions must have a foundation derived from the marketplace or analysis of objective data, and not based solely upon subjective observations and personal experience.

(22 pages)

CIVIL PROCEDURE - DISCOVERY & DISCLOSURE - DISCOVERY - PROTECTIVE ORDERS. CIVIL PROCEDURE - METHODS OF DISCOVERY - DEPOSITIONS. Tax Court: HD Supply Waterworks Group, Inc.; HD Supply Power Solutions Group, Inc. (f/k/a HD Supply Utilities Group, Inc.); HD Supply Facilities Maintenance Group, Inc. v. Director, Division of Taxation; Docket Nos. 003035-2015, 003488-2015, 003492-2015, opinion by Novin, J.T.C., decided January 5, 2017. For plaintiff – Dennis Rimkunas, E. Kendrick Smith, *Pro hac vice*, and John M. Allan, *Pro hac vice* (Jones Day, attorneys); for defendants – Thu N. Lam (Christopher S. Porrino, Attorney General of New Jersey, attorney).

The court entered a protective order quashing notices in lieu of subpoena issued to plaintiffs' parent corporation's Chairman, President and Chief Executive Officer. The court concluded that in evaluating whether good cause exists to preclude the deposition of a high-level or senior corporate executive of a publicly traded corporation – an "apex deposition" – the court must consider whether the deponent possesses some unique, first-hand, non-repetitive knowledge of the facts at issue, and whether the proponent of the deposition has exhausted other less intrusive discovery methods. Although no *per se* rule exists barring depositions of senior corporate executives, the court observed that when the deponent has certified that he or she has no personal knowledge of the material facts at issue, a protective order is appropriate. Under such circumstances, the principles espoused under R. 4:10-2(a) and R. 4:14-1 are not upended by requiring the deposing party to first seek discovery through other less intrusive means, and from lower level employees who likely have direct knowledge.

(15 pages)