

Tax Matters

The Newsletter of the New Mexico Tax Research Institute

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IN THIS “NEW YEARS” ISSUE OF *TAX MATTERS*:

- **Happy New Year!**
- **6th Annual Legislative Outlook Conference Big Success!**
- **Tax Committee Meets for Last Time and Endorses Legislation**
- **Litigators Win, Taxpayers and Good Tax Policy Lose in NM Court of Appeals**
- **NMTRI Welcomes New Members**
- **Knick Knacks**
 - **No Federal Payroll Tax Increase Next Week**
 - **NM Supreme Court Rules on Unemployment Tax Partial-Veto**
- **Tax Quotable**

**THE BOARD AND STAFF OF THE NEW MEXICO
TAX RESEARCH INSTITUTE WISH YOU A VERY
HAPPY AND PROSPEROUS NEW YEAR. WE'LL
SEE YOU NEXT YEAR!**



6th Annual Legislative Outlook Conference Big Success



The 6th Annual Legislative Outlook Conference was held December 15th at the Hotel Albuquerque in Old Town. The attendance was the best ever, as was the lineup. The crowd was greeted by the Albuquerque's Mayor, R. J. Berry, who clearly has interests in tax policy for both fiscal and economic development purposes. Legislative Finance Committee Director David Abbey painted the fiscal picture New Mexico heading into the next legislative session. While things could be better, they could certainly be worse. His informative presentation can be found [here](#).

The interested stakeholder's panel this year included Paul Gutierrez, Executive Director of the New Mexico Association of Counties (www.nmac.org), the head of the Greater Albuquerque Chamber of Commerce, Terri Cole (www.abqchamber.com), Bill Jordan Policy Director for New Mexico Voices for Children (www.nmvoices.org), and President and Executive Director of the Association of Commerce and Industry, Dr. Beverlee McClure (www.aci-nm.org). All of the stakeholders and their respective organizations, not to mention all residents of New Mexico, have a vested interest in New Mexico's tax and fiscal policy and want the best for New Mexico, however their focus, concerns, and preferred policies often differ. The panelists articulated many of these interests and concerns during the presentation, most of which and more can be found on their websites above.

Cabinet Secretaries Demesia Padilla of the New Mexico Taxation and Revenue Department and Dr. Thomas E. Clifford of the Department of Finance and Administration both spoke to the audience on a variety of topics. Secretary Padilla focused on the new in-state preference certification rules created by Senate Bill 1 in the recent special session. The new requirements are administered by the NMTRD's Audit and Compliance Division, and become fully effective

at the first of the year. Companies doing business with the state that would otherwise qualify for the preference but fail to properly certify will be competitively disadvantaged, and the new preference law is broader - covering most state procurement of goods and services - than prior law. Secretary Padilla expressed concern over what might happen to the unwitting, as the Department has only processed ninety certifications out of a few thousand vendors that would otherwise qualify. Information and forms can be found on the NMTRD website [here](#). Dr. Clifford spoke to the current economic environment possibly providing for limited tax relief, and the administration's concerns about pyramiding in the gross receipts tax, the competitiveness of our tax structure including corporate income tax and GRT, small businesses, as well as opportunities for administrative reforms such as independent hearing offices, a taxpayer advocate, PTE/oil and gas withholding simplification, etc. Secretary Clifford's presentation can be viewed [here](#) on our website.

NMTRI's Richard Anklam gave an update on the status of the tax study NMTRI has contracted to perform for the City of Albuquerque, Bernalillo County, three state agencies and the legislature. The effort is also supported by a host of businesses and professional organizations. The study is an enhancement of a previous fifty state study performed by Ernst & Young LLP and commissioned by the Council on State Taxation, a fortune 1000 state tax trade association. The study modeled the effective tax rate on a hypothetical C-corporation making a hundred million dollar investment in each state, including the District of Columbia. New Mexico ranked 51st, presenting the highest effective tax rate on the new investment of any other state in five different industry sectors. The original study, which can be seen on the COST website [here](#), did not include statutory credits and other common incentives that New Mexico is more reliant on than most states, something we knew but affirmed with the KPMG Berents group study from 1997 (which can be found on our website [here](#)). The enhanced study overlays incentives in New Mexico and eight competing states, adds industry sectors, adds a rural location, and asks "what if" policy questions. It appears that not much has changed; as it the new results appear similar, if not a bit worse, than they were in 1997, where incentives made a big difference - but more in some sectors than others. New Mexico's general structure is onerous, so if a business doesn't qualify for incentives, you have to hope you're not competing with anyone out of state. Richard's presentation can be found on our website [here](#).

The audience was also treated to Albuquerque Economic Development's chief executive, Gary Tonjes, who discussed the challenges and difficulties the current economy provides for economic development. He discussed the importance of working incentives, and competitive tax and regulatory structures. He also discussed the latest "wins"; a 100 person expansion by Tempurpedic at their north-American manufacturing facility in Albuquerque, and a Lowe's call center project that will eventually employ 650 in the middle Rio Grande corridor. Gary mentioned, as he often does, that "capital goes where it is welcome and stays where it is well treated."

Finally, the attendees were treated to a panel of legislators who really matter when it comes to fiscal and tax policy, including Senators John Arthur Smith, Steve Fischmann, and Tim Keller, as well as House Minority Leader Tom Taylor and Minority Whip Don Bratton. Representative's Taylor and Bratton are both former mayors (Farmington and Hobbs, respectively) and have a particularly good sense of local government finance and how they interplay with state law and tax policy. All of the panelists were concerned about good tax policy and economic development, with most seeming to prefer a better general tax policy (that

still pays the bills), rather than narrow carve-outs or incentives. Always a stalwart budget hawk, Senate Finance Committee and Legislative Finance Committee Chairman Smith focused on fiscal accountability, with a reluctance to “spend” money like Texas and Arizona on tax cuts or incentives that we can’t afford. Senator Fischmann echoed concerns regarding pyramiding in the gross receipts tax on small business, and wished to address those using offsetting taxes in less damaging or competitive areas. Senator Keller discussed his tax proposals (see next article), while Representative Bratton reminded the audience that what the legislature does is go to Santa Fe to figure out how and how much of our money to spend – a responsibility he takes very seriously. He also pointed out that it was his job to look out for the interests of the state beyond his district. Representative Taylor reminded the audience how little control local governments really have over their revenue options and policy.

Lastly, Chief of Staff for Governor Susana Martinez, and former House Minority Whip Keith Gardner provided the keynote address at lunch, speaking on a variety of topics. A great time was had by all.





Tax Committee Has Last Meeting, Endorses Legislation

The interim Revenue Stabilization and Tax Policy Committee (“RSTP”) met for the last time before the upcoming legislative session and endorsed legislation (sometimes referred to as “committee bills”). Endorsed legislation is typically carried by committee members who volunteer to carry proposals that please the committee, often including NMTRD and other agency proposals. The NMTRD did not propose any legislation to the committee this year.

What Didn’t Get Endorsed

The committee heard fifteen proposals, and endorsed nine. Not endorsed was a disturbing proposal to change the way delinquent property tax is administered in New Mexico, offered up by Representative Bobby Gonzales. Senator Keller’s proposals to create small business loan vis-a-vis a tax credit that gets paid back, provide a tax credit for hiring New Mexico graduates, as well as an idea to set-aside permanent fund money to fund an endowment for professorships all failed to get an endorsement. Two of those proposals were discussed in the last newsletter and the Senator discussed the bills at our recent conference, however the Senator was unable to make the December RSTP meeting, so his proposals lacked their strongest advocate. He has already pre-filed his proposals for the upcoming session. Lastly, two other proposals failed to garner endorsement; one that phased out the local government hold-harmless mechanism over time and another that would sunset many of the healthcare related deductions.

What Did Get Endorsed

The nine bills receiving committee endorsements were mostly tax related and predictably included yet another expansion to the GRT deduction for certain medical services sold to managed care providers, dialysis service facilities in this case, phased in over three years. Senators Harden and Cisneros agreed to carry the bill. Also, Senator and committee chair Tim Eichenberg agreed to carry proposal to create transportation reinvestment zones which would allow local governments to dedicate gross receipts tax increments to construction projects (similar to TIDD's). He will also likely carry a proposal to clarify and substantially raise the qualifying thresholds for purposes of the high wage jobs tax credit (it's the same bill as was introduced in the special session plus the threshold changes).

Senator Cisneros and Representative Gonzales agreed to carry a proposal to allow re-imposition of the county education gross receipts tax increment without voter approval. Senator Harden will carry a proposal to allow leased solar generation facilities to be eligible for assistance under the Community Development Incentive Act. Representative Trujillo will carry the endorsed legislation that would exempt certain plug-in electric drive vehicles from the motor vehicle excise tax as well as the gross receipts and compensating tax. That exemption would only apply to purchases by individuals, and not by businesses. Lastly Senator Cisneros will carry a proposal to extend the gross receipts tax deduction for non-athletic events at New Mexico State University for five years, which otherwise expires next year.

Other quasi-tax related proposals endorsed by the committee included a proposal to dedicate a distribution of the liquor excise tax for drug courts (requested by the Administrative Office of the Courts), and a clarification to the Tobacco Tax Act requested by the Attorney General's Office (similar to the bill vetoed by the Governor in the last regular session).

A list of what was endorsed and what wasn't can be found on our website [here](#). The proposals themselves can be found on the committee's legislative website [here](#).

[NMTRI note: Not all of these ideas are good ones, and the mere fact that a bill receives an endorsement is a poor predictor of ultimate passage, although it does virtually guarantee the proposal will be introduced. The High Wage Jobs Tax Credit proposal will likely get amended as promoters have recently drafted changes to the bill introduced in the special session that was used by the committee.]



Litigators Win, Taxpayers and Good Tax Policy Lose in New Mexico Court of Appeals Decision

On December 8, 2011 the Court of Appeals affirmed the decision by the NMTRD Hearing Officer in the matter of the appeal of *GEA Integrated Cooling Technology v. State of New Mexico Taxation and Revenue Department*. In 2008, the legislature enacted changes to New Mexico's penalty and interest regime, reducing the statutory interest rate on deficiencies and overpayments from 15% to the floating rate used by the Internal Revenue Service. Simultaneously, and in an effort to offset the cost, the legislature effectively doubled the civil negligence penalty, which is imposed at 2% per month, to reach a maximum 20% in ten months, rather

than the previous 10% cap in five months. The statutory language was somewhat vague on the question of transition, and the question for the court was whether taxes assessed after January 2008 on liabilities incurred prior to January 2008 would be subject to the older or newer penalty regime. The NMTRD's contention was that they were subject to the newer penalty regime' as well as the older interest rate, creating a "double-whammy" or "worst of both worlds" situation for taxpayers. The Department's position was formulated much later than the law change when programming necessitated an answer. Several administrative protests on the issue were heard and decided in the favor of taxpayers before GEA was given an adverse decision by the Department's hearing officer. The issue of course is temporary and disappears over time with the tolling of the statute of limitations on assessment for the periods in question. The opinion can be found on the Court of Appeals website [here](#).

[NMTRI note: The Court makes its decision based in part on legislative intent, which the Department constantly reminded the court is evident in the plain reading of the statute. In this case of course, the wording was regrettably unclear and ambiguous. The strange and unfortunate part of this story is the zeal with which the Department chose to fight this issue, ignoring several adverse decisions on a disappearing issued before hiring a temporary hearing officer and switching the case to him just two days before the hearing (the previously assigned hearing officer had already ruled in favor of the taxpayer). Irrelevant and potentially prejudicial information was introduced and made part of the record. In addition to giving the appearance of "home-towning," the taxpayer, and probably helping to breathe new life into calls for independent hearing officers, the most troubling part is the 2008 law changes at issue were provoked and promoted by the Taxation and Revenue Department itself, and never intended to hit taxpayers with the worst part of both regime's. Of course, when the Department's attorneys took this issue up, that knowledge had already been lost internally. So, expect this sort of thing to happen again and again all over government, since agency managers and other officials are seldom retained for long periods of time these days.

Ironically, in addition to this never-intended outcome, the otherwise well-intentioned change in penalty and interest regimes also had the effect of neutering to an extent the state's interest in its own managed audit program, and reclassified the bulk of taxpayer's liability from deductible interest to non-deductible penalty. Much of this was due to the need to "pay" for the rate reduction and create a revenue neutral bill, which of course means we only reshuffled the deck chairs on the Titanic, making the taxpayer's liability before and after the time frame the same on average, but now favoring older assessments rather than newer ones.]

KNICK KNACKS

New Mexico Supreme Court Rules on Unemployment Tax Partial-Veto

On December 14, the New Mexico Supreme Court overturned Governor Martinez's line item veto of the unemployment tax bill passed in the last special session. That bill reduced some benefits and increased the state unemployment tax approximately \$180 million - or a change from Schedule 0 to Schedule 3 - in an effort to stave off insolvency. That meant an increase from an average per employee contribution of \$214.50 to \$369.80. Proponents suggest that the

alternative would be a mandatory shift to schedule 6 ((\$512.21/employee). The Governor wanted the benefit decreases, but preferred to wait longer to see if an increase was in fact necessary before raising taxes, and later wanted to use general fund reserves to avoid the need for a payroll tax increase. She vetoed the bill in a controversial manner similar to that which previous Governor Richardson had used in his last year. At issue was whether the Governor could line-item veto a bill of this kind (non-appropriation) in the way she did. In a twenty page opinion, the court called the bill “unworkable” because it eliminated necessary information to make calculations. In the opinion, the court stated:

“The veto deleted only the language that set the Contribution Schedule to Schedule 3 for 2012 and retained the language that delayed the sunrise of the formula-based Schedule until 2013. The Governor’s veto, however, did not return the Act to its former language, providing for the default, formula- based Schedule, or to any schedule for 2012. Rather, the veto arbitrarily eliminated the Contribution Schedule variable used to determine established employer contributions to the unemployment compensation fund for the year 2012.”

The court went on to say:

“By only deleting certain language, the setting of the 2012 Contribution Schedule to Schedule 3, and leaving other phrases relating to the same subject matter intact, the delay of a formula-based Contribution Schedule until after 2012, the Governor’s veto impermissibly left an incomplete and unworkable Act.”

The court’s action means the tax increases contemplated by the original bill will take effect January 1. The opinion can be found on the court’s website [here](#).

No Federal Payroll Tax Increase Coming Next Week

On Friday, President Obama signed the bill sent over from the House of Representatives extending the stimulus oriented 2% payroll tax deductions for two months. The House had previously rejected the proposal, which was passed by the Senate and sent to the House before they adjourned for the holidays.

[NMTRI note: albeit a sign of compromise, the short term nature of the extension is an administrative nightmare and presents no certainty to anyone. The House raised valid concerns, but started the process by sending the Senate a poison bill supporting a Canadian pipeline proposal, which may have merit, but was unrelated and clearly not acceptable to the administration. The House finally did right by blinking and not letting the provisions expire, however the Senate should have passed a longer extension – for purposes of administration and predictability if for no other.]



WELCOME NEW MEMBERS: The New Mexico Tax Research Institute is delighted to welcome these new members and thank them for their support of good tax policy in New Mexico.

Broderick Phillippi Wright & Comunas, CPA’s
Ricky Bejarano, State Controller

TAX QUOTABLES

"There is an ancient belief that the gods love the obscure and hate the obvious. Without benefit of divinity, modern men of similar persuasion draft provisions of the Internal Revenue Code."

~ *Martin D. Ginsburg*

"The nation should have a tax system that looks like someone designed it on purpose."

~ *William Simon*

[NMTRI note: the same is true of the states...]



COMMENTS: Your suggestions and comments on this newsletter, the conferences (past or future), the Distinguished Lectures Series, our research or any aspect of NMTRI's operation and programs are welcome. Please send them to richard.anklam@nmtri.org, call 505-269-6791 or mail them to P.O. Box 91657, Albuquerque, New Mexico 87199-1657. We genuinely solicit your input and thank you for your support.



"The power to tax involves the power to destroy" - *McCulloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice John Marshall.

"Taxes are what we pay for civilized society" *Campaña General de Tabacos v. Collector*, 275 U.S. 87, 100 (1927), Justice Oliver

Wendell Holmes, dissenting.
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