

# ***Tax Matters***

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## **IN THIS “BALLOON FIESTA” ISSUE OF *TAX MATTERS*:**

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## It's That Special Time of Year – Governor Declares Special Session

The state fair, the smell of roasting green chile, and the balloon fiesta all make this a special time of year in New Mexico. However, we must also talk about the Special Session called by Governor Richardson for October 17, 2009. Attempts to reach early agreement appear to have failed, so we may not have the one day session the executive and some legislators hoped for. One complicating factor is taxes. The governor and legislative leadership wanted to limit the conversation to matters of budget. Discussion of taxes and other revenue raisers is desired by some, however, the governor and legislative leadership at the moment indicate they intend to deal quickly and forthrightly with necessary actions to cover the prior year deficit and claw-back portions of the current budget. Tax talk would likely become contentious and distract from the other priorities and little if anything can be done from a budget perspective that couldn't be accomplished during the regular legislative session in January. Still, some legislators want to talk about tax increases sooner rather than later, so it is possible the agenda could get broader... and the session longer. As it is there have been no "deals cut" with respect to the budget, and the relationship amongst legislative leaders and the executive branch could be best described as acrimonious.

Regardless, there's plenty of political posturing going on as tax proponents argue that we should roll back prior year income tax cuts as something we can no longer afford, and impose mandatory combined filing for corporate income taxes. (When you read references of closing "corporate loopholes", advocates are referring to New Mexico's corporate income tax rule of allowing corporations to make binding elections as to their tax return filing group). Others suggest we cannot maintain spending practices of the past in a depressed economy with a depressing revenue outlook, and that raising taxes will only make matters worse for the private sector which has already absorbed the brunt of the job losses in New Mexico. *{NMTRI note: labor reports show governmental employment is slightly up and legislators are vowing to avoid layoffs of state workers. It is unlikely the federal government will contract in size anytime soon. However, even if state workers are held harmless from layoffs, local government employees may not be as fortunate since local government coffers are also down and local governments have lesser ability to raise revenue than the state. Tribal casino employment which ends up in the same labor report category may also fall as discretionary spending by tourists and locals continues to be soft.}*

As the problem grows worse every time we look at it (state economists are busy now revising the revenue forecast in advance of the special session... and it is bleak! Look for the prior year deficit figure to nearly double, and the current 2010 estimate to increase almost 50%), the inevitable answer may end up being requiring spending cuts and tax increases. However, merely undoing prior year changes or trying to make the state's corporate taxpayers exclusive tax targets are not the only, and possibly not the best solutions for raising money should lawmakers decide to do so. Although you may not know it by reading the general press coverage and op-ed pieces, many other alternatives, to include personal and corporate income tax modifications are being looked at, in addition to the usual litany of sin taxes, motor vehicle excise tax, oil and gas

taxes, etc. Efficiency, administration, and economic development considerations should also be considered in this sort of process but often are not.

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### **Federation of Tax Administrators Hires Helen Hecht as Tax Counsel**



Founding NMTRI board member (while at KPMG), executive committee member as well as board Secretary/Treasurer and Vice-President (while at Sutin Thayer & Browne) is leaving private practice at member firm Sutin Thayer & Browne and joining the Federation of Tax Administrators (FTA) as their new tax counsel. Kudos on the new hire to the venerable Jim Eads, former NMTRI executive director and current executive director of the FTA. Condolences to New Mexicans as it also represents a loss to the already small number of remaining true New Mexico tax experts practicing in the field. For those unfamiliar with the Federation of Tax

Administrators, the association of state tax agencies is well regarded and provides a host of services to its members and the public, including comparative tax data of various sorts. You can visit their website by clicking: [www.taxadmin.org](http://www.taxadmin.org).

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### **RSTP Reviews the Revenue Forecast, Property Taxes, Corporate Income Taxes, Credits, and Costs**

The interim Revenue Stabilization and Tax Policy Committee (“RSTP”) held their August meeting in Raton and a September meeting shortly after that in Cloudcroft. Of particular interest at the Raton meeting was Karen Montoya, Bernalillo County Assessor. She provided the committee with an update on the status of Dzur v.

Montoya case, involving the appeal of a residential property valuation on the basis that the 3% cap on increases in valuation cannot be constitutionally limited to properties which have not been sold but must apply to properties that have been sold as well. District court judge Montoya agreed with the plaintiff, deciding the statute in question was not constitutional. Assessor Montoya ultimately decided to not appeal the district court decision (see a copy [here](#)... it’s an interesting read). Ms. Montoya’s presentation can be found [here](#). The situation is still in flux as it is unclear how Bernalillo and other counties will treat subsequent protests. Meanwhile, the state and other government beneficiaries of property tax revenues are trying to understand the potential fiscal implications of the judge’s decision if applied statewide. This is an issue that will eventually require legislative intervention if the state wishes to properly implement the intent of the constitutional amendment. Legislators however appear to have time, as well as other issues to be concerned with, while the protests and appeals continue.

Other presentations of note included the revised consensus revenue estimate (view [here](#)) and some legislative proposals by the Taxation and Revenue Department (“TRD”). TRD proposals included some technical changes to the Tax Increment Development District statutes, a host of changes to the Tax Administration Act, and a revised version of the expanded pass-through entity (“PTE”) and oil and gas proceeds withholding amendments from last year. The latter proposal goes further than the prior year’s to merge the withholding programs, eliminate resident individuals from the scope and make other changes in response to dialogue over the prior year’s proposal, including new definitions and a safe harbor provision. The TRD explanation of the

proposals can be found on their website [here](#). Preliminary draft legislation for the TIDD proposal can be found [here](#), Tax Administration Act proposals [here](#), and the PTE and oil and gas proceeds proposals [here](#).

The Legislative Counsel Service is now posting the Revenue Stabilization and Tax Policy Committee approved meeting minutes on their website. The approved August meeting minutes can be viewed [here](#).

The September meeting was also of interest. LFC Chief Economist Dr. Tom Clifford provided an overview of tax provisions passed into law since 2004, and their relative cost in terms of fiscal impact. That interesting list can be viewed [here](#). Dr. Clifford also revised a presentation on the subject of film incentives and related tax policy issues. In summary, Dr. Clifford suggested that the return on investment from the credit was probably less than 50%, which is higher than the Arrowhead Institute's number of 14%, but well below Ernst & Young's 94% (note: the two studies included different things and posed different questions, so they are not directly comparable). Dr. Clifford's presentation can be accessed [here](#). TRD's Director of Tax Policy, Dr. Jim Nunns, and NMTRI's President and Executive Director, Richard Anklam, made corporate income tax presentations. The presentations were generally consistent. Mr. Anklam focused on the primary elements of the tax (filing group, comparative rates, apportionment rules), and how they determine liability.

Since mandating combined reporting for corporations is of recent political interest, Mr. Anklam provided the committee maps showing the current state of the states on the issue, noting that most of New Mexico's neighbors require combined reporting, but those states' without exception also impose lower rates and provide more generous apportionment and other options (i.e. Arizona repealed its throwback rule and provides an election for federal consolidated reporting). In addition, Dr. Nunns spoke about alternatives, more specifically the franchise tax proposal introduced in last year's session and presented by him at the NMTRI annual conference this year. Dr. Nunns also spoke regarding the revenue estimating approach for determining the fiscal impact of combined reporting proposals. Citing three comprehensive tax studies and New Mexico's recent legal victories and settlements in corporate tax cases, he advised that the traditional approach of using the historic estimate of twenty percent of the tax base was likely overstated and unsupportable. He declined to provide an actual fiscal impact estimate in the absence of a specific proposal. Mr. Anklam's presentation can be found [here](#) and Dr. Nunns' [here](#) on the TRD website.

*{NMTRI note: The more recently released Maryland study (see below) showed an increase in revenue of 12.5 percent under a Joyce rule (the rule in NM), during the height of an economic boom. The report correctly warns that the results cannot be extrapolated to other periods. With larger numbers of taxpayers having losses, it's possible the impact of such a change in an economic downturn could be much lower or even negative. Still, the study's 12.5% revenue increase appears to set the upper boundary for a mandatory combined filing fiscal estimate and would appear also to support Dr. Nunns testimony.}*

Also presented was an update on the TRD's enhanced collection efforts, monikered "fair share". The TRD was allowed additional positions to bolster tax audit and collection efforts. While

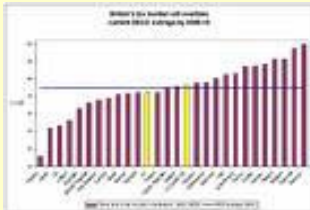
efforts are showing success, the TRD cautioned that the economy was dampening the effects of the programs. The presentation can be accessed [here](#).

Bill Fulginiti of the New Mexico Municipal League (and member of the NMTRI Executive Committee) presented the municipal governments' finance and taxation priorities for 2009-2010 (so far). Like most interests in this environment, their agenda is not aggressive as they are only seeking limited expansion of use of a couple of existing local option taxes, and oppose efforts to reduce local revenues by the state or others. Mr. Fulginiti's presentation can be viewed [here](#).

Finally, David Abbey, Director of the Legislative Finance Committee, presented on budget shortfalls and solvency options. He stressed that there was significant downside risk to the budget forecast, and presented options prepared by staff to address the shortage. He also mentioned that the hiring freeze in effect in state government has not had the effect of reducing headcount or salary expense. His presentation can be accessed [here](#).

At the Rural and Economic Development Committee meeting in Taos on September 28 and 29, TRD's Dr. Jim Nunns and LFC's Dr. Tom Clifford presented a survey of economic development incentives and discussion of tax policy. A revised list of credits and their costs that represented some changes relative to the LFC's previous presentation in Cloudcroft was included in Dr. Nunns presentation. A copy of Dr. Nunns' presentation can be found [here](#).

## **Lots of Charts and Graphs – Numerous Tax-Related Studies Recently Released**



Numerous studies and reviews have been published lately. Some are better than others but all are of interest to state tax geeks. Remember that all studies and comparisons are subject to criticism, and have strengths and weaknesses given their assumptions, data limitations and methodologies.

### **District of Columbia Tax Burden Study**

While not newly released but possibly new to you, the District of Columbia's Office of Revenue Analysis issued in August 2008 its report on 2007 tax burdens titled "Tax Rates and Tax Burdens in the District of Columbia: A Nationwide Comparison." The study compares tax burdens on a hypothetical family of three (two wage earning spouses and a school aged child), at five different gross income levels (\$25K, 50K, 75K, 100K, and 150K), and making certain consistent assumptions regarding spending, modeled the relative state and local tax burden of the District of Columbia compared to the largest city in each state. Taxes included in the study were sales, property, personal income, and automobile taxes. With a rank of 1 being the highest burden, the District found itself in the lower middle of the pack with scores in the 30's across income levels modeled. Philadelphia offered the highest tax burden to residents with the rank of 1 in every income category, with Bridgeport, Baltimore, and Detroit appearing in the top five of every category not far behind. Anchorage offered residents the lowest burden with a rank of 51 in every income category except the \$50K gross income category where they were edged out by Manchester. Trading places in the rankings but always in the lowest six were Manchester, Cheyenne, Las Vegas, and Seattle. Albuquerque fared slightly worse than the District with a ranking of 23<sup>rd</sup> highest burden in the \$25K gross income category, 20<sup>th</sup> highest in the \$50K

category, 24<sup>th</sup> in the \$75K category, 24<sup>th</sup> in the \$100K category, and 28<sup>th</sup> highest in the \$150K category. Surrounding states' largest cities of Houston, Phoenix, and Denver offer lower tax burdens to residents across income categories, while Oklahoma City's tax burden was slightly higher than Albuquerque's. Salt Lake City was less kind than Albuquerque at the \$25K level, but more generous in the other gross income categories than Albuquerque.

The publication also includes a second report that compares tax rates of the fifty states and the District from thirteen tax program categories. The study can be found on the FTA website [here](#)

*NMTRI note: the study cautions that “readers are advised not to compare the hypothetical tax burdens across years; any number of small changes in state and/or local tax policy or in the assumptions of the study can result in misleading information under such comparisons. The purpose of the study remains to compare tax burdens on a hypothetical household in different jurisdictions in a specific year, and not over time.” This is particularly true at times like these with tax laws and rates in such a state of flux in so many jurisdictions. This study is a version of the “representative-firm” model in the context of families. As one can see, it is quite detailed and labor intensive, but limited as a result in the spectrum of variables it can explore (one family size/type and five gross income levels). As the authors point out, and is always true with this approach, the results are in part determined by the assumptions given and used, and the results may differ significantly with seemingly minor changes to those assumptions. Also of note, the revised study for 2009 using 2008 rates is due out soon.*

### **Tax Foundation Business Tax Climate Index**

The Tax Foundation recently released their 2010 State Business Tax Climate Index (“SBTCI”). Their intention is to provide a tool for policymakers and others to gauge how their states' tax systems compare. Their approach was to create five component indexes (using 112 variables) representing the significant state business-related taxes (property, corporate income, sales, unemployment, and individual income taxes) imposed as of July 1, 2009. According to the Tax Foundation, “tax competition is an unpleasant reality for state revenue and budget officials, but it is probably the most effective restraint on state and local taxes. When a state imposes higher taxes than a neighboring state, business will cross the border to some extent. Therefore, states with more competitive tax systems score well in the SBTCI because they are best suited to generate economic growth.”

No great surprises are to be found in their results. According to the study, the state with the best business climate was South Dakota, followed by Wyoming, Alaska, Nevada, Florida, Montana, New Hampshire, Delaware, Washington, and Utah. The state with the worst business climate was New Jersey, followed by New York, California, Ohio, Iowa, Maryland, Rhode Island, Minnesota, Wisconsin, and Vermont. Not at the bottom of every list, New Mexico ranked 23<sup>rd</sup> overall in their study, up from 26<sup>th</sup> in the prior year. In the specific tax categories, New Mexico ranked 1<sup>st</sup> in property tax, 19<sup>th</sup> in employment taxes, 42<sup>nd</sup> in sales tax, 19<sup>th</sup> in individual income tax, and 32<sup>nd</sup> in corporate income tax. The Executive Summary can be found [here](#) on the Tax Foundation website, with the full report [here](#).

### **Corporate Taxes and Union Wages in the United States**

From their Working Paper Series, the National Bureau of Economic Research (NBER) in Cambridge, Mass. recently issued a paper on the subject of corporate income tax incidence.

More specifically, authors R. Alison Felix of the Federal Reserve Bank of Kansas City and James R. Hines, Jr. of the University of Michigan Economics Department explored the effects of state corporate income taxes on union wages. They found that a one percent lower state tax rate is associated with a 0.36 percent higher union wage premium, which they concluded suggests that workers in a fully unionized firm capture roughly 54 percent of the benefits of low tax rates. The paper can be accessed at the NBER website [here](#) (for a \$5 charge), and a briefer similar analysis on the impact of corporate taxes on wages can be found on the Tax Foundation website [here](#).

*NMTRI note: While New Mexico is not a “right to work” state, non-trade non-government union labor does not represent a large component of the labor force. In the manufacturing realm, only the General Electric jet engine plant comes to mind as a significant union employer, and it’s been scheduled for closure. Still, the effects described in the paper could have similar impacts on non-union labor, although they would most likely be less pronounced. The topic of corporate income tax incidence, that is who bears the economic pain of the tax, is both a lively and interesting one. Historically, the default position was that “capital” (the owners) suffer the entire tax burden, whatever it might be (i.e. raise Wal-Mart’s taxes and Sam Walton’s heirs pay them all indirectly). This makes more sense in closed systems and is a better assumption in the context of federal taxation, than state taxation. In reality, the incidence of state corporate taxes may be felt by the owners, the employees and other suppliers, and through the pricing of products. Like electricity, the incidence will follow the path of least resistance and the true incidence is virtually unknowable from company to company because the facts and circumstances can vary dramatically on a case by case basis. Still it’s considered a best practice to understand who is paying a tax before considering changes to that tax.*

### **Latest Combined Reporting Study**

The *Analysis of Tax Year 2006, Maryland Corporate Information Reports* was issued early this month by the Maryland Bureau of Revenue, and is the latest in numerous attempts at analyzing the fiscal impacts of mandating combined corporate income tax reporting. A “combined” filing group is a group of affiliated companies who act as a “unitary” group that is essentially one business entity without respect to legal entity distinctions. The tests of what makes a legal entity part of a “unitary” group, and therefore included in a “combined” return, look to ownership and the degree of integration of operations and management that exists among affiliates. Federal consolidated groups on the other hand, while often the same as a combined group, are determined by the less subjective bright-line rules in the Internal Revenue Code. Separate company returns are just that, tax returns representing distinct legal entities without regard to affiliates.

The Maryland report is based on a review of “dummy” or “as-if” informational returns required by the state for the 2006 tax year. Review of those returns led state officials to determine that if mandatory combined filing had been in effect in 2006, Maryland would have seen a revenue increase of 12.5% under one approach to income apportionment (the *Joyce* rule) and a 19.5% increase under the other common approach to income apportionment (the *Finnegan* rule) (the two rules differ in that the latter includes non-nexus company sales in the numerator of the sales factor). Maryland assumed a standard three factor formula with a double weighted sales factor.

While the review suggested a net win for Maryland, it was a mixed bag for taxpayers. Under both methods, there were essentially equal number of winners, losers, and taxpayers un-impacted. However, losers lost much more than winners won as both methods yielded positive revenue increases.

The authors cautioned against using the results for purposes of estimating impacts of such a proposal beyond the 2006 tax year or to situations where the assumptions used would need to change. While the authors also seemed to acknowledge an upward bias resulting from the assumption that taxpayer behavior would not change as a result of additional tax costs, the study should add to the efforts on this complicated subject. The authors plan on revising the numbers in March after 2007 returns are reviewed in effort to capture the impacts of net operating losses and other conditions that might necessitate the filing of amended 2006 returns by Maryland taxpayers. A copy of the report can be obtained [here](#).

### **Who Pays No Income Tax?**

The Tax Policy Center, a non-partisan joint venture of the Urban and Brookings Institutes, issued a brief paper posing the question “who pays no federal income tax?” The answer may surprise you, and it’s possible that the personal income tax is no longer the broad based tax many of us assume it to be. While intentionally progressive, variation within income strata is also surprising. In 2009, the tax policy center originally estimated that 38% of non-dependent tax returns filed would pay zero or negative taxes. After consideration of the impacts of the American Recovery and Reinvestment Tax Act of 2009 signed into law earlier this year by President Obama, 47% of non-dependent returns (tax “units” in the language of the report) will pay no income tax.

The portion of returns paying no income tax changes considerably from filing status (i.e. single/married-joint/head of household, etc.) and kind of unit (elderly or children in the unit) as well as by income. The report gives as example that 47% of single filers will pay no tax, in contrast to 38% of joint filers and 72% of head of household returns. They also point out that 60% of returns with incomes between \$20-30K will pay no tax, in contrast to the 20% that will pay no tax in the \$50-75K income range. Over 75% of joint filers and heads of household returns earning \$30-40K will owe no income tax, whereas nearly 90% of returns with children pay no tax. Also curious, 1.5% of households earning over \$1 million will also pay no income tax. *(NMTRI note: payroll taxes have become the inescapable tax of working Americans).*

A copy of the report can be viewed on the Tax Policy Center website [here](#).

## **Knick Knacks**

### **Interim Tax Committee Meets in October in Santa Fe**

The Interim Revenue Stabilization and Tax Policy Committee (“RSTP”) was scheduled to meet in room 322 of the State Capitol in Santa Fe on October 14-15, but has been cancelled due to the Special Session. The agenda included a presentation of the revised revenue forecast, Taxation and Revenue Department legislative proposals, a panel presentation of business issues and concerns lead by ACI’s Beverlee McClure, a presentation on gross receipts tax exemptions and transparency by former UNM Law School Dean, practicing attorney and NMTRI member

Robert Desiderio, and a presentation on Streamlined Sales Tax by Dr. Tom Pogue. Many of the presentations will likely be carried forward to future agendas.

### **Legislative Finance Committee Meets in Santa Fe in October - Maybe**

The Legislative Finance Committee will meet in Santa Fe for three days from October 21 – 23. The meeting is scheduled to be held in the room 307 of the State Capitol building. The agenda includes mostly non-tax related items such as agency presentations, however Secretaries Rick Homans (Taxation and Revenue Department) and Katherine Miller (Department of Finance and Administration) will be providing an FY10 and FY11 general fund revenue outlook and bonding capacity update that should be of great interest. The agenda for the meeting can be found on the Legislative Council Service website by clicking [here](#).

*NMTRI note: the recent call of a Special Session on October 17 could result in the cancellation or rescheduling of this meeting.*

### **California Commission Finalizes Late Tax Reform Proposal**

California's Commission on the 21<sup>st</sup> Century Economy (COTCE) released its much anticipated recommendations on September 29. The Commission's recommendations were endorsed by nine of the fourteen members. Governor Schwarzenegger has called a special session of the California legislature to study the recommendations, and indicated he would sign it all into law today if it were up to him. Pundits from the right and left have found the recommendations distasteful, indicating it might have some merit. One of the primary goals of the group was to reduce California's revenue volatility, which is significant given the state's reliance on income taxes. Accordingly, one of the centerpiece recommendations was to replace the corporate income tax, the state's portion of the sales tax, and reduce the personal income tax in exchange for a new "business net receipts tax" or "BNRT". Similar to the Texas Margin Tax and the Ohio Corporate Activity Tax, the BNRT is a hybrid income/gross receipts tax concept that has not been fully developed and accordingly makes some taxpayers nervous given the absence of specificity and uncertainty of the tax rate needed to make the proposal balance. Also recommended was the creation of an independent tax dispute forum. The proposed constitutional change involved the creation of a "rainy day" fund to assist in addressing year to year revenue volatility. Other recommendations for legislative study included a minimum tax for all taxpayers, allowing more offshore oil leases with royalties dedicated to the rainy day fund, and consolidation of the Board of Equalization and the Franchise Tax Board.

The final 425 page report and other information can be found on the COTCE website [here](#).

### **New Mexico Proposes New Income Tax Regulation**

The New Mexico Taxation and Revenue Department is proposing a new regulation pertaining to individual income taxes. The regulation is set for hearing on Thursday, October 22, 2009 at 9:30 a.m. The hearing will take place in the first floor auditorium of the Harold Runnels Bldg. located at 1190 St. Francis Drive, Santa Fe, New Mexico.

The proposed regulation attempts to clarify how Native American servicemen who were improperly withheld income taxes from their military pay could seek refunds of the overpaid taxes. The regulation is in response to Senate Bill 574 of the 2008 session, which provided authority and appropriated money for the purpose of paying refunds to veterans or their survivors who can demonstrate that they improperly withheld upon. Prior to the 2008 legislative effort, the

standard three year statute of limitations barred any of the implicated or their survivors from making such claims.

Copies of these proposed regulations can be found on the New Mexico Register website or on the Taxation and Revenue Department's website by clicking [here](#). Written comments on the proposal may be submitted to the Taxation and Revenue Department, Director of Tax Policy, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before October 22, 2009.

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### TAX QUOTABLE:

“A democratic government is the only one in which those who vote for a tax can escape the obligation to pay it.”

*~Alexis de Tocqueville*

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**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](mailto: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.

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"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.

Join NMTRI today!