Administrative Hearing Office
FY2023 Annual Report & Informal Conference Summaries

Administrative Hearing Office - Mission and Role

The Tennessee Department of Revenue (the "Department") has an Administrative Hearing Office (the "Hearing Office") where Taxpayers can work with Hearing Office personnel to resolve disputes about tax assessments and tax refund claim denials. Hearing officers are required to exercise independent judgment and render decisions on individual issues based on the facts and the law. The Hearing Office is currently comprised of three hearing officers, all of whom are licensed attorneys with significant tax experience, and a legal assistant with an extensive state tax background.

The Hearing Office's mission is to resolve disputes on behalf of the Commissioner of Revenue in an informal, expeditious, consistent, and cost-effective manner. The Hearing Office may also make determinations about the correct amount of tax due. To that end, the Hearing Office conducts informal conferences with Taxpayers to discuss their legal positions, ask questions, request additional information or documentation, and make a determination as to how the dispute should be resolved.

For Fiscal Year 2023, the Hearing Office received 272 requests for informal conferences, 64 of which were resolved without a conference. Information and frequently asked questions about the informal conference process are available on the Department's website at https://www.tn.gov/revenue/tax-resources/compliance-information/request-an-informal-conference.html.

Conference Decisions in Fiscal Year 2023: Topics of Interest

The Department has selected several topics of interest summarized below. Each topic of interest also includes overviews of related conference decisions issued over the past fiscal year.

Please be aware that Tennessee law protects the identity and information of individual Taxpayers. The Department is required by law to maintain a Taxpayer's information as confidential unless the Taxpayer gives the Department permission to disclose information. The unauthorized disclosure of Taxpayer information is a criminal offense.

Because the Department takes Taxpayer confidentiality very seriously, the following summaries of conference decisions do not contain any details that could lead to an individual Taxpayer being identified.

Please also be aware that the summaries are of actual cases and the applicable law might have changed since the conference decision was issued. Furthermore, each case is based upon the facts and circumstances presented, some of which may have been pertinent to the decision but not included in the summary below for confidentiality concerns. Therefore, **Taxpayers should consult with a tax professional before relying on any information contained in the following summaries.**

Personal Liability for Taxes (Tenn. Code Ann. § 67-1-1443)

One reason for operating a business in the form of a corporate or other limited liability entity is to avoid personal liability for the business's liabilities. This protection from liability is not complete, however. So-called "trust fund taxes" are taxes collected on behalf of the government and are an exception to the protections provided by corporate or other limited liability structures.

Individuals who are required to collect and remit tax collected from customers, such as sales tax, may be personally liable for any sales tax collected but not remitted (plus associated penalties and interest),[1] if those individuals had the authority to determine which creditors would be paid and voluntarily chose not to remit the collected taxes to the Department. When a business has an unpaid sales tax liability, the Department's Collection Services Division will first attempt to collect the tax from the business, but if that effort is unsuccessful, it will attempt to identify officers or employees responsible for collecting sales tax and issue proposed assessments to those people individually. In addition to holding conferences about a business's underlying tax liability, the Hearing Office hears challenges to proposed personal tax assessments.

Examples:

- The Hearing Office abated a personal liability assessment for a restaurant's sales tax liabilities. The Taxpayer, a salaried employee, was in charge of the restaurant's day-to-day operations. Personal liability under Tenn. Code Ann. § 67-1-1443 attaches when an individual (1) was required to collect and remit the taxes collected from customers and (2) willfully failed to do so. While the hearing officer found the first prong of this statute met, the company's CPA who prepared its sales tax returns explained that the company's owner was responsible for approving each month's sales tax payment, and the owner did not always approve these payments. The hearing officer thus concluded that the Taxpayer had not willfully failed to pay over the sales taxes collected.

- The Hearing Office upheld personal liability assessments against two individuals who asserted they were not involved in a restaurant's day-to-day operations, did not own the restaurant, and were simply members of the restaurant's parent company. In a filing made in court, the individuals were identified as the restaurant's managers. The Hearing Officer noted that a person liable for a company's unpaid taxes need not be the company's owner, but simply someone required to collect and remit taxes collected from customers and who had willfully failed to do so. The information available supported this conclusion as to both managers.

- The Hearing Office upheld a personal liability assessment against one of the owners of a retail store. Although the Taxpayer claimed he was simply the manager and was not aware of the store's sales tax liability, he acknowledged he handled the store's funds and communicated with the store's CPA about payroll and other financial matters. In addition, he had discussed the store's tax liability with the Department on four occasions and represented himself as the store's owner on his LinkedIn page. Together these factors established the requisite level of control over tax collection and remittance as well as a willful failure to remit.

[1] Tenn. Code Ann. § 67-1-1443 (2013).

- The Hearing Office abated a personal liability assessment against the minority owner of a company with delinquent sales taxes. The Taxpayer was also an elected officer, on the board of directors, and authorized to sign company checks. While these facts suggested the Taxpayer was a person required to collect, truthfully account for, and pay over the sales taxes the company collected from its customers, the evidence reviewed was silent as to whether the Taxpayer actually exercised this authority to become involved in the company's financial activities. There were no signed checks, no approved payments, and no TNTAP authorizations in his name. In the absence of evidence of actual involvement in the company's financial activities, the hearing officer abated the assessment.

Successor Liability

After purchasing a business, the buyer may find that in addition to acquiring the business, the buyer has also acquired outstanding tax liabilities of the business. Under Tennessee law, the buyer of the business is considered the seller's "successor, successors, or assigns."

The buyer is required to withhold from the purchase price of the business the amount of unpaid taxes, interest, and penalties, unless the seller has provided a certificate of clearance from the Department stating that no taxes, penalties or interest are due. Alternatively, the seller can provide the buyer with an affidavit stating that it has no past due tax liability. The buyer must provide the affidavit to the Department to be protected from liability by the seller's affidavit. The Department has 15 days to notify the buyer if the affidavit is incorrect.

Examples:

- The Hearing Office upheld a successor liability assessment against the purchaser of a retail store. Instead of obtaining a tax clearance letter or an affidavit—as described in Tenn. Code Ann. § 67-6-513—the purchaser relied on the seller's assurances that the seller was remedying the store's tax liability. These assurances turned out to be misleading. While the bad acts of the seller were unfortunate, the Taxpayer had not used the statutory mechanisms for insulating themselves against a predecessor's liability. The hearing officer was thus compelled to uphold the assessment against an obvious successor business.

- The Hearing Office upheld a successor liability assessment against a Taxpayer that had purchased all of the inventory and most of the assets of a company engaged in the same type of business and also leased the facility used in that business. The Taxpayer did not believe it was liable, as successor, for the company's sales-and-use and business taxes because the Taxpayer did not purchase the company's shares or all of the company's assets. But under Tenn. Code Ann. § 67-6-513, the hearing officer concluded that purchasing all of the inventory—or "stock of goods"—most of the equipment, and operating a similar business at the same location qualified the Taxpayer as a successor within the meaning of Tenn. Code Ann. § 67-6-513.

- The Hearing Office abated a successor liability assessment. The Taxpayer was operating a business in the same location in which an unrelated company had previously operated the same type of business. The Taxpayer employed some of the same personnel in doing so, but

it argued that it was a separate legal entity with separate bank accounts, separate ownership, and separate funding and revenue. Although the Taxpayer had assumed the company's lease, the Taxpayer undertook massive renovations and improvements at the insistence of the landlord. The hearing officer determined the Taxpayer was not the company's successor under Tenn. Code Ann. § 67-6-513 because the Taxpayer did not purchase the company, the company's business, its stock of goods, or any of its assets. And while the business operations were similar, they were not continuous—the Taxpayer opened its business more than six months after the previous tenant had closed its business.

- The Hearing Office upheld a successor liability assessment against an LLC that purchased the business, business name, and assets of another business. The LLC then operated substantially the same enterprise under a similar but not identical name. At conference, the LLC ownership offered that they were no longer certain that the party that represented themselves as the seller of the predecessor business had the proper legal ownership of that business. But the LLC offered no definitive information on this point. Because the purchase agreement represented a sale of the business that met the successor liability statute and because the LLC had operated in a manner consistent with having made such a purchase, the successor liability assessment was upheld.

- The Hearing Office upheld but adjusted a successor liability assessment against a franchisor that entered an agreement with a franchisee to take over the operation of a franchise business location. The franchisor Taxpayer asserted that it had not acquired the business and become a successor within the meaning of Tenn. Code Ann. § 67-6-513 but had merely terminated a franchise agreement. But the Taxpayer had paid the franchisee what it called a "termination fee" as well as the book value of the franchisee's inventory. It then operated the same type of business in the franchisee's location. Because the Taxpayer expressly paid for the predecessor's inventory and for rights that included operating the business, the hearing officer determined it was a successor under Tenn. Code Ann. § 67-6-513. The hearing officer adjusted the assessment to the amount paid by the Taxpayer to the franchisee.

Lack of Records

Tennessee law requires dealers to keep adequate books and records of sales and purchases for three years from December 31 of the year in which the associated return was filed so the Department can verify returns and determine a dealer's tax liability.[2] If an assessment is made and a Taxpayer challenges the assessment, either to the Department or in court, the Taxpayer must keep all records covered by the assessment until the matter is resolved.[3] If a Taxpayer fails to keep sufficient records, the Department may make an assessment using the best information available.[4] When a Taxpayer

[2] Tenn. Code Ann. §§ 67-6-523 and 67-1-113.

[3] Tenn.. Comp. R. & Regs. 1320-05-01-.80(2).

[4] Tenn. Code Ann. § 67-1-113(b).

has not kept adequate records, auditors will examine available third-party information such as the Taxpayer's purchases, bank deposits and federal tax returns.

In the absence of sufficient records, auditors often must perform a purchase markup audit. This involves applying a percentage markup to the Taxpayer's purchases, to calculate taxable sales. Unless a Taxpayer can furnish documentation that was unavailable during the audit, the Hearing Office in these cases has no basis on which to make an adjustment.

Examples:

- The Hearing Office upheld an assessment against a landscaper who did not charge sales tax on charges for delivering landscape materials. Delivery charges are considered part of the taxable "sales price" under Tenn. Code Ann. § 67-6-102(87)(A). The landscaper claimed the bulk of the charges at issue were for installing the materials but had no records to substantiate its claim, such as itemized charges for installation on invoices or contracts, work orders, or purchase orders specifying installation. In addition, the landscaper's website did not list pricing for installation services but instead offered a list of recommended contractors to install the products. In the absence of suitable records establishing charges for installation, the hearing officer upheld the assessment.

- Under Tenn. Code Ann. § 67-6-343, sales of motor vehicles that will be removed from Tennessee for use in another state within three days are not subject to tax, but a dealership making such sales must keep a record of removal prepared at the time of the sale and signed by the purchaser. When a dealership did not keep these records but instead tried to prove the purchasers had been outside the state by later looking up their addresses on the Internet, the auditors would not accept this information as a substitute for contemporaneously created removal affidavits. The Hearing Office upheld the assessment because the applicable rules did not allow for alternative forms of documentation.

- The Hearing Office upheld an assessment of liquor-by-the-drink ("LBD") tax. The Taxpayer conducted business from two locations during the audit period. It provided records for the first location but was unable to do so for the second, which had closed. The auditor, therefore, estimated the LBD sales of the second location based on the results of the LBD audit for the first location. The hearing officer determined the method used to estimate the LBD sales of the Taxpayer's second location was reasonable and consistent with the requirements of Tenn. Code Ann. § 67-1-113(b), which authorizes the Department to make an assessment "based on the best information available" in the absence of "suitable records." And although the Taxpayer disagreed with the results of the LBD audit for the second location, the Taxpayer had not identified any mathematical errors or explained how the method the auditor used led to an incorrect result.

- The Hearing Office upheld a sales tax assessment against a retailer that sold products both online and at its Tennessee store. The auditor could not verify reported sales because the Taxpayer did not provide sufficient sales records. The auditor, therefore, based the assessment on the best information available, bank deposits. The Taxpayer disagreed with the amount assessed, claiming that most of the bank deposits represented exempt interstate

and wholesale sales. The hearing officer upheld the assessment because the Taxpayer could not specifically identify the bank deposits associated with transactions that were exempt or otherwise not subject to sales tax**.**

Consumer Use Tax

Use tax is the counterpart to the sales tax. All Tennessee residents, as well as businesses operating in the state, must pay use tax when goods are purchased from outside Tennessee and brought or shipped into the state and the seller did not collect sales tax on the purchase.[5] Purchases made from outside the state include, but are not limited to, mail-order catalog purchases, purchases made online, over-the-phone purchases, and purchases made from a store located in another state. Use tax does not apply to the purchase of services.

Use tax is also due on occasional and isolated sales of items such as aircraft, motor vehicles, trailers, off-highway vehicles, and boats that occur between people who are not motor vehicle or boat dealers.[6] These kinds of occasional and isolated sales are generally subject to sales or use tax.

Examples:

- The Hearing Office upheld a consumer use tax assessment against a Tennessee resident who purchased a car at a Tennessee dealership. The dealership did not collect sales tax on the price of the car because the Taxpayer provided the dealership with a three-day removal affidavit. But the car remained in Tennessee even as the Taxpayer later registered it in Montana. The auditor determined that the Taxpayer owed Tennessee use tax on the sale price because they should have registered the car in Tennessee. The Department also added a civil fraud penalty to the use tax liability because the Taxpayer provided the dealership with a three-day affidavit that contained false information. The hearing officer determined the civil fraud penalty had been properly imposed because the Taxpayer had engaged in a deceitful practice to evade paying Tennessee sales tax on the price of this car.

- The Hearing Office upheld a use tax assessment against a Taxpayer reported by United States Customs to have imported goods into the United States through Tennessee. The Taxpayer disputed the conclusion that they were responsible for the importation of the goods, but the information they provided—residential information that was not inconsistent with the Customs report and indicia that they had sought a fraud alert through a credit reporting agency—did not refute or contradict the Customs information on which the assessment was based. The assessment was thus upheld.

- Under Tenn. Code Ann. Section 67-6-210, the Hearing Office upheld a consumer use tax assessment on the value of silver, precious metals, and coins imported into the state from a foreign country. The Taxpayer believed the assessment was wrong based on a change in

[5] Tennessee gives credit for legally imposed sales or use tax paid to another state and the purchaser may claim such payment as a credit against any Tennessee use tax liability. Tenn. Code Ann. § 67-6-507(a) (2018); Tenn. Comp. R. & Regs. 1320-05-01-.91.

[6] Tenn. Code Ann. § 67-6-102(8)(C).

Tennessee law. Effective May 25, 2022, sales of coins, currency, and bullion were no longer subject to sales-and-use tax under Tenn. Code Ann. § 67-6-350. The hearing officer determined the exemption did not apply because the Taxpayer had imported these items into Tennessee before the exemption's effective date. And as the exemption statute was neither remedial nor procedural in nature, the hearing officer concluded it could not be applied retrospectively.

- The Hearing Office abated a use tax assessment against a Taxpayer reported by United States Customs to have imported goods into the United States through Tennessee. While the Taxpayer acknowledged importing the goods and shipping them to Tennessee for safekeeping, they provided documentation establishing their permanent residence in another state and operation of a business there engaged in the resale of similar goods. This and other information provided was consistent with the Taxpayer's explanation that the items were imported to the home of a Tennessee friend only because it was safer to do so given the Taxpayer's travel schedule. Because the Taxpayer imported the items to Tennessee only to export them to their home state for personal use and resale, the items did not come to rest in Tennessee and thus fell within the "import for export" exemption from use tax in Tenn. Code Ann. § 67-6-313(a).

- The Hearing Office abated an assessment against an individual who had purchased a boat in Maryland and later brought the boat into Tennessee. The individual had paid Maryland's vehicle excise tax based on the value of the boat when he registered it there. Tenn. Code Ann. § 67-6-507(a) gives those importing tangible personal property a credit against Tennessee use tax in the amount of any "like tax" properly paid to another state for the purchase or use of that property. Although Maryland's and Tennessee's taxes are not identical, the purposes and structures of the tax schemes are essentially the same – boats must be registered for use on state waters and tax based on the value of the boat must be paid.

Sales and Use Tax

The Hearing Office conducts conferences on a wide variety of sales and use tax issues. Below are examples of some topics the office addressed in conference in fiscal year 2022.

Examples:

- The Hearing Office upheld an assessment of use tax against a business that purchased products without the dealer collecting tax even though the Taxpayer did not present a resale certificate. The Taxpayer argued that the sellers were registered with the Tennessee Secretary of State, had nexus in Tennessee, and were thus obligated to collect the tax on their sales in Tennessee, including to the Taxpayer. The Taxpayer insisted that, as a dealer, this obligation was superior to any obligation on its part to pay use tax on the purchases. The hearing officer disagreed, concluding that a Taxpayer that makes a taxable purchase without tax being collected has an independent obligation to pay tax on that purchase irrespective of the dealer's obligations.

- The Hearing Office upheld an assessment of sales tax on sales of airplane fuel by a vendor in which the Audit Division included federal excise tax (26 U.S.C. § 48.4081), the Tennessee special privilege tax (Tenn. Code Ann. § 67-3-203), and the Tennessee environmental assurance fee (Tenn. Code Ann. § 67-3-204) in the taxable sales price of the fuel. Each of these impositions is imposed directly on the Taxpayer's customer with the Taxpayer serving only to collect and remit them. Such impositions directly on a seller's customers are properly included in the sales price under the definition of that term in Tenn. Code Ann. § 67-1-102.

- The Hearing Office upheld a sales tax assessment against a manufacturer selling products at retail to customers in Tennessee and other states. The Taxpayer collected sales tax on Tennessee sales but not on out-of-state sales. Sales made in interstate commerce are not subject to Tennessee sales tax under Tenn. Code Ann. § 67-6-313(a). The Taxpayer provided the auditor with sales invoices, arguing that these sales should be excluded from the assessment based on the purchasers' out-of-state billing addresses. But some of the invoices were missing shipping information, and the hearing officer concluded that sales in which the "Ship To:" line on a contested invoice was blank failed to document the product shipment location and thus did not establish that the sale was not subject to tax.

- The Hearing Office adjusted a sales-and-use tax assessment. The Taxpayer purchased building materials on a resale certificate and included these materials in building kits sold to customers. The Taxpayer collected sales tax or obtained exemption certificates on these sales. On sales that included labor charges, the auditor determined the Taxpayer was acting as contractor and, therefore, should have remitted use tax on the cost of building materials. The Taxpayer claimed it collected labor charges on behalf of the contractors hired by its customers. The hearing officer removed these transactions from the use tax assessment because there was no proof that the Taxpayer constructed these buildings or hired the contractors that constructed these buildings. The presence of a labor charge on a sales invoice did not, without more, transform a retail sale of tangible personal property into a construction contract.

Business Tax

The Hearing Office conducts conferences on a wide variety of business tax issues. Below are examples of some topics the office addressed in fiscal year 2022.

Examples:

- The Hearing Office approved a request for a refund of business tax paid by an engineering consultant. Although the type of services the consultant provided would have otherwise been subject to business tax, the consultant's services were performed exclusively for an out-of-state facility. The consultant's reports were sent to that facility, and that facility paid the consultant. Under Tenn. Code Ann. § 67-4-711(a)(6), Tennessee exempts sales of services "delivered to a location outside this state," so these services were not subject to business tax.

- The Hearing Office upheld an assessment of business tax against a Taxpayer that arranged transportation services for clients but did not directly provide the transportation. The

Taxpayer believed most of its sales of these services were wholesale sales rather than retail sales because the ultimate consumer of the transportation services it arranged were not typically its clients. The Taxpayer thus reason it was primarily a wholesaler for purposes of determining its business tax rate. But as described, most of its services were sold to customers who used those services themselves to fulfill their own shipping obligations. The clients using the Taxpayer's services in this were the consumer of the service. Because only a minority of the Taxpayer's sales were to other service providers that could be considered to have resold the Taxpayer's services, the Taxpayer was primarily a retailer.

- The Hearing Office upheld a business tax assessment against a Taxpayer that provided logistical services supporting a customer's manufacturing operation in Tennessee. The Taxpayer contended that its services fell within the scope of Business Tax Rule 29(1), which provides that sales of services to manufacturers who use the services in preparing goods for sale are considered sales at wholesale. Because the Taxpayer's customer did not sell its manufactured goods to consumers, the Taxpayer's sales would be sales for resale made by a wholesaler to a wholesaler and excluded from the tax under Business Tax Rule 47(3). But though the services in question closely supported the manufacturing process, they were provided entirely before that process began. Consistent with the statutory treatment of sales of tangible personal property to manufacturers—which is a wholesale sale only when the property becomes a component of the manufactured product—the hearing officer determined that sales of services would be treated as wholesale sales under Rule 29(1) only if the services were consumed on the assembly line, rather than before. The Taxpayer was thus selling its services at retail under Business Tax Rule 29(2).

- The Hearing Office abated a business tax assessment against a Taxpayer operating a data center in Tennessee. The data center provided services to entities located outside the state which the auditor described as the "maintenance and provision of data processing infrastructure." Because the data center was located in Tennessee, the auditor concluded these services were received in Tennessee and subject to business tax. But while the infrastructure necessary to provide the services was physically located in Tennessee, the entities making use of the services were not. The hearing officer thus agreed with the Taxpayer that the services were received out Tennessee and not subject to business tax.

Franchise and Excise Taxes

A corporation, limited partnership, limited liability company, or business trust chartered/organized in Tennessee or doing business in this state must register for and pay franchise and excise taxes. The franchise tax is based on the greater of net worth or the book value of real or tangible personal property (minimum franchise tax base) owned or used in Tennessee. The excise tax is based on net earnings or income for the tax year. The Hearing Office addressed a number of franchise and excise tax issues during fiscal year 2022.

Examples:

- A manufacturer with a small percentage of its business in Tennessee sold its operations and reported the gain on its final franchise-and-excise tax return as nonbusiness earnings. The

Department recharacterized the gain as business earnings. The Taxpayer specifically objected to the characterization of its sale of goodwill as business earnings because it was not in the business of selling goodwill. But under the functional test, a gain arising from the sale of assets constitutes business earnings if the assets were an integral part of the business. The hearing officer reasoned that a business's goodwill and noncompete agreements intended to protect that goodwill were integral to the manufacturer's business. While this gain was properly characterized as business earnings, the Audit Division agreed to adjust the assessment to remove goodwill from the sales factor of the apportionment formula, consistent with Tenn. Code Ann. § 67-4-2012(k).

- The Hearing Office adjusted an assessment of excise tax based on the Department's disallowance, for Tennessee excise tax purposes, of the Taxpayer's federal income deduction for foreign-derived intangible income ("FDII") authorized by 26 U.S.C. § 250(a). While Tennessee has decoupled from the deduction in § 250(b) for "GILTI" (global intangible low tax income), the Hearing Officer concluded that Tennessee had not decoupled from the FDII deduction and adjusted the assessment to permit the Taxpayer to apply the deduction in calculating its Tennessee earnings subject to excise tax.

- The Hearing Office abated an assessment against a Taxpayer that underwent a reorganization under I.R.C. § 368(a)(1)(F) (an "F reorganization") during its tax year and was included in the full-year franchise-and-excise tax return of the holding company into which the Taxpayer was deemed to have been liquidated. The Department issued an estimated assessment against the Taxpayer because it did not file a franchise-and-excise tax return in its own stead. Because Tennessee is a separate-entity filing state (see Tenn. Code Ann. §§ 67-4-2007(d) and 67-4-2106(c)), the Department took the position that the Taxpayer was required to file a short-period return for that part of its tax year before the F reorganization. But Tenn. Code Ann. § 67-4-2015(a) dictates that the period for a Taxpayer's return tracks the period of its federal income tax return. Because the Taxpayer was properly included in the full-year federal return of its post-reorganization holding company, Tennessee law dictated that its post-reorganization status as a disregarded single-member LLC controlled, and its Tennessee filing under the holding company for the full year was correct.

- The Hearing Office upheld an assessment of excise tax against a Taxpayer that sought to claim a deduction for the federal qualified sick leave wages credit. While Tenn. Code Ann. § 67-4-2006(b)(2)(F) allows deductions from earnings for expenses not deducted in determining federal taxable income for which a credit against federal income tax is allowable, the qualified sick leave wages credit was available to be taken against wage- and compensation-based taxes imposed by 26 U.S.C. §§ 3111(a) and 3221(a) rather than against federal income tax. The Taxpayer's claimed deduction thus did not meet the requirements of Tenn. Code Ann. § 67-4-2006(b)(2)(F).

- The Hearing Office abated a franchise-and-excise tax assessment on an LLC's gain from the proceeds of the sale of a limited partnership interest. The Taxpayer characterized the gain as nonbusiness earnings on its franchise-and-excise tax return. The auditor recharacterized the gain as business earnings and assessed additional excise tax. While the hearing officer determined that the gain from the Taxpayer's sale of a partnership interest represented business earnings under the functional test, the Taxpayer's only connection with Tennessee

was its ownership interest in a partnership conducting business in this state. An ownership interest in a partnership (limited), without more, does not establish nexus with Tennessee for franchise-and-excise tax purposes. Consequently, the Taxpayer did not have a franchise-and-excise tax filing requirement.

Miscellaneous Other Taxes and Common Issues

In addition to the tax categories discussed above, the Hearing Office occasionally conducts conferences on where the tax type is one that is less frequently seen. In addition, some issues—such as the statutes of limitations for assessments and refund claims—cut across tax types. Below are some examples of topics the office addressed in fiscal year 2022.

Examples:

- The Hearing Office upheld the Department's denial of a refund claim as untimely. The Taxpayer did not file business tax returns for 2012 and 2013. The Department, therefore, issued estimated assessments. On March 26, 2013, the Taxpayer paid these assessments. On April 6, 2022, the Taxpayer filed business tax returns for 2012 and 2013. The amount of tax reported due was less than the amount previously paid. On May 17, 2022, the Taxpayer filed a refund claim. On June 10, 2022, the Department denied the refund claim as it was not timely failed. Under Tennessee law, a refund claim must be filed within three years from December 31 of the year in which payment was made. Tenn. Code Ann. § 67-1-1802(a)(1)(A). The May 17, 2022, refund claim was for a payment made on March 26, 2013. The hearing officer determined the refund claim was properly denied because it was not filed within the three-year statutory period.

- Under Tenn. Code Ann. § 67-4-1702, Tennessee levies an annual Occupation Tax (commonly referred to as the professional privilege tax) for the privilege of engaging in vocations, professions, businesses, or occupations. The tax applies to persons who maintain an active license with certain Tennessee professional licensing boards. Because it is a privilege tax, those possessing active professional licenses on June 1 must pay this tax regardless of whether they work, live, or have clients in Tennessee. The Department determined the Taxpayer was liable for the professional privilege tax due June 1, 2022, because the Taxpayer held a securities license with the State of Tennessee on that date. The Taxpayer asked the Hearing Office to abate the assessment because they notified their employer that they would be leaving the firm in May 2022, but the employer did not notify FINRA before June 1, and FINRA did not terminate the Taxpayer's Tennessee securities license until June 2, 2022. The hearing officer found the Taxpayer was not liable for the professional privilege tax due on June 1, 2022, because the Taxpayer had done everything required under Tennessee law to terminate their Tennessee securities license before that date.

- The Hearing Office upheld a professional privilege tax assessment against an individual who held a Tennessee securities license as of June 1, 2022, the date the tax is due. The Taxpayer asked the Hearing Office to abate the assessment because they had held a Tennessee license for only three months and canceled it on June 10, 2022, after learning of this tax. But the tax is due on June 1, 2022, with no requirement that a professional license must be held for

minimum number of days for this tax to apply and no partial exemptions for licenses held less than a year; the professional privilege tax cannot be prorated. The hearing officer thus upheld the assessment.

- The Hearing Office upheld the denial of a refund claim because a FONCE application submitted through TNTAP did not constitute a refund claim. The Taxpayer submitted the application before the close of the statute of limitations for the years at issue but did not submit a refund claim for the corresponding amount until the application was approved and a credit generated, which occurred after the statute of limitations for the refund claim had closed. The Taxpayer contended that it could not file a refund claim on TNTAP until the credit was generated, but that is not the case (and claims for refund may be submitted by means other than TNTAP regardless). Because the Taxpayer did not file a timely refund claim to preserve, its claim was not preserved.

- The Hearing Office abated an automobile rental surcharge ("ARS") assessment. Tennessee levies the ARS on short-term rentals of private passenger motor vehicles under Tenn. Code Ann. § 67-4-1901. The Taxpayer rented the use of street-legal all-terrain (ATV) and utility-task (UTV) vehicles on an hourly basis. The vehicles were registered as Class I off-highway vehicles ("OHVs"). The auditor determined the Taxpayer owed the ARS on these rentals because the OHVs were "vehicles" under the statute and were utilized for passenger use on county roads with speeds of 40 MPH or less. But the hearing office determined the ARS did not apply because OHVs were not private passenger motor vehicles. Passenger motor vehicles are manufactured primarily for use on public streets, roads, and highways whereas OHVs are "designed primarily to be operated off public highways" within the meaning of Tenn. Code Ann. § 55-8-101(25). Under Tennessee law, OHVs cannot be operated on state highways or federal interstates. Passenger motor vehicles have no such limitations. Because the OHVs were not passenger motor vehicles, the hearing officer determined the ARS did not apply.

Conclusion

In addition to the above information and summaries, a wealth of tax information is available on the Department's website found at http://www.tn.gov/revenue.