

A close-up photograph of a hand holding a gold-colored pen, poised to write on a document. The document is part of a thick stack of papers, with the edges of many pages visible. The background is slightly blurred, showing a red patterned object and a blue surface.

Think Nationally Before You Act Locally – *A Strategic SALT Litigation Tip*

Prepared by:
Jordan Goodman
Horwood Marcus & Berk Chartered

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THINK NATIONALLY BEFORE YOU ACT LOCALLY – A STRATEGIC SALT LITIGATION TIP



AUTHORED BY **JORDAN GOODMAN**

It is a well-known fact that the states have become more aggressive in their SALT litigation tactics. And, like a bad cold, they seem to "catch" new audit issues from their brethren states. This can easily lead to a single issue being contested in multiple states. Taxpayers then have the sometimes daunting task of devising a strategy of not only how to win in a particular state, but also making sure the tactics in one state do not negatively affect outcomes in other states.

THERE ARE A NUMBER OF FACTORS TO BE CONSIDERED WHEN DEVISING A MULTI-STATE LITIGATION STRATEGY

UNDERSTAND YOUR NATIONAL RISK, STATE BY STATE

A taxpayer should determine which states are potentially affected - even if the audit has not yet arrived on your desk - and calculate the tax impact in each state. Knowing how much is at stake by state is key to putting together your nationwide strategy. Sometimes, it is better to focus your energies on the states where the dollars are not as significant because resolution will draw less attention and you may be able to get a better settlement percentage. There could be an advantage to stringing together a bunch of small settlements at favorable percentages before taking on the larger dollar

states. At Horwood, Marcus & Berk, we have often been able to use a "nationwide settlement percentage" in the larger states as a means to negotiating a favorable result.

ASSESS THE FORMALITY OF THE PROCESS AND HOW "PUBLIC" ANY RESULTS AND PRECEDENT MIGHT BE

Part of the decision process for determining the order of the states may also depend on the forum each state offers.

1. Is there an informal process?
2. If not, are the protests/petitions available to the public?
3. Do you start de novo if the administrative process is unsuccessful?

This is important because what you present as evidence or legal arguments in one forum may come back to haunt you in another. You may be willing to accept a less than perfect settlement to keep it out of the public's (read: other state's) view. This can be particularly true when dealing with apportionment issues.

ESTABLISH A MORE FAVORABLE SETTLEMENT PERCENTAGE BY BETTER CONTROLLING THE AUDIT ORDER

As explained above, the order of states in which you address the issue may be important. We have found you can sometimes control the audit order by using statute of limitation waivers. In other words, address the states you think are the best for establishing a winning settlement percentage by not issuing waivers. In the larger and tougher states use waivers to push the audits down the road.

WINNING NATIONWIDE MIGHT MEAN LOSING A FEW BATTLES IN THE LESS JURISDICTIONS

The question here, is "What is a win?" Is it really a win in a single state if that win leads to a less favorable result in a more important state? When dealing with a nationwide or multistate issue, sometimes you have to "sacrifice" results in one jurisdiction for the best results overall. For example, you may have an opportunity to make certain arguments in one state that gives you the best chance of being successful. However, this same argument and same presentation of facts may give rise to a liability elsewhere that dwarfs the successful results in the first state. We have seen this when crafting alternative apportionment arguments. A win should have a nationwide view and success needs to be measured by overall savings, not simply knocking one small ball out of the park. **Sometimes you have to save your best 'stuff' for the bigger games.**

IN SUMMARY: ASSESS THE ENTIRE LANDSCAPE BEFORE YOU PUT THE FIRST PLANT IN THE GROUND

The most successful way to handle a potentially nationwide issue is to create a cohesive strategy up front and take the necessary steps to follow that strategy in your local efforts.

While local expertise is always important, having a nationwide strategy that measures the risks state by state, and in total to your business, is the key to getting best overall results.

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