

Q&A With Faegre Baker Daniel's David Suess

Law360, New York (December 06, 2013, 1:26 PM ET) -- David Suess is a partner with Faegre Baker Daniels LLP and focuses his legal practice on resolving disputes involving state and local taxes, including property taxes, wagering taxes and the valuation of commercial, industrial and gaming properties for tax purposes.

Suess routinely represents taxpayers before Indiana and Illinois tax agencies and courts in a wide range of tax litigation, including complex appeals. Suess was formerly a clerk for the Honorable Ronald T.Y. Moon, chief justice of the Hawaii Supreme Court. He is a council member of the taxation section of the Indiana State Bar Association.

Q: What is the most interesting or challenging tax problem you've worked on to date?

A: The most interesting and challenging tax problems on which I have worked involved a pair of tax appeals that were moved from the traditional state forums to federal bankruptcy court. As a practitioner of state and local taxation ("SALT"), I typically represent clients before state administrative agencies (i.e., tax boards and departments of revenue) and state courts. The range of venues expanded a few years ago when a couple of clients went into bankruptcy and faced the choice of allowing years of state-tax claims to languish or to resolve them in bankruptcy court.

As SALT professionals know, it can take years for state administrative bodies and state courts to resolve tax litigation. The dollars at stake are often substantial and can be material to the success of the client. As claims languish for prior years, the same or similar claims often continue to accumulate, since each tax year typically "stands alone."

Two of my clients that were trying to reorganize in bankruptcy had multiyear tax disputes involving millions of dollars of tax and refunds per year. If successful, resolution of the state tax claims in bankruptcy would not only result in prompt resolution of disputes that might otherwise take years to resolve, but would also add substantially to the bankruptcy estates. It became clear to the debtors and creditors in these cases that resolution of the tax disputes was not only important — it was the best path forward for all concerned.

Litigating these tax disputes in federal bankruptcy court was challenging both procedurally and substantively. The bankruptcy forum is not automatically available. There are jurisdictional hurdles and parties must explain how resolution of the tax claims in bankruptcy will advance the debtor's reorganization (or resolution of the bankruptcy proceedings), often over the objections of reluctant taxing authorities, which prefer the comfort and familiarity of the traditional state forum.

In addition to procedural issues, the substantive legal issues were untested and novel, particularly for the bankruptcy court. Bankruptcy courts considering state tax challenges apply the substantive law of the state. Even if well-versed in general tax principles, there were unique aspects to state tax law in these particular cases that required us to strike the right balance between informing the judge(s) of key, controlling concepts without distracting them with state law idiosyncrasies. Ultimately, in winning the tax issues — and significant dollars — in the bankruptcy forum, we resolved the tax appeals more quickly than they might have otherwise been resolved, and our clients were in a better position with respect to the bankruptcy proceedings.

Q: Currently, what is a pressing tax concern for your clients, and how are you addressing it?

A: There are a number of pressing concerns for my clients, most of whom have significant property holdings. The first concern, which underlies most others, emanates from the growing need for tax revenue at all levels of government. I often explain — with tongue in cheek — that my practice exists at the intersection of government’s need for revenue and corporations’ desire not to pay it (really, the desire not to pay more than their fair share).

As governments seek new revenue sources or increased revenues from existing sources (e.g., increasing property tax assessments), it challenges my clients in a number of ways. First, it is not always clear why their taxes are going up when, in the real world, the value of their property might be declining, or at least not increasing. A second, and important, concern relates to the very real costs of challenging or litigating assessment or tax increases. Because legal fees are often — or at least can be — the greatest expense in such appeals, I address my clients’ concerns by offering flexibility in how we structure our fees. In all cases, I strive to listen to the client, to answer their particular concerns and to adapt to their needs.

Q: What do you anticipate being the biggest regulatory challenge in your practice in the coming year and why?

A: In the state and local tax arena, there are always new challenges in the form of amendments to existing laws and new administrative interpretations seeking to expand the reach of taxes. Occasionally, statutory changes are followed by administrative pushback, which can pose regulatory challenges.

A prime example of this phenomenon is the recent statutory change involving taxpayer burdens in assessment appeals in Indiana. Until a few years ago, taxpayers bore the initial burden of proof in all tax appeals initiated by the taxpayer. The Indiana legislature changed that with a law placing the burden of proof on assessing officials (in property tax appeals) if the assessor increased the assessed value of the same property by more than 5 percent above the prior year’s assessment.

While this change was seemingly modest, we are now witnessing — possibly in reaction to this change — an increasing tendency of county boards of review to issue sweeping and onerous subpoenas for information. In some cases, the subpoena appears to be narrowly tailored to obtain information related to the value of the property; in other cases, however, the subpoenas appear to be thinly veiled attempts to discourage taxpayers from pursuing legitimate appeals, given the cost of compliance with a subpoena request. I anticipate that this trend will continue and we will see more boards issuing subpoenas as a way to deal with taxpayer appeals, which will, in turn, require practitioners to anticipate and attempt to mitigate their impact.

Q: Outside of your own firm, who is an attorney in your practice area whom you admire, and what is the story of how s/he impressed you?

A: Thomas Atherton of Bose McKinney & Evans — my former firm. Tom has been a mentor to me and has consistently impressed me with his substantive knowledge and civil manner as we litigated cases together for more than a decade. Though I recently moved to Faegre Baker Daniels to expand and grow my practice, Tom and I continue to co-counsel for a number of clients, an unusual arrangement that would not be possible if we did not have a great relationship based on trust or if Tom were a different type of lawyer.

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