

## TAX UPDATE

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The controversial “LLC Tax” provisions, which subjected distributions of profits from limited liability companies (“LLC”) and partnerships to their New Hampshire resident owners to the Interest and Dividends (“I&D”) Tax, have been repealed as part of the budget bill signed into law by Governor Lynch on June 10, 2010. The repeal is effective for “taxable periods ending on or after December 31, 2010.” See Special Session Chapter 1, Sections 50 through 53, available at <http://www.gencourt.state.nh.us/legislation/2010/SSHB0001.html>. The result of this repeal for calendar year taxpayers is that the “LLC Tax” only applied to 2009. In recognition of this awkward ‘on again – off again’ tax structure, the Department of Revenue Administration (“DRA”) issued [Technical Information Release \(“TIR”\) 2010-006 on June 28, 2010](#).

Because the repeal is not retroactive, it does not entitle taxpayers to a refund for I&D Taxes paid or due for the 2009 tax year. However, there is currently a challenge to the LLC Tax provisions pending in Superior Court. See [Wennin, LLC v. State of New Hampshire, Dept. of Revenue Admin., Hillsborough County North Superior Court, Docket No. 10-E-0048 \(“Wennin Case”\)](#). This challenge, brought by a group of LLCs, seeks to have the tax declared unconstitutional. As discussed in our previous article, [“Now Or Never? Why LLC Owners Should Consider Filing A Claim For Refund Before It’s Too Late”](#) (May 3, 2010), there is only a short window of opportunity in which a taxpayer can request a refund of taxes paid based on a claim that the tax is unconstitutional. The request for a refund on this ground must be made within one hundred and twenty (120) days of the due date of the tax being challenged. See RSA § 21-J:29(I)(d). Because it is unlikely that the Wennin Case will be resolved within that time period, we recommended that LLC owners consider filing a refund request now to preserve their right to a refund in case the constitutional challenge is ultimately successful. The deadline for filing such a claim for the 2009 taxable year is **August 13, 2010**.

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The DRA has a standard process by which taxpayers can request a refund for taxes paid, as described in our recent article, [\*\*“The Mechanics Of Preserving Your Client’s Right To A Refund Of I&D Taxes If The “LLC Tax” Is Found Unconstitutional”\*\*](#) (June 14, 2010). However, as the article points out, the DRA may also provide for a simplified procedure in the interest of efficiency, when it expects a heavy volume of substantially similar refund claims. This often occurs when a tax has been challenged as unconstitutional and the matter is pending. In this situation, rather than dealing with each refund claim individually, the DRA may find it more efficient to put all refund claims based on the challenged tax on hold until the constitutionality of the tax is determined.

Anticipating a significant amount of I&D Tax refund claims for the 2009 tax year based on constitutionality, as spurred by the Wennin Case and the recent repeal of the LLC Tax provisions, the DRA issued [\*\*Technical Information Release \(“TIR”\) 2010-007\*\*](#) on June 28, 2010. The TIR provided instructions on a simplified procedure for taxpayers seeking a refund of I&D Taxes, permitting taxpayers to keep their refund claims on hold pending the outcome of the Wennin Case. It sets forth two streamlined methods by which a taxpayer can make a claim for refund based on the constitutionality of the LLC Tax: (1) the taxpayer can file a letter with the DRA requesting a refund which indicates that the request is based on a claim that the tax is unconstitutional, or (2) the taxpayer can file an amended I&D Tax return requesting a refund with the words “Unconstitutional Claim” clearly printed on the top portion of the return.

The taxpayer must clearly express an intent to have the refund claim held pending the outcome of the Wennin Case. ***This request must be submitted to the DRA in writing to be effective.*** If a claim or amended return has not yet been filed, the taxpayer should attach the statement to the filing. The TIR does not directly address what to do if the claim or amended return has already been filed, but it appears that filing a separate statement requesting the suspension of the refund process is necessary. In order to assist the DRA in locating the prior filing, attaching a copy of the original claim or amended return is recommended. The refund claim can be removed from hold status at any time at the taxpayer’s request.

Should you have any questions or concerns about this process, please feel free to contact us.

The Devine, Millimet & Branch State & Local Tax Practice offers this free periodic E-Mail Alert service to provide information on recent tax developments in statutory, regulatory and case law, and decisions. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at [taxenews@devinemillimet.com](mailto:taxenews@devinemillimet.com). Previous issues of the State Tax E-News, can be obtained at <http://www.dmb.com/news-and-events/newsletters.asp>.

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