

## THE MECHANICS OF PRESERVING YOUR CLIENT'S RIGHT TO A REFUND OF I&D TAXES IF THE "LLC TAX" IS FOUND UNCONSTITUTIONAL

By: Justin T. Vartanian, Esq.  
Email: [jvartanian@devinemillimet.com](mailto:jvartanian@devinemillimet.com)  
Phone: 603.695.8635

JUNE 14, 2010

Due to the number of inquiries we received on the topic, we thought it may be useful to expand upon our previous article, ["Now or Never? Why LLC Owners Should Consider Filing A Claim for Refund Before It's Too Late"](#) (May 3, 2010) by providing practical, step-by-step guidance on how to preserve your client's right to a refund if the 'LLC tax' is ultimately deemed unconstitutional. As a quick recap, a lawsuit has been filed against the New Hampshire Department of Revenue Administration ("DRA") challenging the constitutionality of the LLC tax. This case is unlikely to be resolved within the period of time taxpayers are permitted to file a claim for refund based upon unconstitutionality. The state legislature repealed the LLC tax as part of the budget bill passed in a special session on June 9, 2010 and the Governor is expected to sign this bill into law. The repeal does not apply retroactively and will not affect interest and dividends ("I&D") taxes paid for 2009. Accordingly, in order to preserve an LLC owner's right to a refund for I&D taxes paid for 2009, you need to take action soon.

First, because the claim is for a refund of taxes paid, the taxpayer must have already filed a return. This is true regardless of whether the taxpayer received an extension for filing because the 120-day statute of limitations period begins to run on the due date of the tax, April 15th, not the date the filing is due. See RSA § 21-J:29 I. Once a return is filed, there are two methods to claim a refund for I&D taxes paid: (1) filing an amended return, or (2) filing a written request for refund. There is no specific form required for a written request for refund, but it must contain an explanation of the specific grounds for your refund request. Sample language is included below in [Appendix A](#).

### Tax Practice Group Federal, State & Local

Jon Sparkman, Esq., CPA,  
Chair  
603.695.8507  
[jsparkman@devinemillimet.com](mailto:jsparkman@devinemillimet.com)

Steven Cohen, Esq., CPA, LLM  
603.695.8504  
[scohen@devinemillimet.com](mailto:scohen@devinemillimet.com)

Alexander J. Walker, Esq.  
603.695.8553  
[awalker@devinemillimet.com](mailto:awalker@devinemillimet.com)

Maurice P. Gilbert, CPA, MST  
Director of State Taxation  
603.695.8612  
[mgilbert@devinemillimet.com](mailto:mgilbert@devinemillimet.com)

Anu R. Mullikin, Esq., LLM  
603.695.8536  
[amullikin@devinemillimet.com](mailto:amullikin@devinemillimet.com)

Pat C. McHugh, Esq., CPA  
603.695.8572  
[pmchugh@devinemillimet.com](mailto:pmchugh@devinemillimet.com)

Daniel Will, Esq.  
603.695.8554  
[dwill@devinemillimet.com](mailto:dwill@devinemillimet.com)

Nicholas Forgione, Esq., LLM  
978.475.9100  
[nforgione@devinemillimet.com](mailto:nforgione@devinemillimet.com)

Patricia M. McGrath, Esq., LLM  
603.695.8537  
[pmcgrath@devinemillimet.com](mailto:pmcgrath@devinemillimet.com)

Jason E. Cole, Esq., CPA  
603.695.8566  
[jcole@devinemillimet.com](mailto:jcole@devinemillimet.com)

Harper R. Marshall, Esq.  
603.695.8645  
[hmarshall@devinemillimet.com](mailto:hmarshall@devinemillimet.com)

Justin T. Vartanian, Esq.  
603.695.8635  
[jvartanian@devinemillimet.com](mailto:jvartanian@devinemillimet.com)

DEVINEMILLIMET.COM

TAXENEWS@DEVINEMILLIMET.COM

In the interest of efficiency, it may be easier to include an amended return with your client's original return. The amended return should differ only in that it omits all I&D taxes that were listed on the original return. There is no need to calculate what portion of I&D tax was due to the changes made by the LLC tax because the claim is that the I&D tax statute, as it is currently written, is unconstitutional. An explanation similar to the one provided in Appendix A should be included with the amended return. Whether a written request for refund or an amended return is filed, it may be wise to file via certified mail in order to document that the claim for refund was received by the DRA within the 120-day statute of limitations period.

The next step depends on the DRA's response. The DRA will likely respond by denying the taxpayer's claim for refund. If so, a petition for reconsideration must be filed within sixty days of the notice of denial. The petition can be filed on Form A-101 (which is available on the DRA website at <http://www.nh.gov/revenue/faq/billright.htm> but note that the address on this form is incorrect and reflects the DRA's prior location, the address is now 109 Pleasant Street, P.O. Box 1467, Concord, NH 03302-1467) or by letter containing the following information:

- (1) name, address, and identification number;
- (2) name and address of the taxpayer's representative, if any (note that in order for a taxpayer to be represented, a Power of Attorney Form DP-2848 must be on file with the DRA);
- (3) a concise statement of the reason for appeal (such as the description provided in Appendix A), including the tax year at issue;
- (4) the action you are requesting the DRA to take, which in this case is the reconsideration of a denial of a request for refund; and
- (5) a copy of the denial of refund.

To avoid the time and expense that inevitably accompanies the hearing process, it may be best to propose that the hearing be postponed pending resolution of the current case challenging the constitutionality of the LLC tax. This will provide your client with the potential benefit of the legal challenge without the expense of litigating such a claim on their own. While postponing the hearing pending resolution of the ongoing case appears to be in the best interests of all involved, be prepared if the DRA decides to take an aggressive position and move forward with the hearing process on your individual refund claim. If this happens, you should consider speaking with an attorney to prepare for the hearing. Appeal from the result of the DRA hearing would be made to the Superior Court in the county in which the taxpayer resides or to the Board of Tax and Land Appeals.

#### Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

300 Brickstone Square  
Andover, MA 01810  
T 978.475.9100  
F 978.470.0618

43 North Main Street  
Concord, NH 03301  
T 603.226.1000  
F 603.226.1001

Depending on the volume of refund requests that the DRA receives, it is possible that the DRA will temporarily institute a summary procedure for filing refund claims. This last occurred in 1995, when the DRA was inundated with thousands of claims for refund based on the unconstitutionality of the I&D tax. Much like the current situation, there was a lawsuit pending at the time that challenged the constitutionality of the I&D tax. The DRA determined that unless the taxpayer specifically requested a hearing, all refund claims would be held pending the outcome of litigation. In order to streamline the process, the DRA issued Technical Information Release No. 95-001, which permitted taxpayers to attach a letter to their return requesting the refund, rather than completing all of the steps described above. [See N.H. T.I.R. No. 94-002](#); [N.H. T.I.R. No. 94-003](#); [N.H. T.I.R. No. 95-001](#). The letter needed to conform to the requirements for refund requests, but was the only action necessary to preserve the taxpayer's right to a refund if the tax was ultimately found unconstitutional. It is unlikely that such a situation will develop this time around based on claims for refund due to the LLC tax, but at this point it is too early to tell.

While it is impossible to predict the volume of claims for refund that the DRA will receive based on the LLC tax or the DRA's chosen method for processing these claims, following the steps described above will ensure that your client's claim to a refund is preserved if the tax is ultimately deemed unconstitutional. Should you have any additional questions or concerns about the process, please feel free to contact us.

## **APPENDIX A**

[*Name of taxpayer*] has paid \$ \_\_\_\_\_ in tax to the State of New Hampshire for the 2009 tax year pursuant to the recently amended interest and dividends tax, RSA 77:1-a, which went into effect July of 2009. Due to the amendments, the interest and dividends tax now violates several provisions of the New Hampshire Constitution. Based on these violations, [*Name of taxpayer*] is entitled to a refund of \$ \_\_\_\_\_, the entire amount of the interest and dividends tax paid for 2009.

The interest and dividends tax is unconstitutional for the following reasons:

First, the interest and dividends tax violates the equal protection guarantees of part I, articles 2 and 12 of the New Hampshire Constitution because it treats similarly situated taxpayers disparately and is not rationally related to a legitimate state interest. [See N.H. CONST. pt. I, arts. 2, 12](#); [see, e.g., Opinion of the Justices, 126 N.H. 554, 559 \(1985\)](#); [Verizon New Eng., Inc. v.](#)

City of Rochester, 151 N.H. 263, 270 (2004). Second, because the amended interest and dividends tax went into effect in July of 2009 and applied retroactively to transactions as of January 1, 2009, the tax is a retrospective law in violation of part I, article 23 of the New Hampshire Constitution. See N.H. CONST. pt. I, art. 23. Third, the tax violates part I, article 12 and part II, article 5 of the New Hampshire Constitution because it does not treat similarly situated business entities uniformly and equally with respect to the tax imposed on similar transactions. See N.H. CONST. pt. I, art. 12, and pt. II, art. 5; see also Opinion of the Justices, 128 N.H. 1, 8 (1986). Lastly, because the amended interest and dividends tax does not adequately specify the process for determining the property subject to tax, it is vague and indefinite in violation of the due process requirements of part I, article 15 of the New Hampshire Constitution. See N.H. CONST. pt. I, art. 15.

**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>.**