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Tax Policy

Each month or so, members of Crowell & Moring's state tax team sit down with a different state's top revenue official(s) for a candid conversation regarding current tax issues and career highlights. The series has a comprehensive nationwide scope. For this column, the fifth in the series, Don Griswold, Walt Nagel, and Jeremy Abrams (members of Crowell's state tax team) spoke with Barbara Brohl, Executive Director of the Colorado Department of Revenue, and John Vecchiarelli, its Senior Director of Taxation.

Crowell's Conversations: An Interview With Barbara Brohl and John Vecchiarelli of the Colorado Department of Revenue

BARBARA BROHL AND JOHN VECCHIARELLI,
INTERVIEWED BY DON GRISWOLD, WALT NAGEL, AND
JEREMY ABRAMS

Background and Career

CROWELL: Let's start with your role, and what you do, Barbara, because it's broader than just tax, right?

BROHL: It certainly is. The Department of Revenue here in Colorado really governs a lot of functions. I won't say, "Give it to Revenue, they'll take anything," but that's kind of how it has been in the past. When a

new function comes up, and it has revenue associated with it, it tends to come here.

So in addition to state tax, I have the Division of Motor Vehicles, the Lottery Division, and the Enforcement Division, which includes gaming, the automotive industry, horse racing, liquor and tobacco, medical marijuana, . . . and now we will also have adult use marijuana as well. So those are the enforcement and regulation areas I'm responsible for. We have more than 1,500 employees. We bring in more than \$11 billion in fees and taxes for the state. We were looking for a slogan for the department, and we were thinking maybe, "We fund Colorado" or something like that.

CROWELL: You've served as corporate counsel at Qwest and in other legal roles, Barb. How do you draw on those experiences now?

BROHL: I'd love to say that everything in my career has been part of one grand design, but I've actually always just fallen into things; they just seem to be the right thing at the right time. And so for me, everything I've done in my past has, I think, set me up for this role. I have a real strong customer service background. I spent 15 years in IT, and we have a ton of technology projects here. Every time we have new legislation, we have to implement it generally through technology, and I think that background has been helpful. I understand that part of the business as well. Also, I was an attorney for 18 years before taking on this responsibility, and for

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the first six years, I was a technical expert witness. So I testified for a living.

CROWELL: So do you testify across the street at the legislature on tax bills now?

BROHL: I spent more time testifying there this year than in the past. I have to testify before the Joint Budget Committee and both the House Finance and the Senate Finance Committees. But in general, for the bills themselves, we have a lot of experts in the Department that have taken on that role. This year I spent a lot more time there mainly because of Amendment 64 and the adult use of marijuana, since I was one of the co-chairs of the task force.

CROWELL: You know we're going to get back to that one, Barb! But let's turn next to you, John. You're Senior Director of Taxation — what does that mean?

VECCHIARELLI: Well, that means that I'm responsible for all of the divisions within the taxation line of business. That includes the Taxpayer Service Division, the Tax Audit and Compliance Division, which are the enforcement arms, the collection and audit functions.

CROWELL: The enforcement / collection / audit function is, as you know, of particular interest to the corporate readership of Bloomberg BNA's *Weekly State Tax Report*.

VECCHIARELLI: I'm sure it is. And I'm also responsible for the Conferees Section, which is where we start to adjudicate the liabilities, whether or not the assessment is actually due or not. I was the director of business and professional credit with Citibank's Diners Club subsidiary in Englewood, Colorado, before I joined the Department. I was recruited to the Department because they were starting a collection division. It was right after the amnesty program in 1985.

That tax amnesty program was coined "the carrot and stick approach" — the carrot being the amnesty period and the stick being this new collection division that was going to be formed and its more aggressive collection approaches. I was brought in to form that division and to develop those strategies and objectives and approaches. It wasn't really that challenging an assignment since the collection activities that preceded it were very loose and not all that aggressive. So just by putting in standardized processes and working in a more systematic approach, it was easy to achieve those kinds of outcomes without being really overbearing or heavy handed with the populous. So that's where I came into the picture.

Changes in State Tax Environment

CROWELL: What changes have you seen over the past 30 years, in terms of the evolution of the tax environment in Colorado, John?

VECCHIARELLI: If I were to editorialize on that, I think there has been a change in tax administration and taxpayer activity just as there's been a change in our society. There's greater willingness on the part of people to "push the envelope," to test the boundaries, and maybe a little less "civic duty" kind of an obligation. So yeah, I've seen a little change in that regard, but, you know, that's just part of the culture we live in. And over time I've accumulated more and more responsibility in the Department until I became a Senior Director of Tax. And that's what I do now.

CROWELL: One of the topics we were talking about at the Denver TEI [Tax Executives Institute] meeting yesterday was the history of state tax planning and governmental responses over that 30-year period.

VECCHIARELLI: Well state tax—when I first started—wasn't high on the radar screen of corporations. But they have realized that they can improve their profitability if they can reduce that expenditure.

With the change in tax administration and taxpayer activity, there's greater willingness to "push the envelope," to test boundaries, and maybe a little less "civic duty."

CROWELL: And on the other side, revenue agencies have discovered that there's potentially more government revenues to be collected if they "push the envelope" as well.

VECCHIARELLI: I think that we react more than we initiate, but yeah, there's some of that.

BROHL: One thing that we've talked about at the Department here is that it's not our role to maximize taxation or revenue collections. It's really our goal—and our role—to determine what's the appropriate, legally-required taxable amount, to address that issue, and go after that correct amount.

VECCHIARELLI: Right, not a penny more, not a penny less.

BROHL: Exactly.

VECCHIARELLI: I agree that aggressive tax administration can happen, that there's a risk of that happening, but my experience with tax administrators around the country is they all want to arrive at the right answer. They're trying to get there.

Our role is to determine what's the appropriate, legally-required taxable amount, to address that issue, and go after that correct amount.

CROWELL: We hope so! Over the years representing clients on audits and refund claims around the country, we've had some circumstances in some states where a state official will personalize the dispute. They'll fail to recognize that we're all laboring in these fields of taxation together, whether we're plowing on the taxpayer side or the government side.

VECCHIARELLI: You know, you asked me about changes I've seen over the years and I actually have seen that kind of change also. I think state tax administrators sometimes do make tax disputes personal, but I think industry does that more and more also, where it becomes a battle of wills against individuals rather than a quest for the truth.

BROHL: What's important to me—and it's something that I've done since I've gotten here—is to go back to what the statute says because to me that's really the be-

all end-all. What is our statutory authority? And so we do a really good job here at the Department of Revenue going back to the statute. Because the truth of the matter is that with agency law, the Department's interpretation is pretty much upheld as long as you don't go outside your statutory authority . . . or you don't act arbitrarily and capriciously and so as a result, we go back to what the statute says. We read it all the time and we go back to what our regulations are saying and so those form the basis for what we do.

VECCHIARELLI: I'd say that's been a good reminder to us. You're in this business long enough and you think that you remember everything, but it doesn't hurt to go back and read the statute again and make sure that you're on solid footing. Because often our memories, our recollection changes things a little bit.

CROWELL: That's so true.

VECCHIARELLI: That happens to us a lot here. It's not unusual. We'll characterize something as a nexus question one day, for example, and the next day wonder is it really a nexus question? We were having this discussion just yesterday.

With agency law, the Department's interpretation is pretty much upheld as long as you don't go outside your statutory authority or act arbitrarily and capriciously . . .

But we have to interpret the statutes in a way that is consistent with their objectives and makes sense from a policy perspective and can be administered. We've got a small office of three people who do that kind of policy evaluation.

“Mile High” Taxation

CROWELL: Another set of policy issues involves the intersection of economic development and taxation. Why should businesses come to Colorado? What's your sense of the perceived tension between legislative economic incentives for business, and the Department's mission to squeeze more tax money out of businesses? How do you wrestle with that tension?

BROHL: First, businesses are going to locate in a particular state for many reasons, only one of which is going to be taxation. So there are going to be a number of things, a number of reasons that they come here.

CROWELL: You've got mountains here in Colorado that we just don't have back in D.C.

BROHL: That and we are very much an outdoorsy state. People come to visit and tend to want to come back; this is considered one of the healthiest states in the country. I mean, we have more days of sunshine than any other state including Florida and Hawaii.

VECCHIARELLI: That was a Chamber of Commerce quote . . .

BROHL: It is, but it's great!

VECCHIARELLI: And we have a highly educated work force. And we're a technology-centric kind of a state.

BROHL: And we have an airport that provides access anywhere because it's in the middle of the country essentially. We can go to Japan, we can go to Iceland, all over the place. So there are a lot of other reasons in addition to taxation.

VECCHIARELLI: And Denver's always served as kind of a regional hub for commerce and industry throughout the Rocky Mountain west. So we think this is where it happens in this part of the country. If you want to be on the forefront, you want to be in Colorado.

There's now another reason why Denver's known as the “Mile High City.”

CROWELL: The comedians are saying there's now another reason why Denver's known as the “Mile High City.” Taxation of legal adult-use marijuana; where is this thing heading? Is it going to become a stable revenue source?

BROHL: Well, I don't think that was its primary goal, to be a significant revenue source. I think its intended goal was to regulate in such a manner that takes marijuana out of the hands of kids, cartels, and criminals. So it's an attempt to not only decriminalize, but also to regulate it in a manner that makes sure that you do address those issues.

I think there are a number of reasons why Amendment 64 was voted on favorably. From the Department's perspective, our goal is to tax it appropriately, based on what happens with the tax legislation this fall. Then John's team is going to implement the outcome of that. From the regulation and the enforcement side, it's to ensure that we have the appropriate regulatory oversight so that marijuana businesses can operate in the way the Amendment gives them the right to operate, while we also protect the State, the people in the State, and people outside the State.

CROWELL: Will the marijuana tax operate like a typical retail sales tax charged at the point of sale?

VECCHIARELLI: There'll be an excise tax at the production level, and a retail point-of-sale sales tax just on that product . . . if the voters approve it in addition to the existing sales tax for the sale of tangible personal property.

CROWELL: South Carolina had a “stamp tax” for marijuana, didn't it?

VECCHIARELLI: I think all the states did at one point. In the late '90s, there was a move to make available tax stamps for marijuana products, knowing full well that it was an illegal product.

Direct Marketing Association v. Huber

CROWELL: Okay, enough about pot. New subject: What's the Department doing in reaction to the Court's decision in *DMA*?

Editor's Note: [*Direct Marketing Association v. Huber*, No. 10-CV-01546-REB-CBS (D. Colo. 2012) (holding unconstitutional under the U.S. Commerce Clause, Colorado reporting requirements falling on out-of-state retailers to notify in-state customers and the Department

of Revenue about purchases giving rise to use tax liabilities), appeal filed 4/27/12.]

BROHL: That's still active litigation for us, but briefs were filed on both sides and you can probably glean from those what you choose to glean from those.¹

VECCHIARELLI: But I think it's fair to say we have honored the injunction. We have taken no actions to enforce the statutes. It's a rapidly evolving area of interest and the law.

BROHL: We'll see what happens.

CROWELL: Fair enough. Tell us about Colorado's latest involvement in sales tax simplification legislation.

VECCHIARELLI: We did not initiate either of those pieces of legislation. [H.B. 1295 and H.B. 1288, enacted 5/28/13.] But the sponsors of both bills approached us and asked us to work with them on trying to get it right from a practical administration perspective. It's my perspective that both of them are reasonable tax policy approaches. Colorado's often viewed and often reported to be one of the most complicated states in which to do business from a sales tax perspective.

CROWELL: Indeed.

VECCHIARELLI: The second bill [H.B. 1288] talks about a study of the sales tax base in an effort to try to achieve greater uniformity. Theoretically, we think that that's a sound approach. It's reasonable to make it easier for businesses to comply and for consumers to understand what's happening with the sales tax burden that they're bearing. The bill addresses the Marketplace Fairness Act—and from my perspective as a tax administrator, it's sound policy and reasonable to treat similarly situated transactions in a similar fashion.

CROWELL: Whether you're brick and mortar or online?

VECCHIARELLI: Right. So I think that compelling collection of a tax that's already due makes a certain amount of sense, and if this helps us move towards that objective, I think that's reasonable tax policy.

It's sound policy and reasonable to treat similarly situated transactions in a similar fashion whether you're brick and mortar or online.

BROHL: We'll see how that works out too. We're definitely watching that carefully.

VECCHIARELLI: Very carefully.

Technology Changes

CROWELL: Barb, you spoke earlier about your IT background. How will these issues of remote sales tax collection and sales tax simplification change how the Department uses technology?

BROHL: The one thing that we have done in the past year-and-a-half is really to take a systematic approach to how we address technology. The project that John

¹ See Appellant's brief; Appellee's brief filed by DMA; Corrected Amicus Curiae brief filed by MTC; and Appellant's reply brief.

worked on was very well managed. It had a project manager, there was a program office, it was really well done. Unfortunately, for the rest of the Department that was not something that was well understood. So after I got here, we took a look at those processes, and we have developed a program management office within the Department because the notion that the IT organization will do all project management is naïve. The Department needed to step up to the plate to make sure we were doing project management and project delivery in a very rigorous manner as well. So utilization of our new processes is pushing how we adopt and implement technology in the Department.

VECCHIARELLI: I agree. Those disciplines will help improve the success rates of the projects and their outcomes. But, more theoretically and philosophically, yes, technology has changed the landscape in the business community, from my perspective, for the better.

A lot of the issues that really couldn't be overcome in a paper environment can be overcome readily in a technological environment. For example, rate differentiations based upon jurisdiction. That was daunting in the past, almost impossible to achieve. Now the databases are sophisticated enough that they can do it in a split second.

BROHL: Absolutely. We have an online system that essentially takes much of that into account and so when people file their income taxes online a lot of this is addressed for them

VECCHIARELLI: And, you know, the Marketplace Fairness Act has provisions in there that require states to provide certain technological functionality to businesses to make it easy for them to comply. I think that those things all are good and the objective is to not create environments that foster non-compliance, but environments that improve the ability to comply . . . so that people of good will can do the right thing and that's what we're trying to do.

Contingent-Fee Contract Audits

CROWELL: Does Colorado use contingent-fee contract auditors? Does the Department have a policy position on that?

VECCHIARELLI: We have no stated policy position, but we have never used contingent-fee based arrangements with any of our audit resources, ever. It really was in reaction to industry's concerns. They told us they don't like that because, if you put that incentive out there with auditors, they'll push the boundaries to a level that makes it almost impossible for businesses to interact constructively with them.

BROHL: But we do participate in the MTC [Multistate Tax Commission] audit programs and that has helped us quite a bit.

We have never used contingent-fee contract auditors. There's enough low-hanging fruit.

VECCHIARELLI: And even a contract audit doesn't have to be done on contingency. It can be done on a flat hourly rate. But most jurisdictions want that auditor to be a little bit more aggressive and not just sit there for 20 hours and say I got a zero adjustment. They come up

with something. But we have never done that. There's enough low hanging fruit that you don't really have to go to extremes to find these issues.

Colorado Watches *Gillette*

CROWELL: There may be "low hanging fruit" on both sides. Everybody's watching the *Gillette* Compact litigation in California and *IBM* in Michigan. As we wait for the California Supreme Court to review *Gillette* on appeal, I assume Colorado, like every other Compact state, is looking at this and thinking about this.

VECCHIARELLI: Yeah, we are. We think that the MTC has done a lot to promote uniformity across the country and we think that's a laudable goal. The *Gillette* decision in California, I think surprised a lot of people, but it's not a final decision yet and we'll see what the final outcome is. We enacted our statute slightly differently than they did and we believe that if the case were to be litigated in Colorado based upon our facts that a different conclusion would be reached.

***Gillette* surprised a lot of people, but we enacted our statute slightly differently and believe that if the case were to be litigated in Colorado a different conclusion would be reached.**

But it's an interesting issue. You know, I think everybody was surprised. I don't know that we're all Compact experts, right? I think the movement towards the single sales factor was really intended to be business-friendly and I don't think people thought through the entirety of the situation. Or else different approaches would have been taken; I'm certain of that.

CROWELL: Can you comment on Colorado refund claims based on this issue?

BROHL: I'd just as soon not address what kind of claims we're getting and what kind of claims we're not getting because our legislation is pretty strict about confidentiality. We have a lot of non-disclosure statutes and so we really try to keep this close to the vest.

Tax Incentives

CROWELL: How about tax incentives for business expansion? The Governor recently signed H.B. 1287 to extend the income tax credit for expanding. What's your view of these credit programs from a policy perspective?

VECCHIARELLI: I'm a tax administrator and as long as the credit or the incentive can be administered and reasonably verified, I don't weigh in on the question of whether the incentive achieves the outcome the legislature was trying to achieve. That's a question the State Auditor might ask or the legislature itself might ask. If it can be administered, I'll administer it. The public policy behind it is really something for legislators to grapple about.

BROHL: Yeah, it's really the legislature's responsibility to establish that policy, it's really our role to implement that policy.

VECCHIARELLI: And reasonable people take different positions on it.

CROWELL: We're getting close to the end of our time together today. Can you share any other big issues at the Department that would interest corporate America?

BROHL: This is not your grandfather's Department of Revenue anymore. We've made a lot of strides in working with constituent groups. We work with the Colorado Society of CPAs and we were able to really address some systemic issues that we felt were causing them some problems. We recently had a meeting with them and they told us that this tax season was the easiest and the best that they have had in their relationship with the Department of Revenue. With DMV we're looking to see what things we need to do in order to address the issues that DMVs are having because if you think that the adult use marijuana is a subject of late night talk show jokes, listen for the ones that they talk about with DMV! And so we're really trying to move things in a different direction.

As we started, I told you that I had a real strong customer service background. That's really important to me because the way that I look at it, if it weren't for the folks that we provide services to, if they weren't here asking for us to provide services to them, we would have no reason to be here. The only reason we exist is to provide service to taxpayers, to drivers, to business owners, to people who want to buy a lottery ticket, etc. And so when you look at it from that perspective, there are a lot of things that we can do. So the final thing that I would want people to know is that this Department of Revenue is really looking at how we can develop process improvements, how we can improve on things, how we can do things faster and how we can do things better.

This is not your grandfather's Department of Revenue.

We're really listening to the people that we serve; we're bringing that input back and we're modifying many of the things we do. Now, I'm not going to say that means we're giving away the farm, but the way I look at it is threefold. You have to set the right expectations — tell taxpayers what they need to do in order to either get that credit or file that return or get that license. Then you have to tell them what you're going to do. And then you have to do it.

VECCHIARELLI: I will add this. I'm kind of old school and I believe in civic duty and civic obligation. The way Ms. Brohl has articulated public service, I think is the right way to approach it.

We are a government of the people, for the people and by the people. You know — my mother, my brother, my sister — they live here and they work here in Colorado and I want to provide the best environment we can for people. But I also think there's an obligation on the other side. Individuals and corporations have to understand that in order to sustain our way of living and this form of government, everybody has to operate with a sense of duty and obligation. Nobody should be operating with a hidden agenda or try to disadvantage others. We need to work together.

CROWELL: Those two remarks are a great way to end this. Thank you both very much. This was great.