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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 Commissioner of Revenue or Chief Counsel for a candid conversation regarding current tax issues as well as his or her own career. The series has a comprehensive nationwide scope. For this column, the second in the series, Walt Nagel, Don Griswold, and Jeremy Abrams (members of Crowell's state tax team) spoke with Milton Kimpson, General Counsel to the South Carolina Department of Revenue.

Crowell's Conversations: An Interview With Milton Kimpson, General Counsel to the South Carolina Department of Revenue

MILTON KIMPSON, INTERVIEWED BY WALT NAGEL,
DON GRISWOLD, AND JEREMY ABRAMS

Corporate Tax Litigation

CROWELL: As you know, Milton, the readership of Bloomberg BNA's *Tax Management Weekly State Tax Report*, like our own client base here at Crowell, is primarily large corporate clients. What percentage of corporate tax cases in South Carolina get litigated—as opposed to settling out—and what is your perspective on handling these cases, as the Department's General Counsel?

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KIMPSON: I would bet of all the corporate audits that come, less than 25 percent actually get to my area. That's probably not a firm percentage, but a small number of the overall audits actually get to the General Counsel's office. A case will come to me and the first thing that I will need to do is issue what's called our Department determination. Now, I can't count the number of times that I'll get a call from someone representing one of the companies saying, "Milton, can we come in to talk with you prior to issuing the Department determination?" I am a big believer in, "Let's talk, Let's see if we can resolve issues." If nothing else, it helps me understand your position and then it helps you understand my position and each of us can do the cost-benefit analysis. From my position, up front we establish a good level of communication.

Now, let's suppose we sit down and we can't resolve the case. I've had cases where in the very beginning I knew when I picked up the file after that initial call we couldn't resolve anything. On the other hand, I've had cases where we have continued to meet over the course of six months, maybe longer and eventually resolved issues. So we want to always let the world know, let taxpayers know that we are willing to sit down and talk even once the file has progressed to my office.

If we can't resolve the case, then we're in litigation and we file the Department determination and you eventually have to request a contested case hearing at

our administrative law court. So of that 25 percent of the audit files that get to my office, I would bet in the corporate world, I'd say only a third of that number actually gets to hard litigation. And I call it hard litigation because we're actually in court. And as you know, even though we have begun the litigation process, we've started discovery, and we're hurtling toward trial, that doesn't mean we can't settle.

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CROWELL: There are situations where, as you know, taxpayers decide they really want a court to decide the issue, they really want to go all the way, so to speak.

KIMPSON: Of course. We respect that. We understand. You know, the idea is to get to a fair resolution. If you have a position that you feel strongly in that there is no compromise, we understand that. And quite frankly, that's why the Office of General Counsel exists. So that's fine and we understand that. We've got to be cordial; we've got to work together. I think we all understand there are certain issues that we can't resolve ourselves and we need a court to decide for us. That's why the courts are there; we're all part of the system and we just have to try to make the system work.

We've had litigation, I think, where there are just genuine disagreements about a basic issue. For instance, if you'll go to the hotel accommodation tax, sales tax on accommodations, there was just a genuine disagreement. We believed that the online travel companies should include the tax; they didn't. That litigation was as painless as you could ever believe. We didn't fight over discovery; we conducted discovery. We had a spirited trial, but nobody left the trial fighting, nobody left the trial upset. It's just the process.

CROWELL: You've litigated *TravelScape*, *Emerson Electric*, *American Petroleum*, etc. Based on your rich background, can you share with our readers any interesting stories?

KIMPSON: I don't know about a “rich” background. The interesting thing about the *TravelScape* decision is this: We conducted one deposition which, because of some scheduling problems, had to occur over the telephone. *TravelScape's* witness was in Las Vegas and we originally had scheduled to go to Las Vegas and we were excited about that idea. This kid from South Carolina, I'm going to Las Vegas to conduct a deposition. Something happened and we were not able to go. So . . .

CROWELL: I bet you don't get a lot of sympathy on the home front when you say you're going to Las Vegas for work.

KIMPSON: Not at all! So, the schedules just wouldn't mesh. So we literally conducted over the telephone, in one day, an eight-hour deposition. Now I know things are done electronically, and this wasn't that long ago, but we're a state agency and therefore we have certain constraints. The better way to do that would've been to

conduct a video conference deposition. We instead did it on the telephone, which meant that I had to get my exhibits to Las Vegas. So I “FedEx” all this stuff the day before. The day of the deposition we didn't know where the package was. Somehow or another, only because I think the court reporter literally went by FedEx and picked the exhibits up, we were able to get it done. The witness who was just the kindest person in the world. I mean, think about being a witness there for eight hours. Just the kindest, but it went without a flaw. Of course, nobody was there from the Department of Revenue on-site. So we had no idea what kind of reactions the witness was giving, you couldn't see anything. But it was just amazing in retrospect that it all worked out.

Exercising the Department's Discretionary Authority

CROWELL: A couple years ago, we were with a client in your big conference room, meeting with you and your team the morning that the *Media General* case came down. One of your young attorneys came in and — with apparent delight — announced to you: “We lost *Media General!*” That case, establishing the possibility of Departmental approval of a discretionary change from separate-entity filing to unitary-combined filing, has significant implications for the Department and for taxpayers. What do you see as the future of combined reporting (taxpayer-requested or Department-required) in South Carolina?

KIMPSON: *Media General* probably was one of the most important cases in South Carolina . . . second, if second, to the *Geoffrey* case. It's a very important case. The lawyer in our office who tried that case and who argued it all the way to our Supreme Court, she was so upset that it didn't turn out “right,” but she did an excellent job the entire time.

It's probably, again, one of the most important cases. We had a position — that the Department did not have authority to grant combination to a taxpayer who requested it. We believed it to be right because we were, what we would refer to as a separate entity state. That's what we had done, that's what we believed the law said.

“*Media General* probably was one of the most important cases in South Carolina . . . second, if second, to the *Geoffrey* case.”

Now, that doesn't mean that we are unhappy with the result because sometimes you need a court to clarify what the law is. In this case, the court clarified that yes, Department, you have the ability to go to an alternate apportionment method to include combined reporting. It also allows — under the terms of the statute — a taxpayer to come forward to the Department suggesting . . . well, “One of the standard formulas does not fairly tax us. Can we use something different?” So the *Media General* decision, aside from our initial concern about losing, opens an opportunity, opens an ability to get to a fairer result.

When you think about it, that's all the tax agency, any taxing agency, should really want, to get to the fairest result.

CROWELL: Yes, too often I think in the last, I don't know, 10 or 20 years, we've seen both the IRS and some of the state agencies move away from "getting to the right result" to the "let's maximize revenue" approach. Since *Media General*, has the Department exercised its discretion and granted a taxpayer's request to file based on combined reporting?

KIMPSON: Let's just suppose we've audited a taxpayer. And we find in the course of that audit that we'll issue an assessment. And we'll continue to work on the issue. We'll find that really a combined approach may be the better route. And we will eventually resolve the case based on that. I don't know that I can say from my standpoint whether taxpayers have requested combinations and we have then granted it on the audit level. That is possible. Certainly from what I have been seeing, we have considered combinations in some of the existing audits and said, well, you know, this makes sense for everybody, let's do this. So, as a taxpayer, if you come in with a good faith belief that the standard apportionment formula does not work in your case, let's consider it.

CROWELL: Another important case is *CarMax*, which involves a company that both licensed intangibles to the group and operated the retail business in many states – a structure sometimes called a "second generation intangibles holding company." The Department seeks to cut the company in half, ignoring the part with all the multistate operations and focusing instead on the half that looks a lot like a first generation IHC, like Toys R Us' subsidiary, Geoffrey. Before the court got to this "bifurcation" issue, though, it dealt with the "burden of proof" issue for making discretionary adjustments. What can you tell us about the case?

KIMPSON: Well, once the Courts of Appeals rendered its decision, both parties filed a petition for certiorari at our Supreme Court. And right now we're just waiting on the court to either grant or deny cert. I think, both from the taxpayer's standpoint and from the Department's standpoint, we would like for the court to grant cert. Of course, from the Department's standpoint, we think there needs to be clarification on the burden of proof issue.

And I'm sure if you talked to the taxpayer, they think there are some other issues that need to be dealt with. But then again we go back to how we kind of started with this idea. Sometimes the court just needs to help parties figure out what the correct law is so everybody can be on the same sheet of music.

The Department then will use whatever happens in *CarMax* going forward in its taxing and auditing, and taxpayers will have some guidance on how to do business in South Carolina. So it's certainly not a bad thing for the court to be taking up this issue.

Safeguarding Private Taxpayer Information

CROWELL: Unfortunately, the Department recently became the victim of a cyber attack. Can you share anything about new security programs?

KIMPSON: I can't tell you the specifics, but yes, I am intimately involved. Nobody's immune. From the federal government to banks, entities that have the highest

level of security, who have the funds to devote to the newest software. Everybody's at risk.

What I would tell the world about this breach is this: It happened, and immediately South Carolina took steps to try to protect taxpayers and to secure our systems. We will never be able to eliminate all risk completely, but we put in — almost immediately within, oh gosh, within two weeks — a credit protection plan for taxpayers who had been affected. There is legislation pending in our general assembly to provide even greater protections for taxpayers. So first our focus was on the taxpayers. At the same time, we also had a focus on making sure data was secure.

“The Department then will use whatever happens in *CarMax* going forward in its taxing and auditing, and taxpayers will have some guidance on how to do business in South Carolina.”

CROWELL: Well, we certainly wish you and the Department the best in your efforts to provide stronger safeguards for taxpayers.

Life Before Taxes

CROWELL: Let's turn to you and your career for a few moments. We've each taken different paths to get to where we are today. How did your legal career get started?

KIMPSON: Interestingly enough, I came out of the Army. I went to the JAG Corps to get litigation experience. I wanted to be a lawyer years ago because I wanted to stand up and try cases. So the JAG Corps seemed to be an attractive vehicle to do that and I in fact did try lots of cases in the JAG Corps. We tried all kinds of things, even drug cases. So, I got a lot of good experience, good litigation experience in the Army.

After I left the JAG Corps, I went into the private practice of law in Columbia, South Carolina. I started out with a medium-sized firm, was an associate there and enjoyed it, learned a lot. Then I got the bright idea that I could do it better by myself and went into a small two-man office, enjoyed that for a while. Then for about four years I was just a solo practitioner. I handled whatever came down the road. A lot of family law litigation, civil litigation, everything litigation. If you needed somebody to go to court, you hired Milton Kimpson.

CROWELL: So did you handle many tax cases in those early years?

“If you needed somebody to go to court, you hired Milton Kimpson.”

KIMPSON: Believe it or not, no tax cases. One day my wife called and she told me there was an opening at the South Carolina Department of Revenue. I said "I don't know anything about taxes, why would I want to work

at the Department of Revenue?” But what the Department needed at the time more so than tax knowledge was lawyers who had litigation experience, someone who was willing to go into court and try cases. I fit the description and the position would allow me to see my family more often. So I took the job.

Rising Up the DOR Ranks

CROWELL: From the Army to the Department of Revenue. That’s quite a transition! Tell us about your rise up through the ranks at the Department.

KIMPSON: I started out in 2003 as counsel for revenue litigation, and tried cases a lot. I then became what was referred to as a managing attorney and there I had about three, sometimes four lawyers, who reported to me, but essentially I would — in addition to my own case load — manage them as they moved through and tried cases. Did that for probably two-and-a-half years, that’s how I then became the team leader of the Honors Litigation Program.

CROWELL: What’s that?

KIMPSON: Essentially, these are people who are graduating from law school in May or whenever graduation takes place, they sit for the Bar, the day after the Bar they come work for the Department of Revenue and as soon as they get their Bar results, which normally would take another two months, we put them in court. I was the team leader of that group for about three and a half years – and then the perfect storm occurs, the general counsel retires, and the opportunity presented itself.

So a perfect storm occurs. Yes indeed. By this time I get hired as the general counsel for litigation. So it really is an amazing story.

CROWELL: Thank you for sitting down with us today, Milton. See you again soon.

KIMPSON: I appreciate the opportunity to do this. South Carolina has been beaten up a lot lately and an opportunity for us to sit down, kind of in a conversational manner, and get our story out, that’s important to us. Thank you.