

## TAX CONTROVERSY

The principal goal of the Hodgson Russ attorneys working in the area of tax dispute resolution is to win your case. Our tax attorneys represent clients in tax disputes from the audit level through the appellate process and in the court system. We work at the local, state, federal, and international levels, and in all types of tax disputes—business tax, personal income tax, sales and use tax, estate and gift tax, international tax, and controversies under international treaties.

We strive to find innovative solutions to seemingly impossible situations. Focusing on developing a sound strategy, we seek to resolve tax disputes successfully without litigation. But when litigation is required, our record is exemplary. In some instances where the law or interpretive authority has run counter to our clients' interests, we have sought—and in many instances obtained—policy, regulatory, or statutory changes. We often work closely with other advisors, such as in-house counsel or financial advisors. We can handle as much or as little of a matter as appropriate. Whether the client is an individual or a *Fortune* 500 company, our tax attorneys can work one-on-one with the client or become a valuable addition to a team of professionals.

Our tax attorneys have collective experience in virtually every facet of tax law. We also have attorneys who practice in a full range of other business areas, including corporate and securities, intellectual property and technology, labor and employment, and employee benefits. Our multifaceted approach affords us the opportunity to advocate for our clients from virtually every angle, as tax disputes are rarely just about tax law.

Hodgson Russ tax attorneys are frequently asked to give presentations for prestigious legal and business organizations. We are very active in the American Bar Association, key positions on the executive committees of the New York State Bar Association and various tax committees, and teach tax courses at major law schools.

Our tax dispute resolution attorneys are on the forefront of the law, writing the books other practitioners read. These publications were written by our attorneys:

- *Contesting New York State Tax Assessments, 4th Edition*, New York State Bar Association
- *2019 Guidebook to New York Taxes* (CCH)
- *New York Residency and Allocation Audit Handbook* (CCH)
- *New York State Sales and Use Tax Answer Book* (CCH)

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### Professionals

#### Attorneys

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William Turkovich  
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Andrew Wright  
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- *What to Expect in a Sales and Use Tax Audit* (Hodgson Russ)
- *What to Expect in a Residency Audit* (Hodgson Russ)

For information about how to obtain any of these handbooks, please click [here](#).

Other publications written or edited by our tax attorneys include:

- "Broadening New York's Decanting Statute" (*New York Law Journal*)
- *Canadian Tax Highlights* (a monthly publication from the Canadian Tax Foundation)
- *Annual Guidebook to New York Taxes* (CCH)
- A monthly column in *State Tax Notes* (a national publication about state and local tax)
- *New York Residency & Allocation Audit Handbook* (CCH)
- *Canadian Companion to 1040 Preparation and Planning Guide* (CCH)
- *Practice Advisor* (LexisNexis)

In addition, Paul R. Comeau and Tim Noonan, received the Burton Award for Excellence in Legal Writing for an article they wrote about executive compensation and employer withholding. Hodgson Russ LLP has been awarded prestigious "Best Law Firms" rankings by *Best Lawyers/U.S. News & World Report* in the categories of National Tier 2, Tax Law and Litigation – Tax, Metropolitan Tier 1, Tax Law, and Metropolitan Tier 2, Litigation – Tax.

## Experience

Hodgson Russ represented major hotel chains in litigation against the New York State Department of Taxation and Finance concerning more than \$20 million in refund claims for sales taxes paid on reimbursements related to hotel loyalty and rewards points programs.

Hodgson Russ represented a client that was certified as an New York State Empire Zone business in its challenge to the state's retroactive denial of tax benefits. The New York Court of Appeals ruled that it was unconstitutional to take away the previous year's Empire Zone tax credits from businesses that were kicked out of the program when the state changed the rules of participation midstream.

In *Robinson Knife Manufacturing Co., Inc. v. Commissioner*, the U.S. Court of Appeals for the Second Circuit agreed with Hodgson Russ's client's position that royalty payments for using licensed trademarks in connection with sales of kitchen tools were immediately deductible. The court noted that the position taken by the IRS and the U.S. Tax Court would result in exactly the problem Congress enacted uniform capitalization rules under Internal Revenue Code Section 263A to fix. Under the court's decision, where a producer's royalty payments are 1) calculated as a percentage of sales revenue from inventory and 2) are incurred only upon the sale of that inventory, they are immediately deductible. The court's decision, which is binding in the Second Circuit, provides legal authority for taxpayers and presents litigation risks for the IRS outside of the Second Circuit. The U.S. Treasury has repeatedly identified issuing regulations on the treatment of sales-based royalties as a priority project. If the Treasury does issue such regulations, their validity would be subject to judicial

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review. Also, the IRS's interpretation of the regulations in specific cases would be subject to review. In *Robinson*, the Second Circuit determined that the interpretation of a relevant regulation by the IRS and the Tax Court was contrary to its plain meaning. If the court had agreed with the IRS and the Tax Court that Robinson's royalty payments were not immediately deductible, the company would have been required to capitalize the costs by adding them to inventory. Some of the costs would have been capitalized to ending inventory and deductible only in later tax years. As a result, even though Robinson's royalty costs were based on sales of kitchen tools, and kitchen tools sold were clearly not in ending inventory, Robinson would have been required to capitalize the costs. Any business that incurs sales-based royalties should consider the possible application of the court's holding that sales-based royalties that meet the requirements in the court's decision are immediately deductible.

Hodgson Russ served as tax counsel in a New York State Division of Tax Appeals case in which we successfully proved that a commercial bridge painting project in New York City satisfied New York State's rules for capital improvements. The litigation included a hearing before an administrative law judge and a successful appeal to New York's Tax Appeals Tribunal.

On behalf of two nonresident S corporation shareholders, a Hodgson Russ team led by Christopher L. Doyle successfully litigated to decision a case involving a stock sale with an IRC §338(h)(10) election. Such elections treat stock sales as deemed asset sales for federal income tax purposes. Chris was able to convince the Tax Appeals Tribunal to ignore the federal income tax treatment. Ultimately, the decision was overturned legislatively, but not until Chris's client realized the benefits of the favorable decision.

After a protracted litigation and multiple unfavorable rulings for the state, the New York State Department of Taxation and Finance capitulated in its attempt to impose approximately \$85,000 in sales tax on the services of a Hodgson Russ client. Moreover, after reviewing the merits of the case, the New York State Supreme Court judge ordered the Tax Department to pay our client approximately \$159,000 in attorneys' fees under the Equal Access to Justice Act, which permits the award of fees in cases where government action is not substantially justified.

Hodgson Russ attorneys represented the victorious taxpayer in a highly anticipated decision in a tax residency case before the New York Court of Appeals. In *John Gaied v. New York State Tax Appeals Tribunal*, the court agreed with the position advocated by Hodgson Russ on behalf of Mr. Gaied and established a new rule for determining when individuals domiciled outside of New York may still be taxed in New York as "statutory residents." This was the first case in several decades to prompt New York's highest court examined the scope and extent of New York's residency rules. The case has been widely cited in the press, including the *Wall Street Journal* and *Law360*.

### In the News

New York Tribunal Says Siblings Received Distributions, Not Loans  
*Tax Notes*, March 4, 2022

Coronavirus Resource Center

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How the New Tax Rules Affect Taxpayers

October 26, 2020

Tax Dispute Resolution Heats Up

*Buffalo Law Journal*, November 17, 2014

Hodgson Russ Partner Timothy P Noonan Columnist for *State Tax Notes*

March 27, 2007

Hodgson Russ Offers Clients the Services of a New Tax Dispute Resolution Group

October 14, 2004

### Press Releases

Fifty-Nine Hodgson Russ Attorneys Ranked in 2022 Edition of Upstate New York Super Lawyers

*Hodgson Russ Press Release*, August 23, 2022

Two Hodgson Russ Attorneys Selected to Author Monthly Columns in Tax Notes State

*Hodgson Russ Press Release*, April 27, 2020

Attorney Timothy Noonan Lends Tax Litigation Know-How to Major Legal Publication

*Press Release*, October 21, 2015

### Publications

IRS Extends 2020 Individual Income Tax Return Filing and Tax Payment Deadline from April 15 to May 17, 2021

*Hodgson Russ Federal-International Tax Alert*, March 18, 2021

IRS Notice 2020-23 Provides Additional Deadline Extension Relief

*Hodgson Russ Federal-International Tax Alert*, April 10, 2020

Trump Signs CARES Act – Federal Tax Law Changes

*Hodgson Russ Federal-International Tax Alert*, March 27, 2020

IRS People First Initiative Provides Administrative Collection and Other Relief

*Hodgson Russ Federal-International Tax Alert*, March 26, 2020

IRS Announces Federal Income Tax Payment Deferral

*Hodgson Russ Federal-International Tax Alert*, March 19, 2020

Tax Advantages for Sales-Based Royalties

*CPA Journal*, September 2011

Manufacturer Deductions for Sales-Based Expenses

*IndustryWeek*, October 11, 2010

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IRS and Tax Court Deny Charitable Deduction for Historic Preservation Easement

*Tax Dispute Resolution Alert*, August 11, 2010

Be Prepared For New York State Tax Audits

April 2008

New York's Less Kind and Gentle Tax Department -- Preparing for Criminal Investigations

*State Tax Notes*, March 31, 2008

### **Presentations & Events**

Tax Strategy Series: Domicile and State Residency

March 22, 2023

A Practical Introduction to Nontaxable Corporate Reorganizations

ABA Section of Taxation 2022 Fall Tax Meeting

Dallas, TX, October 13, 2022

2020 Hodgson Russ/CCH (Summer) Tax Webinar Series

Wednesdays, May 6 - June 17

Update on IRS Foreign Information Reporting and Tax Prosecutions

The Harvard Club NYC 35 W. 44th Street, New York, NY, October 30, 2019

In the Wake of Wayfair and the Tax Cuts and Jobs Act

Aurora, Colorado, October 24, 2019

NYSSCPA Southern Tier Chapter - Annual Taxation Conference

Binghamton, NY, October 24, 2019

2019 Summer Tax Series

Understanding New York State Tax Issues of 2019

The Harvard Club 35 W. 44th Street, New York, NY, June 12 - August 7, 2019

New York State Tax Update

Brooklyn, NY, January 21, 2016

Hodgson Russ Summer Tax Series: Covering the Most Important State Tax Issues in 2015

The Harvard Club, 35 W. 44th Street, New York, NY, July 29, 2015

Canada/U.S. Cross-Border Estate and Income Tax Planning

Toronto, Ontario, September 17, 2014