



Practical Tax Advice for Educational Institutions

Today's Program – October 27, 2016
Speaker Biographies



Brian O'Connor co-chairs the Tax and Wealth Planning Group for the national law firm of Venable and practices in its Baltimore, MD, Washington, DC and Tysons Corner, VA offices. In addition to his role of managing the Tax and Wealth Planning Group, Mr. O'Connor provides sophisticated tax and business advice to publicly-traded and closely-held businesses and their owners. His practice focuses on foreign and domestic tax matters for partnerships, limited liability companies, joint ventures, both C and S corporations, real estate investment trusts ("REITs") and regulated investment companies ("RICs"). He is also regularly consulted by wealthy individuals and entrepreneurs on federal and state income tax matters and federal estate and gift tax issues.

Mr. O'Connor handles all types of tax matters for clients of all sizes. As a transactional tax attorney, he works on transactions ranging from small sales transactions to merger or acquisition transactions in the billions of dollars. Similarly, as a tax controversy attorney, he has represented both individual clients in small audit matters and publicly-traded corporate clients in tax disputes with amounts at issue in excess of one billion dollars. His clients often find his in-depth knowledge and broad experience very helpful in addressing both their everyday tax needs and their most difficult tax problems.



Michael Phillipou is a partner in the firm's Real Estate Practice Group. He regularly represents sophisticated clients in a wide variety of real estate transactions including the acquisition, sale, design, construction, financing, management, leasing and zoning/land use planning of real property.

Mr. Phillipou represents private developers, investment funds and property owners in complex commercial transactions. Mr. Phillipou has also developed a specialty representing world class cultural, educational and governmental clients and is conversant in the unique issues that face them.



Michael Bloom is a member of Venable's Tax and Wealth Planning Group. He counsels public and private companies on various corporate transactions, including mergers & acquisitions, financing transactions, licensing matters, and joint ventures. Mr. Bloom works closely with the firm's Los Angeles office to provide U.S. federal, state and local tax planning services to many prominent entertainers and professional athletes. He has experience in domestic and international tax planning for such clients, including advising on both "inbound" planning and "outbound" transactions (e.g., U.S. film directors working on location in the U.K.) and activities all over the world. Mr. Bloom also has significant tax controversy experience and has advocated on behalf of public companies, small businesses and individual clients involved in controversies before the IRS.

A decorative graphic on the left side of the slide. It features a cluster of colorful, irregular shapes in shades of blue, green, and orange, resembling bubbles or stylized flowers. Below this cluster is a vertical wooden pencil pointing upwards. The background of the slide is white with horizontal blue lines and a vertical orange line on the left side.

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Law & Education Forum

a discussion series focused on legal issues important to universities, secondary schools, independent schools and other degree-granting institutions



Law & Education Forum

Practical Tax Advice for Educational Institutions

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Brian O'Connor

Partner, Co-chair – Tax and Wealth Planning
bjoconnor@Venable.com
410.244.7863

Michael Phillipou

Partner – New York Real Estate, Education Industry
mcphillipou@Venable.com
212.370.6237

Michael Bloom

Counsel – Tax and Wealth Planning
mabloom@Venable.com
212.370.6283



Road Map

- Brief overviews of:
 - Federal Income Tax Exemptions
 - New York Real Property Tax
- The Exemptions: Can I Do That?
- Case studies and Discussion
- Q&A
- Reference Materials

Questions?



Brian O'Connor
Partner, Co-chair – Tax and Wealth Planning
bjconnor@Venable.com
410.244.7863



Michael Phillipou
Partner – New York Real Estate and Education groups
mcphillipou@Venable.com
212.370.6237



Michael Bloom
Counsel – Tax and Wealth Planning
mabloom@Venable.com
212.370.6283



For Your Reference



Federal Income Tax: Exemptions

- “An organization described in subsection (c). . . shall be exempt from taxation. . . .” IRC § 501(a)
- subsection (c)(3):
 - “Corporations. . . Organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes. . . .”
 - Generally, the term “exclusively” has been interpreted to mean “substantially”
 - Thus, an organization will not automatically lose its exemption if it earns some revenue from an unrelated trade or business.
 - As a practical matter, given the ambiguity in the meaning of “substantial”, schools should strive avoid activities that are inconsistent with its tax-exempt educational purpose
- Tax-exempt organizations are eligible to receive tax-deductible contributions under IRC § 170



Federal Income Tax: Advocacy of Viewpoints

- Advocating a particular viewpoint will not prevent an organization from qualifying for exemption as educational so long as the organization presents a sufficiently full and fair exposition of the pertinent facts so as to permit an individual or the public to form an independent opinion or conclusion.
- If the organization's principal function is the mere presentation of unsupported opinion, the treasury regulations conclude that the organization is not educational.
- Rev. Proc. 86-43 (the "Methodology Test")



Federal Income Tax

- Rev. Proc. 86-43 (the “Methodology Test”)
- Four Factors
 - (1) Presentation of viewpoints or positions unsupported by facts is a significant portion of the organization’s communications.
 - (2) The facts that purport to support the viewpoints or positions are distorted.
 - (3) Presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
 - (4) The approach used in the organization’s presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.
- The educational methodology test now takes into account the materials on the organization’s website (see *Nationalist Foundation v. Comm’r*, TCM 2000-318 (2000))



Unrelated Business Taxable Income (UBIT)

- General Rule: Tax-exempt organizations must still pay Federal income tax (at regular rates) on net income earned from a trade or business unrelated to the purpose for which the organization was granted exemption.
- Form 990-T (Must file if have > \$1,000 UBIT).
- 3-Pronged Test:
 - (1) "Trade or Business" (For Profit = Per Se T/B).
 - (2) "Regularly Carried On" (e.g., Occasional Bake Sale; Car Wash, etc.)
 - (3) Not Substantially Related to its Tax-Exempt Purpose (Facts and Circumstances test).



Unrelated Business Taxable Income (UBIT)

- What is related to an “educational” purposes?
 - The goal of “making money” to be used in the organization is insufficient.
 - The for-profit activity must, in and of itself, “contribute importantly” to the educational mission.



Unrelated Business Taxable Income (UBIT)

- Exceptions:
 - Passive Investment Income
 - Royalties and Licensing Arrangements
 - Rental Income



New York Corporate Franchise Tax

New York (and out-of-state) corporations are taxable on net income allocable to New York at the rate of 6.5%

- Non-Profit Exception

- Non-stock corporations organized “other than for profit” are exempt from the Article 9-A general corporation franchise tax if they are operated on a nonprofit basis, and no part of the net earnings of the corporation inures to the benefit of any officer, director, or member. [NYCRR 20 §1-3.4\(b\)\(6\)](#)

- Presumptions based upon federal status

- The franchise tax regulations provide a presumption that a corporation exempt from tax under IRC §501(a) is also exempt from the state franchise tax.
- If the IRS denies the corporation the exemption, the corporation is presumed liable for state franchise tax. [NYCRR 20 §1-3.4\(b\)\(6\)](#)

- Revocation

- Generally, the Department will follow a determination of the IRS denying or revoking exemption from federal taxation under the Internal Revenue Code. [NYCRR 20 §1-3.4\(b\)\(6\)](#)



New York State and Local Sales Tax Exemption

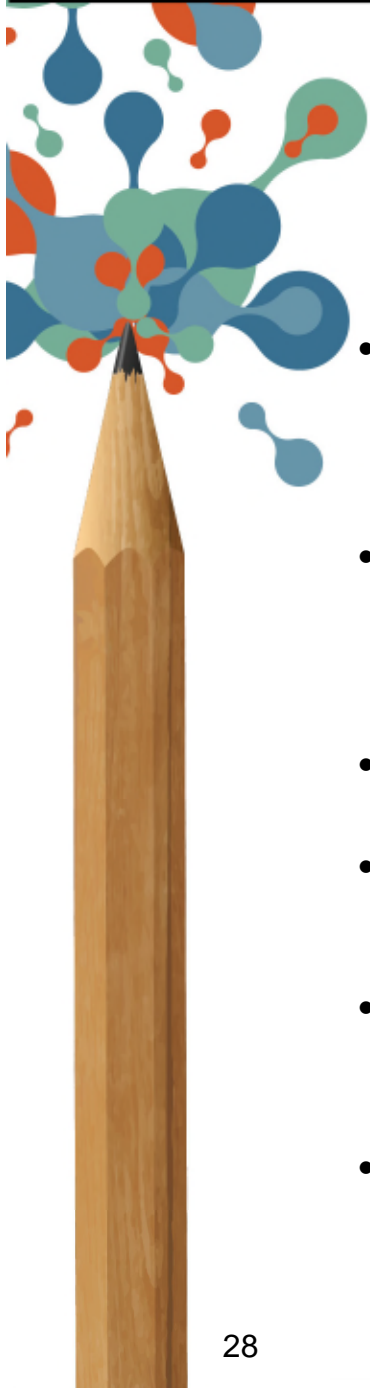
General Rule: Vendors of tangible personal property in New York are responsible for collecting sales tax from purchasers at the rate of 8%

- Nonprofit educational organizations are exempt from tax. The exemption extends to any sale or amusement charge by or to any of these organizations. These organizations are also exempt from use and occupancy tax. [N.Y. Tax Law §1116\(a\)\(4\)](#)
- In order for an educational institution to be exempt, it must file a completed application form with the Department of Taxation and Finance and prove that it meets the statutory requirements. [NYCRR 20 §529.7\(a\)](#)
- In addition to the application for exemption, the organization must submit specified documents. [NYCRR 20 §529.7\(f\)\(2\)](#)
- When the application is approved, the Department issues to the applicant a numbered exempt organization certificate. [NYCRR 20 §529.7\(f\)\(6\)](#)



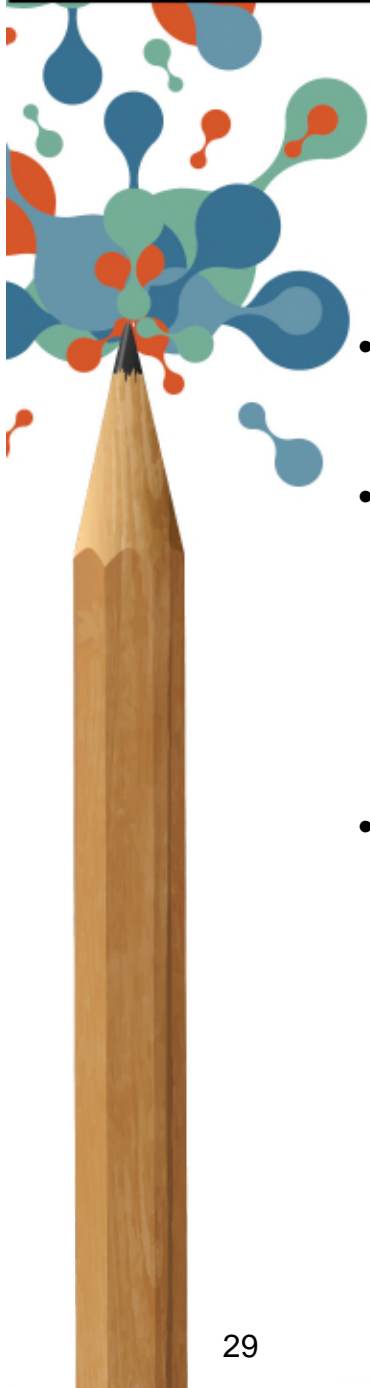
New York State Real Property Taxes

- New York property taxes apply to all real property in the state (except for property that is specifically exempted by statute)
- Current rate of 10.574% - 19.994% of assessed value based on property use (class) type
- Nonprofits exempt – mandatory class: religious, charitable, hospital, educational or moral or mental improvement of men, women or children. [N.Y. Real Prop. Tax Law §420\(a\)](#)
- Federal exemption not sufficient
- 2 Prongs to Exemption: (1) Corp-Level and (2) Use Test



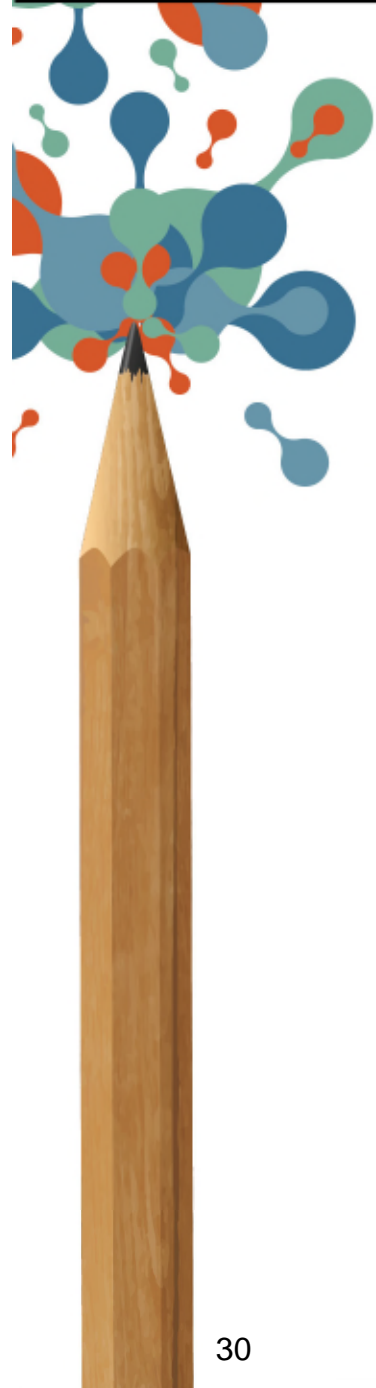
N.Y. Real. Prop. Tax Law §420: The Exemptions

- Use by nonowner: The exemption survives the use of property by an exempt corporation other than an exempt owner, if moneys paid by the user do not exceed a proportionate share for carrying maintenance and depreciation charges. [N.Y. Real Prop. Tax Law §420-a\(2\)](#)
- Idle real property: Idle real property of an institution is exempt if suitable construction is in progress or contemplated or if the property is held subject to reversion to the grantor in the case an unsuitable building is constructed. [N.Y. Real Prop. Tax Law §420-a\(3\)](#)
- Use as polling place: Use as a polling place does not impair the exemption. [N.Y. Real Prop. Tax Law §420-a\(4\)](#)
- Real property partially devoted to exempt purposes: Real property partially devoted to exempt purposes is only exempt to the extent of the exempt purposes. [N.Y. Real Prop. Tax Law §420-a\(2\)](#)
- Property used for civil defense purposes: Property of a nonprofit educational organization that is used for civil defense purposes is exempt from tax. [N.Y. Real Prop. Tax Law §420-a\(2\)](#)
- Specially chartered schools: Specific specially chartered schools are exempt from tax. [N.Y. Real Prop. Tax Law §420-a\(7\)](#)



N.Y. Real. Prop. Tax Law §420: The Exemptions *continued*

- Stadium facilities: Stadium facilities built with state funds that are owned by a corporation organized solely for educational purposes are exempt from tax. [N.Y. Real Prop. Tax Law §420-a\(9\)](#)
- Fraternal organizations: A fraternal organization, the income of which is used solely for asylums, homes or schools for its members, is exempt from tax. N.Y. Real Prop. Tax Law §428 Property used in the START-UP NY Program: Property in a tax-free NY area that has been approved for the START-UP NY program under Article 21 of the Economic Development Law is exempt from tax. [N.Y. Real Prop. Tax Law §420-a\(2\)](#); [New York Technical Service Bureau Memorandum No. TSB-M-13\(7\)C, 10/22/2013](#)
- [Specific exemption: An exemption is allowed for real property, the fee of which was acquired on March 23, 1994, under a mortgage foreclosure sale conducted by the Federal Deposit Insurance Corporation by a corporation or association organized exclusively for educational purposes, and which has been used exclusively by the corporation or association for carrying out educational purposes on the property since the date on which the fee title was acquired by the corporation or association, and is currently being used for such purposes. (New York City can cancel and annul any unpaid real property taxes that accrued on the property before the date the fee title was acquired by the owner, along with any accrued interest.) [N.Y. Real Prop. Tax Law §420-a\(12\)](#)



Contact Us



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GOVERNMENT EXPERIENCE

Attorney-Advisor,
Internal Revenue Service, Office of Chief Counsel

BAR ADMISSIONS

Maryland
Virginia
District of Columbia



Brian O'Connor

Partner, Co-chair – Tax and Wealth Planning
bjoconnor@Venable.com
410.244.7863

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Transportation and
Transportation Infrastructure
Education

BAR ADMISSIONS

New York and New Jersey

EDUCATION

J.D., Boston College Law School, 2004
Vice President, Domestic Violence Advocacy Project
B.A., cum laude, University of Richmond, 2001
Dean's List, Phi Beta Kappa, Golden Key National Honor Society



Michael Phillipou

Partner – New York Real Estate, Education Industry

mcphillipou@Venable.com

212.370.6237

Michael Phillipou is a partner in the firm's Real Estate Practice Group. He regularly represents sophisticated clients in a wide variety of real estate transactions including the acquisition, sale, design, construction, financing, management, leasing and zoning/land use planning of real property. Mr. Phillipou represents private developers, investment funds and property owners in complex commercial transactions. Mr. Phillipou has also developed a specialty representing world class cultural, educational and governmental clients and is conversant in the unique issues that face them.

Mr. Phillipou's experience includes (among others) representing:

- Archdiocese of New York in all aspects of its construction and development of several of its properties throughout the state of New York;
- New York Law School in construction related matters;
- National Railroad Passenger Corporation (Amtrak) in connection with the construction of a concrete casing preserving the alignment of a new Hudson River crossing tunnel beneath the Hudson Yards Development including extensive negotiation with the developer of Hudson Yards, the MTA and LIRR;
- National insurance company in entering into a joint venture for the acquisition, construction and development of three new city blocks in downtown Washington D.C., including drafting and negotiating of all documents with private parties and municipal and federal governmental entities related to the development;
- New York City Economic Development Corporation in the sale of the Willets Point Development Site to a joint venture including negotiating agreements for the remediation and development of the site; and
- Lower Manhattan Development Corporation in all aspects of the redevelopment of the World Trade Center site including drafting and negotiating construction and deconstruction agreements, architect agreements, easement and conveyance documents as well as participating in its successful defense of a construction dispute litigation with its primary contractor.



Michael Bloom

Counsel – Tax and Wealth Planning
mabloom@Venable.com
212.370.6283

AREAS OF PRACTICE

Tax and Wealth Planning
Corporate
Mergers and Acquisitions
Technology Transactions
and Outsourcing

BAR ADMISSIONS

New York
District of Columbia

EDUCATION

J.D., University of
Pennsylvania Law School,
2007

Wharton School of the
University of Pennsylvania,
2007 Certificate in Business
and Public Policy

B.A., with honors, University
of Michigan, 2004

Michael Bloom is a member of Venable's Tax and Wealth Planning Group. He counsels public and private companies on various corporate transactions, including mergers & acquisitions, financing transactions, licensing matters, and joint ventures. Mr. Bloom works closely with the firm's Los Angeles office to provide U.S. federal, state and local tax planning services to many prominent entertainers and professional athletes. He has experience in domestic and international tax planning for such clients, including advising on both "inbound" planning and "outbound" transactions (e.g., U.S. film directors working on location in the U.K.) and activities all over the world. Mr. Bloom also has significant tax controversy experience and has advocated on behalf of public companies, small businesses and individual clients involved in controversies before the IRS.



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Educational institutions are employers, real estate developers, IP owners and creators, importers and exporters of goods and services, and so much more. Because of this variety of roles, educational institutions today face an unprecedented range of legal issues.

Venable has been actively involved in the cross-disciplinary practice of education and school law for over 50 years, representing educational institutions of all sizes, denominations, philosophies and locations. Our experience with educational institutions includes management and board counseling and governance, real estate and construction, tax advice, litigation, investigations, labor & employment, and regulatory compliance.

Why Venable?

- We regularly handle internal investigations for educational institutions. We understand well the sensitivities, the role of the board and the financial implications of an internal investigation for an educational institution, particularly in connection with sexual misconduct or harassment claims.
- We have served as land use, construction, environmental and real estate counsel for the redevelopment of educational and cultural institutions throughout New York City. This work involves zoning analysis and master planning, obtaining land use approvals, environmental and landmarks reviews, subdivision of tax lots, purchase, sale and leasing transactions, and design and construction contract issues.
- We advise schools regarding indoor air quality and related environmental issues connected to their presence in older buildings and with renovation projects.
- We assist institutions with creating employee handbooks, hiring, leave and social media policies, executive compensation and retirement and health insurance benefits.
- We counsel institutions on federal regulations, including tax and fundraising compliance, UBIT, HIPAA, Affordable Care Act, ADA compliance and issues surrounding the Family Educational Rights and Privacy Act (FERPA), and we advise universities in securing federal funding for critical projects.
- We provide counseling on not-for-profit law, governance, conflicts of interest and board matters.
- We defend medical schools, arts education institutions, independent schools and universities in age, race and sex discrimination lawsuits in federal and state courts throughout the country. We also litigate for schools defending wage and hour and wrongful discharge claims and in construction-related litigation.
- A focus of our IP practice is managing large portfolios of active patent applications for universities and research institutions. Our IP team also routinely advises on university-funded research and technology transfer arrangements and royalty agreements.
- We represent educational institutions in transactions and commercial law, including tax exempt bond financings, loan transactions, sale of real and physical property and negotiation of business and vendor contracts.
- We represent schools in class actions, including several law schools in the putative class actions brought by former law students who claimed to have been misled about their postgraduate employment options.
- Our education attorneys are often called upon to speak at state and national education conferences, meetings and regularly provide on-campus presentations and trainings.



Representative Members of Our Law & Education Team



Michael J. Volpe

**Education – related Investigations,
Labor & Employment Law and
Litigation**

mjvolpe@Venable.com | 212.808.5676



Brian J. Clark

Labor & Employment Law and Litigation

bjclark@Venable.com | 212.503.0544



Caryn G. Pass

**Independent School and Education
Law**

cgpas@Venable.com | 202.344.4902



Doreen S. Martin

**Education – related Investigations and
Litigation**

dsmartin@Venable.com | 212.983.1179



Suzanne St. Pierre

Real Estate and Construction

sst.pierre@Venable.com | 212.370.6222



Susan E. Golden

**Real Estate, Zoning, Land Use and
Not-for-Profit Law**

sgolden@Venable.com | 212.370.6524



Juliana Reno

**Employee Benefits and Executive
Compensation**

jreno@Venable.com | 212.503.0671



Michael C. Phillipou

Real Estate and Construction

mphilippou@Venable.com | 212.370.6237



Brian J. O'Connor

Tax Planning and Compliance

bjconnor@Venable.com | 410.244.7863

About the Law & Education Forum

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