



AUGUST 2021

THE BR STATE + LOCAL TAX SPOTLIGHT

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Note from the Editor

By Eugene J. Gibilaro

Welcome to the August 2021 edition of *The BR State + Local Tax Spotlight*. We understand the unique demands of staying on top of important State + Local Tax developments, which happen frequently and across numerous jurisdictions. Staying updated on significant legislative developments and judicial decisions helps tax departments function more efficiently and improves strategy and planning. That is where *The BR State + Local Tax Spotlight* can help. In each edition, we will highlight for you important State + Local Tax developments that could impact your business. In this issue, we will be covering:

- A recent Michigan appeals court decision that solidifies the standard for when property is used in state for purposes of its use tax;
- A recent Ohio Supreme Court decision that allows taxpayers to file timely appeals to tax assessments by utilizing tolling provisions enacted due to COVID-19; and
- A recent Tennessee appeals court decision that highlights why taxpayers should exercise caution when entering into statute of limitations extension agreements.

We invite you to share *The BR State + Local Tax Spotlight* with your colleagues and visit Blank Rome's State + Local Tax [webpage](#) for more information about our [team](#). Click [here](#) to add State + Local Tax to your subscription preferences.

*Editor, **The BR State + Local Tax Spotlight***



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NICOLE L. JOHNSON

PARTNER

Control Issues: A Use Tax Prerequisite

By Nicole L. Johnson

Use tax is often an afterthought for many companies—playing second fiddle to sales taxes. Yet, use tax audits are common—and often costly. Use tax is generally applicable when property is purchased out-of-state and used in state. The Michigan Court of Appeals recently confirmed that the determination of when property is used in state for purposes of the use tax depends on whether the taxpayer has control of the property while in the state. *Bed Bath & Beyond, Inc. v. Mich. Dep’t of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued July 8, 2021 (Docket Nos. 352088 and 352667).

Facts: In that case, the Michigan Department of Treasury (“Department”) asserted that use tax was due on advertisements that were printed outside the state and delivered to Michiganders by a third party. *Id.* The advertisements at issue were primarily coupons that were used in-store. The Department asserted that the company “used” the advertisements in Michigan because the company controlled certain aspects of the delivery—such as setting the parameters of when and where the advertisements were to be delivered. *Id.* The company refuted those assertions as the delivery was handled by a third party and any control the company had over the advertisements ended before the materials reached Michigan. *Id.*

The Decision: Upon review, the Court of Appeals agreed with the company and determined that the company did not have any “actual control over the process of delivery.”

Id. at pg. 11. The court found that the company ceded all control regarding the delivery of the advertisements when the advertisements were sent to the third party for ultimate distribution. *Id.* The court stated that if the Department’s assertions were correct, “then any direct mail campaign originating entirely outside the state would be subject to taxation.” *Id.*

This decision solidifies that companies need to pay close attention to the level of control exercised and retained with respect to property brought in from out-of-state when analyzing whether use tax applies. In particular, companies should evaluate their distribution of advertising materials.

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Deepak Chopra said that “if you want to reach a state of bliss—make a decision to relinquish the need to control.” Although it is unlikely that he was referring to use taxes when stating that control should be relinquished, the adage applies just as well. While a lower tax bill is not a state of bliss to everyone, it certainly is to tax practitioners! □



CRAIG B. FIELDS

PARTNER

Ohio Supreme Court Agrees That Taxpayers' Appeals Were Timely Due to COVID 19 Tolling Provisions

By Craig B. Fields

On July 15, 2021, the Ohio Supreme Court reversed the Board of Tax Appeals ("BTA") and held that two taxpayers had timely filed appeals from final determinations of the Tax Commissioner ("Commissioner") as a result of tolling provisions enacted due to the COVID-19 global health emergency thus highlighting the importance of these provisions around the country. *Chapman Enters., Inc. v. McClain*, 2021-Ohio-2386 and *Chapman v. McClain*, BTA No. 2020-1162, 2020 Ohio Tax LEXIS 2017, *1 (October 13, 2020), rev'd and remanded by *Chapman Enters., Inc., v. McClain*, 2021-Ohio-2386.

Facts: The facts in the two cases are identical. The Commissioner completed service of final determinations upholding tax assessments to an individual and a related company on May 4, 2020. The taxpayers had 60 days to file an appeal with the BTA. Because the BTA's offices were

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closed on that day due to the July 4th holiday, the deadline for filing the appeal fell on July 6, 2020. The taxpayers delivered notices of appeal to the Commissioner on June 26, 2020, but did not file notices of appeal with the BTA until July 27, 2020.

The BTA issued decisions dismissing both appeals as untimely. While the BTA acknowledged that the General Assembly had tolled certain statutory time limits as a result of COVID 19, it concluded that "such extension does not apply to notices of appeal filed with this board."

The Decision: Although the Commissioner had filed motions to dismiss both cases at the BTA as untimely, at the Supreme Court the Commissioner finally agreed that the taxpayers had timely appealed and filed motions to remand each case to the BTA rather than address the merits of the case.

The Court, however, determined that, since the issue was jurisdictional, it did not matter whether the parties agreed that the appeals to the BTA were timely. Instead, it was required to determine whether the appeals were timely filed.

The Court then reviewed the tolling provision which provided that "[t]he following that are set to expire between March 9, 2020, and July 30, 2020, shall be tolled:" a statute of limitations for "any administrative action or proceeding" and "[a]ny other criminal, civil, or administrative time limitation under the Revised Code." H.B. 197, Section 22(A). It concluded that the taxpayers' appeal deadlines were tolled under the first provision and, even if they were not, the deadlines were tolled under the second provision. Accordingly, the appeals were held to be timely.

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EUGENE J. GIBILARO

OF COUNSEL

Statute of Limitations Extension Agreements: Taxpayers Beware!

By Eugene J. Gibilaro

On July 19, 2021, the Court of Appeals of Tennessee held that a company was barred by the statute of limitations from bringing a lawsuit to challenge a deemed denial of its tax refund claim finding that the one year statutory period for challenging a deemed denial had run notwithstanding that the taxpayer and the Tennessee Department of Revenue (“Department”) executed extension agreements extending the statutory period for the Department to assess additional tax or refund overpayments. *Zimmer US, Inc. v. David Gerregano*, 2021 Tenn. App. LEXIS 285, *1 (Tenn. Ct. App. July 19, 2021). This case is a reminder that when entering into statute of limitations extension agreements, especially agreements drafted by state taxing authorities, taxpayers should exercise great caution and ensure that the agreements expressly provide for all necessary taxpayer rights and protections.

Facts: In December 2015, the company filed sales and use tax refund claims for the 2012 through 2015 tax years. The parties entered into three extension agreements over the next three years, with the final agreement extending the period for assessment and refund to December 31, 2018. The extension agreements each stated that “any tax liability... may be assessed at any time on or before the new expiration date” and that “any overpayment... may be refunded if, by the new expiration date, the Commissioner is in possession of proper proof and facts showing a refund is due.” *Id.* at *3. After the parties conducted two “exit conferences” in late 2018 in an attempt to resolve their differences, the company filed a complaint in Davidson County Chancery Court challenging the Department’s deemed denial of the company’s refund claim. The Department argued, and the Chancery Court agreed, that the extension agreements had not extended the statutory one-year period (commencing from when the refund claim was filed) for challenging a deemed

refund claim denial in court and the company’s lawsuit was therefore time-barred.

The Decision: The Court of Appeals affirmed the Chancery Court’s decision and held that the extension agreements did not evidence the Department’s consent for the company to file a lawsuit beyond the one-year statutory period. Focusing on the “plain language” of the extension agreements, the Court of Appeals found that the extension agreements “include[ed] no reference to the statute of limitations for filing suit to challenge

Focusing on the “plain language” of the extension agreements, the Court of Appeals found that the extension agreements “include[ed] no reference to the statute of limitations for filing suit to challenge a denial or deemed denial of a refund claim.”

a denial or deemed denial of a refund claim.” *Id.* at *8. The Court of Appeals further rejected the company’s argument that the result reached by the Chancery Court was inequitable because the company believed that the extension agreements had extended the period in which the company could bring a lawsuit if the Department ultimately denied its refund claim. According to the Court of Appeals, “[w]hen interpreting a contract, we do not attempt to ascertain the parties’ state of mind at the time of execution, but instead must seek to ascertain the parties’ intention as embodied and expressed in the contract as written.” *Id.* at 10 (internal quotations omitted).

The Court of Appeals’ decision is appealable to the Tennessee Supreme Court, though it is not known as of this writing whether an appeal will be taken. Stay tuned for further developments. □

What's Shaking: Blank Rome State + Local Tax Roundup

Blank Rome's nationally prominent State + Local Tax attorneys are thought leaders in the community as frequent guest speakers at various local and national conferences throughout the year. Our State + Local Tax attorneys believe it is necessary to educate and inform their clients and contacts about topics that will impact their businesses. We invite you to attend, listen, and learn as our State + Local Tax attorneys interpret and discuss key legal issues companies are facing and how you can put together a plan of action to mitigate risk and advance your business in accordance with state and local tax laws.

University of Wisconsin at Milwaukee | 2021 SALT Lecture Series

- ▶ **Craig B. Fields** will serve as a speaker for the University of Wisconsin-Milwaukee's Lubar School of Business State and Local Taxation ("SALT") Webinar Series, being held in October and November 2021 to provide in-depth analysis and discussion on a wide variety of critical SALT-related topics. Craig and co-presenter Richard Pomp, Professor of Law at University of Connecticut School of Law, will present "Significant Nationwide Developments in State and Local Taxation" on Thursday, November 4, 2021, from 11:00 a.m. to 1:00 p.m. CDT, covering recent developments in SALT across the country and their implications for tax filing and planning. To learn more, please click [here](#).

28th Annual Paul J. Hartman State and Local Tax Forum

- ▶ **Hollis L. Hyans** and **Craig B. Fields** will speak at Vanderbilt University Law School's 28th Annual Paul J. Hartman State and Local Tax Forum, being held October 27 through 29, 2021, in Nashville, Tennessee. There will also be a virtual option available for all program sessions. Blank Rome is pleased to be a Gold Level sponsor of the forum. Holly, who is also a member of the forum advisory board, will speak on the "Top Ten Income Tax Cases" panel, taking place Thursday, October 28, from 9:00 to 10:00 a.m. Panelists will discuss the top ten income tax cases that all state and local tax ("SALT") professionals should be watching and offer insights into the issues that are likely to dominate in the coming year. Craig's session, "A Constitutional Rethink," later that day from 3:30 to 4:30 p.m., will look at where the Complete Auto and Moorman rulings stand now, after having anchored much of state tax law over the last few decades, and how the changing face of the U.S. Supreme Court may impact them. To learn more, please click [here](#).

COST 52nd Annual Meeting

- ▶ **Craig B. Fields**, **Mitchell A. Newmark**, **Nicole L. Johnson**, and **Eugene J. Gibilaro** will speak at the Council on State Taxation ("COST") 52nd Annual Meeting, which will be held October 17 through October 20, 2021, in Las Vegas, Nevada. This program offers sessions of interest to every state tax professional in the industry, as well as in the consulting, accounting, and legal profession. The program covers all types of state and local taxes that business taxpayers are confronted with today and provides updates on key SALT issues. Additional information coming soon.

Blank Rome State + Local Tax Summit 2021

- ▶ Blank Rome's State + Local Tax team returned in person to host our annual State + Local Tax Summit at our New York office on August 13, 2021. This year's program included insightful discussions on the top judicial and legislative updates across the country with a particular focus on New Jersey and New York issues; judicial deference to state taxing authorities; and the tax benefits and consequences of a mobile workforce. We were also pleased to welcome as our featured speaker, **Roberta Moseley Nero**, former president and commissioner of the New York State Tax Appeals Tribunal. To learn more, please click [here](#).

Developments & Issue Spotting—Apportioning Corporate Income Tax

- ▶ **Craig B. Fields** served as a panelist at the Institute for Professionals in Taxation's ("IPT") 2021 IPT Reconnect Conference, which was held July 28 through 30, 2021, in Austin, Texas. Craig presented on "Developments & Issue Spotting—Apportioning Corporate Income Tax" as one of the conference's State Income Tax breakout sessions. To learn more, please click [here](#).

2021 State Transaction Tax Webinar

- ▶ **Craig B. Fields** and **Mitchell A. Newmark** served as panelists at the Council on State Taxation's ("COST") 2021 State Transaction Tax Webinar, which was held July 15, 2021, from 2:00 to 4:15 p.m. EDT. Blank Rome LLP was pleased to be a sponsor of the program. Craig presented on "Important Transactional Tax Legislation Addressed by the States This Year" and Mitchell presented on the "Significant Litigation Impacting Transactional Taxes." To learn more, please click [here](#).