



MAY 2021

THE BR STATE + LOCAL TAX SPOTLIGHT

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STATE + LOCAL TAX TEAM:

Craig B. Fields | cfields@blankrome.com
Hollis L. Hyans | hhyans@blankrome.com
Nicole L. Johnson | njohnson@blankrome.com
Mitchell A. Newmark | mnewmark@blankrome.com
Irwin M. Slomka | islomka@blankrome.com

Matthew F. Cammarata | mcammarata@blankrome.com
Eugene J. Gibilaro | egibilaro@blankrome.com
Kara M. Kraman | kkraman@blankrome.com
Philip M. Tatarowicz | ptatarowicz@blankrome.com
Michael A. Pearl | mpearl@blankrome.com
Peter H. Hull | peter.hull@blankrome.com

Note from the Editors

By Matthew F. Cammarata and Eugene J. Gibilaro

Welcome to the May 2021 edition of our new publication, *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:

- Georgia's recent legislation prohibiting state court and tax tribunal deference to the state Department of Revenue's interpretation of tax laws;
- Florida's recent legislation that imposes sales and use tax collection obligations on remote sellers and requirements on so-called marketplace providers;
- New York's recent legislation enacting changes to the liability provisions of the state's real estate transfer tax; and
- A recent Ohio Board of Tax Appeals decision that addresses the sourcing of NASCAR's broadcast and media revenues.

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.

Co-Editors, *The BR State + Local Tax Spotlight*

MATTHEW F. CAMMARATA

Of Counsel

212.885.5142

mcammarata@blankrome.com



EUGENE J. GIBILARO

Of Counsel

212.885.5118

egibilaro@blankrome.com



MATTHEW F. CAMMARATA

OF COUNSEL

Georgia Says Goodbye to Administrative Deference

By Matthew F. Cammarata

Effective April 29, 2021, Georgia courts and the Georgia Tax Tribunal are prohibited from granting any deference to the Georgia Department of Revenue's interpretation of the tax law, unless that interpretation has been formally adopted as a rule under the Georgia Administrative Procedure Act ("APA"). S.B. 185, 2021 Leg., Reg. Sess. (Ga. 2021).

Taxpayers in Georgia (and in other states with similar practices) should be aware that they are now on equal footing with the taxing authority, and that the taxpayer's interpretation of an ambiguous statute will be accorded the same weight as the taxing authority's interpretation. Administrative agencies will have to promulgate formal rules in Georgia to be granted any judicial deference and will otherwise be held to the same standard to which taxpayers have always been held in advancing their construction of the tax law. Taxpayers, on the other hand, may find more success in advancing alternative interpretations of the tax law before the courts.

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Administrative deference at the state level is often modeled after principles from federal case law, pursuant to which courts will, under certain circumstances, defer to an agency's interpretation of an ambiguous statute or regulation.¹ One justification for this practice is that agencies often have technical expertise in highly specialized areas and are therefore better suited than courts of general jurisdiction to interpret ambiguous statutes that the agencies administer. In state tax

proceedings, judicial deference to taxing authorities can make it difficult for taxpayers to successfully combat an agency's interpretation of the tax law in litigation.

The new Georgia law solves this problem for taxpayers and expressly prohibits courts from granting deference to administrative interpretations. Under the new law,

[a]ll questions of law decided by a court or the Georgia Tax Tribunal pursuant to this subsection, including interpretations of constitutional, statutory, and regulatory provisions, shall be made without any deference to any determination or interpretation, whether written or unwritten, that may have been made on the matter by the [Georgia Department of Revenue]

S.B. 185, 2021 Leg., Reg. Sess. at ln. 41-45 (Ga. 2021). The new law does not apply, however, to "the judicial standard of deference accorded to rules promulgated pursuant to [the Georgia APA]." *Id.* at ln. 68-70. Thus, while regulations that have been formally adopted under the APA will still be afforded some judicial deference in Georgia courts, all other administrative interpretations—even if they are longstanding—will no longer be entitled to the judicial deference they were previously granted.

Georgia joins several other states that have in recent years abandoned the deference that courts typically afford to administrative agencies. Arizona, Mississippi, and Wisconsin, for example, have all abandoned judicial deference to administrative agencies either by statute or case law. Florida's prohibition against administrative deference was approved by voters and is written directly into the Florida constitution. Fla. Const. Art. V, § 21. □

1. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).



EUGENE J. GIBILARO

OF COUNSEL

Florida Enacts Remote Seller Nexus and Marketplace Provider Laws

By Eugene J. Gibilaro

On April 19, 2021, Florida joined a growing number of states in enacting legislation imposing sales and use tax collection obligations on remote sellers lacking a physical presence in the state and requiring so-called marketplace providers to collect and remit sales and use tax with respect to taxable sales that they facilitate through a marketplace. S.B. 50, 2021 Leg., 2021 Sess. (Fla. 2021). According to the Florida Senate’s fiscal note, Florida becomes the 44th state (plus the District of Columbia) to enact a remote seller nexus law and 39th state (plus the District of Columbia) to enact a marketplace provider/facilitator law. Fla. S., B. Analysis and Fiscal Impact Statement, S.B. 50, 2021 Leg., 2021 Sess. at 6 (2021). Of the states imposing sales and use tax, Missouri remains the only holdout in enacting a remote seller nexus law, though legislation is currently pending in Missouri on this issue. See H.B. 554, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

Remote seller nexus laws like Florida’s come in the wake of the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), holding that physical presence was not a constitutional requirement for states to impose sales and use tax collection obligations on remote sellers. Taxpayers will nonetheless be wise to remember that while the *Wayfair* Court indicated that state nexus statutes will not be struck down as unconstitutional for lack of a physical presence requirement, these statutes remain susceptible to constitutional challenges on other grounds (e.g., the statute discriminates against or places an undue burden on interstate commerce). *Wayfair*, 138 S. Ct. at 2099.

The new Florida law imposes sales and use tax collection obligations on all persons making “a substantial number of remote sales” in Florida, which is defined as “any number of taxable remote sales in the previous calendar year in which the sum of the sales prices... exceeded \$100,000.” S.B. 50, 2021 Leg., 2021 Sess. at ln. 591-594 (Fla. 2021). The law further requires that marketplace providers with a taxable presence in Florida certify to marketplace sellers that they will collect and remit sales or use tax due on the marketplace

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seller’s sales. A “marketplace” is defined as “[a] physical place or electronic medium through which tangible personal property is offered for sale” and a “marketplace provider” is a person who facilitates sales by a marketplace seller by listing or advertising the sale in a marketplace and who collects payment from the customer and transmits all or part of the payment to the marketplace seller. Fla. S., B. Analysis and Fiscal Impact Statement, S.B. 50, 2021 Leg., 2021 Sess. at 6 (2021).

Florida’s law changes apply beginning with sales made or facilitated on or after July 1, 2021. The law changes will not apply retroactively to sales made or facilitated prior to July 1, 2021, provided that any person to whom the changes apply registers with the Department before October 1, 2021. □



KARA M. KRAMAN

OF COUNSEL

New York Enacts Changes to Liability Provisions of New York Real Estate Transfer Tax

By Kara M. Kraman

On April 7, 2021, the New York State Legislature passed the New York Budget Bill for fiscal year 2022 which was signed by Governor Andrew Cuomo on April 19, 2021 (the “Budget Bill”). S.B. S2509C, 2021 Leg., 2021 Reg. Sess. (N.Y. 2021). The Budget Bill enacted two notable changes to the liability provisions of the New York State real estate transfer tax.

Real estate transfer tax (“transfer tax”) is generally imposed on every conveyance of New York State real property or interest therein when the consideration exceeds \$500. N.Y. Tax Law § 1402(a). The transfer tax is imposed on the grantor, defined as “the person making the conveyance of real property or interest therein” although both the grantor and grantee are jointly liable for the tax. N.Y. Tax Law §§ 1401(g), 1404(a).

First, the Budget Bill extends the definition of a person responsible for paying the transfer tax to include any person who is an officer, employee, manager, or member of a corporation, partnership, limited liability company (“LLC”), or individual proprietorship with a duty to act to comply with the transfer tax provisions, or who has so acted. This means that such responsible person can be held *personally liable* for the transfer tax.

While the concept of a responsible person under the transfer tax is not as broad as under the sales tax, which provides that every partner and LLC member is a responsible person regardless of whether the partner or LLC member is under a duty to act on behalf of

the LLC or partnership (with certain exceptions), it still represents a potentially significant expansion of who is liable for the transfer tax under the statute. This change to the law underscores how important it is for those responsible for legal compliance to ensure that transfer tax is correctly filed and paid on transfers of real property as well as transfer of interests in entities that own real property.

Second, the Budget Bill clarifies that while the grantor and grantee remain jointly liable for the transfer tax, it is the grantor that is the party responsible for paying the tax. The bill does this by adding language to the

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statute giving the grantee a statutory cause of action to recover transfer tax paid by it from the grantor in cases where the grantor fails to pay the tax as required under the statute. This provision protects grantees from being stuck with

a transfer tax bill even where there is no contractual agreement between the parties allowing the grantee to seek indemnification from the grantor for unpaid transfer tax.

The above provisions apply to conveyances made on or after July 1, 2021, unless the conveyance was made pursuant to a binding written contract entered on or before April 1, 2021. The legislation does not make corresponding changes to New York City transfer tax. □



IRWIN M. SLOMKA

SENIOR COUNSEL

Ohio Appeals Board Upholds Audience-Based Sourcing for NASCAR Broadcast Revenue

By Irwin M. Slomka

The application of market state sourcing to income from intellectual property continues to be a vexing problem in many states. The Ohio commercial activity tax (“CAT”) sourcing statute is no exception, as evidenced by a recent Ohio Board of Tax Appeals (“Board”) decision involving the sourcing of NASCAR’s broadcast and media revenues. *NASCAR Holdings, Inc. v. McClain*, No. 2015-263, 2021 Ohio Tax LEXIS 780 (Ohio Bd. Tax App. Apr. 5, 2021). The Board held that the Ohio Department of Taxation (“Department”) could source those revenues based on overall Ohio cable television viewership or Ohio’s percentage of the U.S. population. NASCAR holds that revenues from granting a right to use intellectual property over an area that includes Ohio may be sourced to Ohio based on estimates of where the payor’s customers are located.

Facts. NASCAR Holdings, Inc. (“NASCAR”), headquartered in Daytona Beach, Florida, sanctions auto races throughout the United States and abroad. During the years in issue, only seven NASCAR-sanctioned events took place in Ohio. *NASCAR*, 2021 Ohio Tax LEXIS 780 at *1.

After performing a CAT audit, the Department assessed tax on several categories of NASCAR’s broadcast and media revenues, including broadcast revenues that allowed broadcasters, such as FOX, the right to broadcast racing events over a broadcast area that included, but was not limited to, Ohio. The parties agreed that the broadcast revenues were derived from granting the right to use NASCAR’s intellectual property. The Department sourced NASCAR’s broadcast revenues using Nielsen Ratings, and sourced license fees and sponsor fees using U.S. census data for Ohio. NASCAR claimed that the broadcast revenues should be sourced to Florida, where NASCAR is headquartered and where it received the revenues from its intellectual property. *Id.* at *8-12.

The Decision. The Board concluded that NASCAR’s revenue streams should be sourced to where the payors used, or had the right to use, the intellectual property, which included Ohio. Under the CAT sourcing statute, gross receipts from the “right to use” intellectual property, such as trademarks and copyrights, are sourced to Ohio “to the extent the

receipts are based on the right to use the property” in Ohio. R.C. § 5751.033(F). Gross receipts from the sale of “all other services...and all other business receipts,” are sourced based on the proportion of the “purchaser’s benefit” in Ohio. R.C. § 5751.033(I).

The Board upheld the Department’s use of Nielsen Ratings or census data to determine where the broadcasters used NASCAR’s intellectual property, in part because NASCAR did not furnish evidence of its actual ratings information during the audit. For a similar reason, the Board rejected NASCAR’s argument that the Department’s methodology was flawed because it did not take into account that the broadcast area was also international. NASCAR raised constitutional challenges—none of which are identified—but the Board said that only the courts could address them. *Id.*

NASCAR filed an appeal with the Ohio Supreme Court asserting ... that none of its intellectual property receipts were based on the use of such property in Ohio.

In a significant decision last year, the Ohio Supreme Court held that an independent dealer of ADT, a nationwide security services company, could source its sales to ADT of customer service contracts based on where ADT (its customer) was physically located, and not, as the Department claimed, to where ADT’s own customers were located. *Def Sec. Co. v. McLain*, 162 Ohio St. 3d 473 (Ohio 2020). Here, the Board concluded that *Defender Security* was inapplicable because it applied a sourcing statute that looks to where the purchaser “uses or receives the benefit” of intellectual property, and not, as in NASCAR, to the location of the purchaser’s “use of or right to use” the property. *NASCAR*, 2021 Ohio Tax LEXIS 780 at *14 (internal citations omitted).

On May 5, 2021, NASCAR filed an appeal with the Ohio Supreme Court asserting, among other things, that none of its intellectual property receipts were based on the use of such property in Ohio, as well as its constitutional challenges not addressed by the Board. □

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.

Save the Date: Blank Rome State + Local Tax Summit 2021

- ▶ Please save the date for our annual State + Local Tax Summit on Friday, August 13, 2021, from 9:00 a.m. to 2:00 p.m., in person at 1271 Avenue of the Americas, New York, NY. The Summit will include discussion of the state and local issues affecting your company. New York CPE and CLE certification will be requested. There is no fee to attend. Blank Rome is aware of the continued concerns regarding COVID-19. The health and safety of our clients and employees are our highest priorities. We continue to monitor the situation closely and have implemented precautionary measures across our business. More details will follow in an upcoming issue of *The BR State + Local Tax Spotlight*.

Article: Outsourcing Tax Staff: Don't Outsource Attorney-Client Privilege

- ▶ **Mitchell A. Newmark** and **Eugene J. Gibilaro** authored the article, "Outsourcing Tax Staff: Don't Outsource Attorney-Client Privilege," which was published in the May 2021 edition of *Tax Notes® State* (Vol. 100). In the article, Mitchell and Eugene examine the implications for the attorney-client privilege of outsourcing a company's tax functions to a third-party tax service provider. To learn more, please click [here](#).

Client Advisory: New York State Enacts Pass-Through Entity Tax as SALT Limitation Workaround

- ▶ **Irwin M. Slomka**, **Craig B. Fields**, **Cory G. Jacobs**, and **Joseph T. Gulant** published a client advisory on the recent creation of the New York Pass-Through Entity Tax, effective for tax years beginning on or after January 1, 2021. The tax takes on added significance in mitigating the effect of the newly-imposed New York State personal income tax rate increases on high earners. To read this alert, please click [here](#).

Mitchell Newmark Named to *Law360* Tax Authority's State & Local Editorial Advisory Board

- ▶ **Mitchell A. Newmark** was selected to join the *Law360* Tax Authority State & Local Editorial Advisory Board, whose purpose is to get feedback on *Law360's* coverage and to gain insight from leaders in the field on how best to shape future coverage. To learn more, please click [here](#).

University of Wisconsin at Milwaukee | 2021 SALT Lecture Series

- ▶ **Craig B. Fields** will serve as a panelist at the University of Wisconsin at Milwaukee 2021 SALT Lecture Series, which will be held in Fall 2021 as a virtual conference. Craig will discuss significant nationwide developments in state and local taxation.

NYU State and Local Tax Study Group Virtual Events

- ▶ **Holly L. Hyans** and **Nicole L. Johnson** served as panelists at the NYU State and Local Tax Study Group, which was held May 5, with another session scheduled for June 9, 2021, as virtual events. Holly and Nicole will discuss current developments in state and local taxation.

Council on State Taxation ("COST") | 2021 State Income Tax Webinar

- ▶ **Nicole L. Johnson** and **Mitchell A. Newmark** served as panelists at the COST 2021 State Income Tax Webinar, which was held April 26–29, 2021. Blank Rome was pleased to be a sponsor of the program. Mitchell presented on "Qualifying to Do Business In A State—How Does That Impact an Entity's Tax Status?" and Nicole presented on "Tax Planning for Rapidly Changing Supply Chains and Business Models." To learn more, please click [here](#).