



DECEMBER 2021

THE BR STATE + LOCAL TAX SPOTLIGHT

BLANKROME
CELEBRATING 75 YEARS



CONTENTS

1. Note from the Editors
2. Here a Penalty, There a Penalty, Everywhere a Penalty
3. Delaware Supreme Court Reject's Division's Longstanding but Unpublished Policy on NOLs
4. Louisiana Court Holds That a Locality Cannot Run Out the Clock on a Refund Claim
5. What's Shaking: Blank Rome State + Local Tax Roundup

STATE + LOCAL TAX TEAM:

Craig B. Fields | craig.fields@blankrome.com
Hollis L. Hyans | hollis.hyans@blankrome.com
Nicole L. Johnson | nicole.johnson@blankrome.com
Mitchell A. Newmark | mitchell.newmark@blankrome.com
Irwin M. Slomka | irwin.slomka@blankrome.com
Eugene J. Gibilaro | eugene.gibilaro@blankrome.com

Kara M. Kraman | kara.kraman@blankrome.com
Philip M. Tatarowicz | phil.tatarowicz@blankrome.com
Michael A. Pearl | michael.pearl@blankrome.com
Peter H. Hull | peter.hull@blankrome.com
Anna Uger | anna.uger@blankrome.com

Note from the Editors

By Eugene J. Gibilaro and Anna Uger

Welcome to the December 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 Ohio appeals court decision that struck down a tax penalty for failure to timely pay property taxes because the taxpayer proved she was kidnapped at the time in question;
- A recent Delaware Supreme Court decision that invalidated an unpublished Division of Revenue policy regarding net operating losses that violated the Delaware Code; and
- A recent Louisiana appeals court decision that allowed as timely a company's appeal of a locality's refund claim denial despite the locality's argument that the statutory timeframe had expired.

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*



EUGENE J. GIBILARO

Of Counsel

212.885.5118

eugene.gibilaro@blankrome.com

ANNA UGER

Associate

212.885.5473

anna.uger@blankrome.com



Here a Penalty, There a Penalty, Everywhere a Penalty

By Nicole L. Johnson

NICOLE L. JOHNSON

PARTNER

Back in the “good old days,” penalties were only imposed to punish some nefarious conduct—for example, when a person “hid” funds offshore or purposefully failed to pay the tax due. By definition, a penalty is a punishment. *Penalty*, *Black’s Law Dictionary* (11th ed. 2019) (last visited Dec. 7, 2021). Thus, for a penalty to apply, there must be some conduct that needed to be punished. However, states have expanded the application of penalties to nearly every understatement of tax.

The California Large Corporate Understatement Penalty is just one of the many penalties that is automatically applied based on certain thresholds and which the Franchise Tax Board states cannot be waived—regardless of circumstances. Thankfully, most states are not as overzealous as California. Nevertheless, penalties have become a routine part of every audit. While the application of penalties has become the new normal, it doesn’t mean that the penalties shouldn’t be challenged. A perfect example is the recent decision in *Sanders v. Franklin Cnty. Bd. of Revision*, No. 2021-316 (Ohio B.T.A. Oct. 27, 2021).

Facts: Deborah Sanders failed to timely pay her property tax bills and was assessed penalties. Upon appeal to the Ohio Board of Tax Appeals (the “Board”), Ms. Sanders established that she was kidnapped by her daughter for two years in Indonesia. While kidnapped, Ms. Sanders was unable to timely pay her taxes. (Maybe the threat of tax penalties was why Liam Neeson was so desperate to get his daughter back in *Taken*.)

The Decision: The Board ultimately determined Ms. Sanders’ failure to timely pay was due to reasonable cause and not willful neglect. While the *Sanders* decision is an extreme example, it does serve as an excellent reminder that penalties can—and should—be challenged. There are a wide variety of circumstances that qualify for the reasonable cause exception—especially during the pandemic. At a minimum, taxpayers should ask for penalties to be waived—as the adage goes “if you don’t ask, the answer is always no.”

While the *Sanders* decision is an extreme example, it does serve as an excellent reminder that penalties can—and should—be challenged.

The *Sanders* decision also serves as a helpful reminder to fully present your arguments for penalty waiver. In her initial request for penalty waiver, the application merely stated that Ms. Sanders was “stuck” outside of the country. On appeal, Ms. Sanders provided additional details of her kidnapping and supporting documentation. Had the information been fully provided with the initial application, the issue may never have reached the Board.

Paul Frankel’s mantra of “Don’t Pay, Don’t Pay, Don’t Pay” applies perfectly to penalties. Instead, request abatement of the penalties or challenge them. But make sure to support your arguments and describe why reasonable cause existed. □



CRAIG B. FIELDS

PARTNER

Delaware Supreme Court Rejects Division's Longstanding but Unpublished Policy on NOLs

By Craig B. Fields

The Delaware Supreme Court has invalidated an audit policy that had been in place for at least 30 years as being inconsistent with the Delaware Code, demonstrating that just because a taxing agency's policy is longstanding, does not mean that it is correct. *Dir. of Revenue v. Verisign Inc.*, No. 18, 2021, 2021 WL 5563437 (Del. Nov. 29, 2021).

Facts: Verisign filed a federal consolidated return along with its affiliated corporations. As required by Delaware law, it filed a separate company Delaware corporate income tax return. In calculating its Delaware tax liability, Verisign computed its net operating losses for the two years at issue on a separate-company basis and reported no tax due. On audit, the Division of Revenue ("Division") asserted that the net operating loss ("NOL") computation violated its longstanding policy of limiting a taxpayer's NOL to the consolidated NOL deduction reported by its federal filing group (the "Policy").

The Policy, however, only appeared in the Division's internal manual for auditors. Moreover, the Division could not explain why it was placed there or why it was enacted. All the Division stated was that the Policy "has been in place for at least 30 years and in any event longer than any current employee of the Division can remember." (It is noted that the Policy's limitation did not apply to federal consolidated groups that consisted of only Delaware taxpayers.)

Delaware taxpayers that have paid tax because of the Division's now-invalidated Policy should consider whether refund opportunities exist.

The Decision: The Court looked to the Delaware Code and, after noting that it "is hardly beach reading," found that in all instances a corporate taxpayer is required to report items of income and deductions on a separate-entity basis. It also noted that the Division's return instructions explicitly provided that a corporation filing as part of a federal consolidated group is required to "calculate its stand alone federal taxable income, *including all deductions*, in accordance with the IRC" (emphasis in original).

The Court concluded that the Policy violated the Delaware Code and therefore invalidated the Policy.

Interestingly, on July 30, 2021, the General Assembly enacted legislation which codifies much of the Policy and explicitly limits a taxpayer's NOL to the value of the consolidated NOL deduction claimed by the federal consolidated group. The legislation does not, however, have a carve-out for taxpayers that file a consolidated federal return exclusively with other Delaware taxpayers. While the Court discussed the legislation, it did not form part of its analysis.

Delaware taxpayers that have paid tax because of the Division's now-invalidated Policy should consider whether refund opportunities exist. This decision is also a good reminder that just because a taxing agency says it has a longstanding position, does not mean that the position cannot be successfully challenged. □



EUGENE J. GIBILARO

OF COUNSEL

Louisiana Court Holds That a Locality Cannot Run Out the Clock on a Refund Claim

By Eugene J. Gibilaro

On November 5, 2021, a Louisiana appeals court held that a company's appeal of a locality's refund claim denial was timely inasmuch as it was filed within 90 days of the date of the locality's notice of disallowance. *Nucor Steel La., LLC v. St. James Parish Sch. Bd.*, No. 20-CA-247, 2021 WL 5149770 (La. Ct. App. Nov. 5, 2021). This is another recent example of a taxing authority appearing to work in good faith with a company in reviewing the company's refund claim, but then attempting to pull the rug out from under the company with a statute of limitations argument when the matter goes to court. See *Zimmer US, Inc. v. Gerregano*, No. M2020-00171-COA-R3-CV, 2021 WL 3029566 (Tenn. Ct. App. July 19, 2021), and Eugene J. Gibilaro, *Statute of Limitations Extension Agreements: Taxpayers Beware!, The BR State + Local Tax Spotlight* (August 2021). Fortunately, the Louisiana appeals court here did not permit the taxing authority to run out the clock.

The court reasoned that if the statute was interpreted to mean that only a final decision could constitute action, then the statute would absurdly require that “a taxpayer must file an appeal during the course of an ongoing evaluation but before a ruling on the claim.”

Facts: Louisiana law provides that if a locality fails to act on a refund claim, an appeal cannot be filed “after the expiration of one hundred eighty days from the end of the expiration of the one year” from the date of the filing of the refund claim. La. Rev. Stat. tit. 47, § 337.81(A)(2) (2021) (effective June 16, 2017). Here, the locality acknowledged receipt of the company's timely-filed refund claim and requested additional information from the company, which it received and reviewed. During the refund claim review period, the parties entered into several “Agreement to

Suspend Prescription of Taxes” as well as a confidentiality agreement with respect to certain confidential documents that the locality requested to review and did eventually review. Moreover, the locality represented to the company that it could appeal the locality's decision to the Board of Tax Appeals within 90 days of the issuance of the notice of disallowance.

Despite the fact that the locality actively reviewed the refund claim, was in communication with the company throughout the period from when the refund claim was filed until the locality issued the notice of disallowance, and expressly stated that the company had 90 days to appeal, the locality argued in court that the locality failed to act on the refund claim within the statutory timeframe and the company's appeal after that timeframe had expired was time barred.

The Decision: The court rejected the locality's argument that the failure to issue a final decision on the company's refund claim during the year-plus-180-day timeframe constituted a failure to act under the statute. Instead it concluded that the locality did indeed act on the refund claim during that timeframe by conducting a “thorough and extensive investigation” of the company's refund claim. The court reasoned that if the statute was interpreted to mean that only a final decision could constitute action, then the statute would absurdly require that “a taxpayer must file an appeal during the course of an ongoing evaluation but before a ruling on the claim.”

The court further held that the locality was estopped from asserting that the company's appeal was time barred inasmuch as the locality represented to the company that it had 90 days to appeal a notice of disallowance and the company relied on that representation to its detriment. To hold otherwise, the court explained, “would be contrary to the principles of the taxpayer bill of rights and allow a governmental entity to mislead a law-abiding taxpayer.” □

What's Shaking: Blank Rome's 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.

Article: Looking Back, With an Eye Toward the Future

- ▶ **Craig B. Fields** authored the *Behind the Board* series article, "Looking Back, With an Eye Toward the Future," which was published in the November 29, 2021 edition of *Tax Notes® State* (Vol. 102). *Behind the Board* is a series that highlights the milestones, challenges, and lessons that members of *Tax Notes® State*'s advisory board have experienced over the course of their careers. In his article, Craig discusses the following highlights: What was the greatest milestone of your career? What was the biggest obstacle or challenge you encountered? What do you hope to achieve in the near future? What is the most important lesson you've learned? To learn more, please click [here](#).□

COST 2021 SALT Basics School

- ▶ **Mitchell A. Newmark** will serve as a panelist at the Council on State Taxation's ("COST") 2021 SALT Basics School, which will be held the week of May 15, 2022. Mitchell's panel, "Restrictions on a State's Ability to Tax," will review the various restrictions on a state's ability to impose taxes such as constitutional restrictions, federal legislation, and judicial pronouncements.□

2022 National Multistate Tax Symposium

- ▶ **Craig B. Fields** will serve as a speaker at the 2022 National Multistate Tax Symposium, presented by Deloitte Tax LLP in collaboration with the Tax Section of the Florida Bar, being held February 9 through 11, 2022, at Disney's Grand Floridian Resort & Spa in Lake Buena Vista, Florida. Craig's session, "State, Federal, and International Income Tax Convergence: Scanning the Sphere," will take place on Tuesday, February 1, from 1:45 to 2:45 p.m. and from 2:00 to 3:00 p.m. The session will explore how states continue to react to the global regulatory regime and new economy, often by broadening their corporate income tax bases and apportionment reach to encompass more forms of income and entities (foreign and domestic) through unitary combined reporting, intercompany expense disallowance, economic nexus standards, and erosion of P.L. 86-272 protections. To learn more, please click [here](#).□

40th Annual Institute on State and Local Taxation

- ▶ **Nicole L. Johnson** and **Mitchell A. Newmark** served as panelists at the NYU School of Professional Studies' 40th Annual Institute on State and Local Taxation, which was held virtually December 13 through 15, 2021. Blank Rome LLP was pleased to be a sponsor of the program. Nicole's session, "Apportionment Issues and Developments," considered the extent to which the pandemic may have exacerbated historic apportionment issues, including potential factor distortion, unrepresentative factors, alternative apportionment, and controversy over the treatment of large gains. Mitchell spoke on the "How to Tax a Moving Target: The Complexities of a Mobile Workforce" panel, which discussed whether COVID has made remote work a permanent feature of state tax complexity, including the intricacies of taxation and reporting for a mobile workforce: personal income tax, residency, convenience of the employer, sales and use tax, and property tax issues. To learn more, please click [here](#).□

44th Annual Advanced State & Local Tax Institute

- ▶ **Philip M. Tatarowicz** served as a speaker at the 44th Annual Advanced State & Local Tax Institute, which was hosted by Georgetown Law's State and Local Tax Certificate Program and held on December 1, 2021, as an online program. Phil, who is also a professor and director of the SALT Certificate Program within the Graduate Tax Department of the Georgetown University Law Center, presented the welcome message and introduction to open the program, which included the sessions "The Convergence and Divergence of Global and U.S. Federal and State Tax Policies" and "Square Pegs in Round Holes: The Digital/Remote Economy in an (Almost?) Post-COVID World." To learn more, please click [here](#).□