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THE BR STATE + LOCAL TAX SPOTLIGHT **BLANKROME**



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Note from the Editors

By Eugene J. Gibilaro and Anna Uger

Welcome to the February 2022 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 New York tax appeals tribunal decision determining a service measuring advertising effectiveness is not an information service subject to state sales tax because the service provider did not have the technical ability to provide the information to its other customers;
- A recent petition for writ of certiorari asking the U.S. Supreme Court to review a Washington Supreme Court decision that allowed the state to impose an arguably discriminatory business and occupation surtax on financial institutions; and
- A recent New Jersey tax court decision rejecting the Division of Taxation's attempt to offset a taxpayer's refund against a purported liability from a closed tax year.

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.

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CRAIG B. FIELDS

PARTNER

Service Excluded from New York Sales Tax Since It Was Not Furnished to Others

By Craig B. Fields

The New York State Tax Appeals Tribunal held that an information service was not subject to sales tax because although the service provider had the *right* to provide the information to others, it did not have the technical ability to do so. *In re Dynamic Logic, Inc. (by Kantar LLC, as successor-in-interest)*, DTA No. 828619 (N.Y. Tax App. Trib. Jan. 20, 2022).

Facts: Dynamic Logic, Inc. (“Dynamic”) provides various services to its clients that measure the effectiveness of a client’s advertising. One of its services, a “CrossMedia” study, surveys consumers who have viewed an advertisement and analyzes their responses. Dynamic then provides its findings and conclusions to the client.

The Tribunal’s conclusion is significant and could provide other service providers the ability to fit within the exclusion from tax.

Dynamic’s clients grant it the right to use the data it collects from all of its services—not limited to its CrossMedia services—in Dynamic’s “MarketNorms” database, a database of anonymized and aggregated results that can be used for benchmarking purposes. Significantly, Dynamic does not include any data that it collects as part of a CrossMedia study in its MarketNorms database as it has not been able to create a database that could be used for benchmarking purposes out of the CrossMedia data.

The Decision: The Tribunal first concluded that the CrossMedia service is an information service since it consists entirely of the evaluation of advertising campaigns through the collection and analysis of information. It then looked to whether the service was excluded from tax as information that is “personal or individual in nature *and* which is not or may not be substantially incorporated in reports furnished to other persons.” (Tax Law § 1105(c)(1)) (Emphasis added).

Since the Administrative Law Judge (“ALJ”) below had found that the information furnished by Dynamic in a CrossMedia study was personal and individual in nature, and the Division of Taxation did not file an Exception to that conclusion, the Tribunal did not address the issue.

The Tribunal then rejected the ALJ’s holding that since Dynamic had the right to use the data collected from a CrossMedia study, “such information *may be* substantially incorporated into reports furnished to others” within the meaning of the statute. (Emphasis in original.) *In re Dynamic Logic, Inc.* at 22. Specifically, the Tribunal held that “[t]he possibility that information could be furnished to third parties in the future if the service provider develops a means to do so does not disqualify an information service from the statutory exclusion under the ‘substantially incorporated’ component.” *Id.* Accordingly, receipts received from a CrossMedia study were not subject to sales tax.

The Tribunal’s conclusion is significant and could provide other service providers the ability to fit within the exclusion from tax. □



NICOLE L. JOHNSON

PARTNER

A Battle against Discrimination

By Nicole L. Johnson

It is without question that when the Washington Legislature enacted the Business & Occupation surtax on financial institutions with consolidated net income of at least one billion dollars, the Legislature had a discriminatory intent—namely, they sought to impose the additional tax on out-of-state financial institutions. However, the question remains whether there is an impermissible discriminatory effect of the surtax.

The Washington Supreme Court concluded that the surtax did not discriminate against interstate commerce because the statutory language applied equally to financial institutions located in-state and out-of-state. *Wash. Bankers Ass’n v. Dep’t of Revenue*, 495 P.3d 808 (Wash. 2021). Two banking associations have petitioned the U.S. Supreme Court for review. Petition for Writ of Certiorari, *Wash. Bankers Ass’n v. Dep’t of Revenue*, No. 21-1066 (2022).

In their Petition, the associations assert that the surtax has a discriminatory effect, which is best demonstrated by an example. Assume there is a Washington-based financial institution that has net income of \$750 million—all of which is earned in Washington. Also assume that there is a Missouri-based financial institution that has net income of \$1.6 billion—of which only \$100 million is earned in Washington. The Washington-based financial institution would escape the surtax as its net income is less than one billion dollars, while the Missouri-based

financial institution would be subject to the surtax on its Washington earnings.

Essentially, by basing whether the surtax applies on a set amount of a financial institution’s global income—not just on the financial institution’s income earned in Washington—the surtax places an impermissible burden on interstate commerce. The Petition quickly points out that this discrimination is not just theoretical. Pet. at 2. Of the 153 financial institutions that paid the surtax, only three were based in Washington—less than 2 percent. *Id.* Of the total surtax paid, less than 0.5 percent was paid by the Washington-based financial institutions. *Id.*

This discrimination should not be excused merely because the Legislature artfully drafted the statute in a non-facially discriminatory manner.

As the above example makes clear, the incremental tax burden is not based on a financial institution’s Washington activity. Instead, it is based on the financial institution’s activity globally. The surtax is then applied to the

Washington activity. This discrimination should not be excused merely because the Legislature artfully drafted the statute in a non-facially discriminatory manner.

The Washington Legislature was clear—it wanted out-of-state financial institutions to pay more tax. Now it will be up to the U.S. Supreme Court to determine if such discrimination is permissible. □



EUGENE J. GIBILARO

OF COUNSEL

New Jersey Tax Court Rules that the Division Cannot Offset a Taxpayer's Refund against a Liability from a Closed Tax Year

By Eugene J. Gibilaro

On January 19, 2022, the New Jersey Tax Court issued a decision denying the Division of Taxation's attempt to take away a refund due to a taxpayer and apply it against a purported liability from a tax period for which the four-year statute of limitations had lapsed, calling the Division's attempted application of the refund to the closed tax period "tantamount to a[n unlawful] reopening and audit of closed years." *Solvay Specialty Polymers, LLC v. Dir., Div. of Tax'n*, No. 009365-2019, 22 (N.J. Tax Jan. 19, 2022). This case is a good reminder to taxpayers that statute of limitations protections can apply in situations other than when a state taxing authority issues a formal assessment and taxpayers should not be afraid to challenge state taxing authorities whenever they purport to take action with respect to tax years outside the typical statute of limitations period.

Facts: The company was engaged in the business of manufacturing and distributing specialty chemicals used in the semiconductor, automotive, and chemical process industries. In July 2015, the company filed sales and use tax refund claims in connection with returns filed between August 2011 and January 2014 claiming that its purchases of manufacturing equipment, repair parts, and supplies used in the production of the chemicals were tax exempt. In 2019, the Division issued its final determination, finding that the company was due a portion of its refund claims, but offset the refunds due against amounts that the Division claimed were owed for the tax periods August 2011 through January 2014.

The amounts that the Division claimed were owed related to credits that the company had taken during

that period against its sales and use tax liability, though the credits were unrelated to the company's refund claims. The Division argued that the offset did not constitute a time-barred assessment, but rather the Division was simply reducing the company's refund due by the amount of the credits that the Division had determined the company was not permitted to use.

The Tax Court observed that "[a]s a matter of public policy, any other determination would dissuade taxpayers from requesting a refund."

The Decision: The Tax Court rejected the Division's argument, finding that the Division had four years from when the company filed its sales and use tax returns "to assess and reassess all aspects of the return including the use tax credits" and "[i]f the Division failed to rectify incorrectly applied credits during the statutory period, it cannot do so in the context of [the company's] refund claim." *Id.* The Division also tried to argue that the statute of limitations period began to run when the company filed its refund claim, but the Tax Court quickly dismissed this argument out of hand inasmuch as the applicable statute expressly stated that the limitations period began on the "date of filing of a return." *Id.* Finally, the Tax Court observed that "[a]s a matter of public policy, any other determination would dissuade taxpayers from requesting a refund." *Id.* □

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.

COST 2022 SALT Basics School

- ▶ **Mitchell A. Newmark** will serve as a panelist at the Council on State Taxation's ("COST") 2022 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. To learn more, please click [here](#). □

Lawline

- ▶ **Craig B. Fields** and **Nicole L. Johnson** will be the presenters for the Lawline CLE program, "State of the States," taking place on Thursday, May 12, 2022. Craig and Nicole will provide updates on important state tax litigation around the country. More details will follow in an upcoming issue of *The BR State + Local Tax Spotlight*. □

TEI's 72nd Midyear Conference

- ▶ **Nicole L. Johnson** will be a speaker at TEI's 72nd Midyear Conference, which is being held March 20 through 23, 2022 as a fully hybrid event. The in-person portion of the conference will take place at the Grand Hyatt in Washington, D.C. Nicole's session, "Where are You Now? Addressing Tax Issues from a Permanent Mobile Workforce," will take place on Tuesday March 22, from 3:30 to 4:30 p.m. EDT. To learn more, please click [here](#). □

Strafford CPE Webinars

- ▶ **Nicole L. Johnson** will co-present "Nonresident and Mobile Workers: Nexus Triggers, State Tax Traps" a 110-minute Strafford CPE live webinar with interactive Q&A, on Thursday, March 17, 2022, from 1:00 to 2:50 p.m. EDT. This CPE webinar will provide tax professionals and advisers guidance on differing state rules on withholding tax obligations for employers and personal income tax allocation for employees operating or working in multiple jurisdictions post-Wayfair. The panel will discuss nexus triggers, key challenges under various state tax rules, income tax allocation issues, resident credits, and methods for maintaining compliance. To learn more, please click [here](#). □

COST 2022 Sales Tax Conference & Audit Session

- ▶ **Eugene J. Gibilaro** and **Mitchell A. Newmark** will serve as panelists at the Council on State Taxation's ("COST") 2022 Sales Tax Conference & Audit Session, which will be held March 8 through 11, 2022, in Las Vegas, Nevada. Eugene will speak on the "Top Transactional Tax Legislation/Cases in 2021 and What to Expect in 2022" panel on Wednesday, March 9, at 8:15 a.m. The session will cover the most important transactional tax legislation and cases of 2021 and what the panelists expect to be the major issues and trends for 2022. The speakers will also cover how these issues impact business operations and ways to successfully resolve and/or mitigate them. Mitchell's session, "COVID-19—The New Normal: SALT Impact of Telecommuting," will take place at 11:10 a.m. the same day and the panel will walk through the various tax considerations of the ongoing remote work environment, where specific state guidance is often absent, as well as addressing what is yet to come when we are back to a "new normal," with a focus on transactional tax issues. To learn more, please click [here](#). □