



OCTOBER 2022

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



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Note from the Editor

By Eugene J. Gibilaro

Welcome to the October 2022 edition of *The BR State + Local Tax Spotlight*. We recognize the essentials of staying on top of important State + Local Tax developments, which appear frequently and across numerous jurisdictions. Staying up to date 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 important State + Local Tax developments that could impact your business. In this issue, we will be covering:

- A Pennsylvania decision finding that Pittsburgh's tax on nonresident athletes violates Pennsylvania's Uniformity Clause
- An Ohio decision ruling for the taxpayer in her as applied constitutional challenge to Ohio's pandemic emergency legislation
- A taxpayer win in a sales tax case at the Mississippi Supreme Court

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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CRAIG B. FIELDS

PARTNER

Pittsburgh's Tax on Only Nonresident Athletes Violates Pennsylvania's Uniformity Clause

By Craig B. Fields

While not many states have a uniformity clause in their constitutions, for those that do it can be a powerful tool in a person's arsenal in challenging a tax. This was recently demonstrated in *National Hockey League Players' Association v. City of Pittsburgh*, No.: GD-19-015542 (Pa. Ct. Com. Pl., Sept. 21, 2022), where Pittsburgh's Non-Resident Sports Facility Usage Fee ("Facility Fee") was struck down as violating Pennsylvania's Uniformity Clause.

The Facts. Pittsburgh enacted the Facility Fee whereby nonresidents of Pittsburgh who use the city's sports venues to engage in an athletic event or performance for remuneration are subject to a three-percent assessment on personal income earned while in Pittsburgh. Similarly situated resident athletes of Pittsburgh are not subject to the Facility Fee.

The National Hockey League Players' Association, Major League Baseball Players' Association, National Football League Players' Association, and a nonresident athlete from each association challenged the Facility Fee arguing that it was, in reality, a tax and that it violated the Uniformity Clause of the Pennsylvania Constitution.

The Decision. The Court first agreed that even though denominated as a "fee," the imposition was, in substance, a tax. It reasoned that the funds received by Pittsburgh went into its general fund, the "fee" is assessed as a percentage of taxable income, and a legislative purpose of enacting the Facility Fee was the stated goal of reducing a different tax (two-thirds of the Facility Fee was to be used to reduce the amount of tax on admissions to certain places of amusement).

The Court then had little difficulty in finding that the Facility Fee violated the Uniformity Clause, which requires taxes be uniform upon the same class of subjects, although there is an exception where there is a non-arbitrary, reasonable, and just basis for the disparate treatment.

The Court indicated that the Pennsylvania courts have consistently held that residence cannot be made the basis of discrimination in the taxation of persons engaged in the same profession. Here, the Facility Fee was found to be facially discriminatory since it levies a three-percent income tax on nonresidents in comparison to the city's one-percent income tax on residents. The City attempted to justify the

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different tax rates by asserting that resident athletes also pay a two-percent income tax towards Pittsburgh school districts. The Court rejected this argument since the two-percent school tax is levied by the school board, not Pittsburgh, and is used to directly fund the schools. It concluded that "[t]here is no permissible or rational basis for an unequal application of tax rates across residents and non-residents, and unequal application of tax rates across the same profession" and that the Facility Fee therefore violates the Uniformity Clause of the Pennsylvania Constitution. □



NICOLE L. JOHNSON

PARTNER

Limitations on the Ability to Tax

By Nicole L. Johnson

In the post-*Wayfair* age, the challenges to a jurisdiction's ability to tax have decreased. However, the pandemic brought a slew of new tax considerations and emergency rules and legislation, which have resulted in a steady uptick in challenges to a jurisdiction's ability to tax. One such successful challenge is the recent decision in *Morsy v. Dumas*, No. CV 21 946057 (Ohio Ct. Com. Pleas, Sept. 26, 2022).

The decision in *Morsy* examined Ohio's emergency legislation, which provided that if an employee provided personal services from home during the Stay at Home Executive Order, then the employee would be deemed to have provided those services at the employer's principal place of business. See H.B. 197. Dr. Morsy lived in Blue Bell, Pennsylvania, and commuted over six hours each way to work during the week in Cleveland, Ohio.

The Facts. From March 13, 2020, through December 31, 2020, Dr. Morsy worked from her home in Pennsylvania. Nevertheless, the City of Cleveland refused to refund

the municipal income tax Dr. Morsy paid for that period as a result of the emergency legislation. Dr. Morsy challenged the refund denial. The City defended the tax, in part, on the basis that "the ability to continue performing her job duties through a virtual network connection with her employer, located in Cleveland, created a substantial nexus." The City argued that providing services and protections to the employer's offices (notably not to the employee though)

and maintaining an infrastructure to allow Dr. Morsy to work from home was a sufficient basis for the imposition of the tax.

The Decision. The Court of Commons Pleas was not swayed by the City's expansive arguments. Instead, the court focused on the distinction between the two other Ohio cases on this issue and the current case—specifically that the other cases dealt with Ohio residents. See *Buckeye Institute v. Kilgore*, 2021-Ohio-4196 (Ct. App. Ohio, Nov. 30, 2021) and *Schaad v. Alder*, 2022-Ohio-340 (Ct. App. Ohio, February 7, 2022). The court held that the Ohio General Assembly "cannot create jurisdiction to levy a tax on the income of persons who are not residents of Ohio,

The court held that the Ohio General Assembly "cannot create jurisdiction to levy a tax on the income of persons who are not residents of Ohio, and that was earned for work performed outside of the State of Ohio."

and that was earned for work performed outside of the State of Ohio."

While this case focused on the emergency legislation enacted as a result of the pandemic, states that use a

convenience of the employer test to assert taxing authority should be wary. In those states, tax is often imposed if the employee only worked one day in the state and spent the rest of the year working from home. This case serves as an important reminder that merely having a tenuous connection with a jurisdiction does not grant that jurisdiction the authority to impose tax over a nonresident's income. □



EUGENE J. GIBILARO
OF COUNSEL

Tangible Means Tangible—State High Court Rules for Taxpayer in Sales Tax Dispute

By Eugene J. Gibilaro

As technology advances and an increasing number of products that used to be sold in tangible form are now instead sold in digital form, states are faced with the challenge of adapting their sales and use taxes, which have historically applied only to tangible personal property, to the modern economy. Mississippi, like several other states, has addressed this issue by extending its sales and use tax to apply to specified digital products, such as digital books and digital audio works. Miss. Code Ann. § 27-65-26.

Mississippi, like several other states, has addressed this issue by extending its sales and use tax to apply to specified digital products, such as digital books and digital audio works.

However, what about other types of products that have historically been sold in tangible form that are now being sold in digital form but that the legislature has not specified as taxable in their digital form like, for example, wedding photographs? May a state tax administrator torture the meaning of “tangible personal property” so that it still encompasses these products even though they are now provided to customers in digital form? In a recent decision, the Mississippi Supreme Court said no, ruling for the taxpayer based on the court’s conclusion that tangible means tangible. *Miss. Dep’t of Revenue v. EKB, Inc.*, No. 2021-SA-00441-SCT (Miss. 2022). Words have meaning and taxpayers should not back down when state tax administrators fail to follow the words of a taxing statute.

The Facts. EKB, Inc. (“EKB”) provides wedding photography services. Clients select one of EKB’s photograph packages, and every package includes the transfer of digital images

via a DVD or flash drive. For nearly all packages, clients purchase copyrights to the images created by EKB. After the wedding, EKB uses a computer to adjust and crop the images and then uploads the images to the DVD or flash drive for transfer to the client. EKB pays sales tax on DVDs and flash drives when it purchases them for clients.

The Mississippi Department of Revenue (“the Department”) audited and assessed sales tax against EKB based on its assertion that EKB’s sale of its photograph packages were taxable sales of tangible personal property because EKB conveyed the photographs in tangible form to clients in the form of a DVD or flash drive. The assessment was sustained at the administrative appeal levels, but the Chancery Court ruled for EKB, and the Department appealed to the Mississippi Supreme Court.

The Decision. The Mississippi Supreme Court ruled for EKB holding that its photograph packages were not subject to sales tax. The court reasoned that “EKB’s clients did not pay EKB thousands of dollars for a jump drive or DVD that they could purchase at an office-supply store for a few dollars.” The court concluded that what EKB’s clients were paying for was for EKB to take digital photographs of their wedding, and the DVD or flash drive was merely incidental to the transaction. The court also found it significant that, while the Legislature “has recognized the difference between tangible personal property and digital products” by expanding the sales tax to apply to specified digital products, the legislature did not include “still digital images” within the definition of taxable digital products. Finally, the court rejected the Department’s alternative argument that EKB provided taxable photo finishing services, noting that EKB “does not even use—let alone develop and print—film” and the legislature “has given no indication that digital editing services are to be included in ‘photo finishing.’” □

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.

29th Annual Paul J. Hartman State and Local Tax Forum

- ▶ [Craig B. Fields](#) and [Nicole L. Johnson](#) will speak at Vanderbilt University Law School's 29th Annual Paul J. Hartman State and Local Tax Forum, being held October 19 through 21, 2022, in Nashville, Tennessee. There will also be a virtual option available for all program sessions. Craig will speak on the "Leading Practices in Audits, Assessments, and Alternative Dispute Resolutions" panel, taking place Wednesday, October 19. Nicole's session, "Allocable Income," will take place the next day, Thursday October 20. To learn more, please click [here](#). □

Tax Executives Institute ("TEI") 77th Annual Conference

- ▶ [Craig B. Fields](#) will be a panelist at the Tax Executives Institute ("TEI") 77th Annual Conference, being held October 23 through 26, 2022, in Scottsdale, Arizona. Craig will speak on "NOLs—The Most Valuable State Tax Assets You Only Think You Have" on Tuesday, October 25 from 11:00 a.m. to 12:00 p.m. as part of the State & Local Tax ("SALT") educational track. To learn more, please click [here](#). □

COST's 53rd Annual Meeting

- ▶ Blank Rome State + Local Tax partners [Mitchell A. Newmark](#) and [Nicole L. Johnson](#) and of counsel [Eugene J. Gibilaro](#) will serve as panelists at the Council on State Taxation's ("COST") 53rd Annual Meeting, which will be held October 24 through 27, 2022, in Orlando, Florida. Blank Rome LLP is pleased to be a sponsor of the program. To learn more, please click [here](#). □

State Tax Program

- ▶ Blank Rome State + Local Tax partner [Mitchell A. Newmark](#) will serve as a panelist at the Lincoln Institute of Land Policy's 2022 National Conference of State Tax Judges, which will be held October 27 through October 29, 2022, in Cambridge, Massachusetts. Mitchell's session, "State Tax Program," will take place on Saturday, October 29, from 9:00 to 11:45 a.m., and Mitchell will be joined on the panel by moderator Myriam Bouaziz, California Office of Tax Appeals, and Kirk Stark, University of California, Los Angeles Law School. To learn more, please click [here](#). □

Tax Bootcamp Part II: Successful Litigation Strategies and Techniques

- ▶ Blank Rome State + Local Tax partner [Mitchell A. Newmark](#) will serve as a panelist for at the California Lawyers Association's ("CLA") 2022 Annual Meeting of the Tax Bar and Tax Policy Conference, which will be held November 2 through 4, 2022, at the Loews Coronado Bay Resort in Coronado, California. The Conference features an agenda of more than 30 educational courses and numerous networking opportunities tailored to corporate tax executives, attorneys, CPAs, financial planners, enrolled agents, government tax officials, legislators and staff, and law students. MCLE credit is available. To learn more, please click [here](#). □

A Multifaceted, Multi-State Perspective on FTE

- ▶ Blank Rome State + Local Tax of counsel [Eugene J. Gibilaro](#) will serve as a panelist at the Michigan Association of Certified Public Accountants' ("MICPA") Michigan Tax Conference, being held on Thursday, November 3, 2022, in Livonia, Michigan. Eugene's session, "A Multifaceted, Multi-State Perspective on FTE," takes place from 2:30 to 3:30 p.m., and will be moderated by Emily Irish, CPA, State & Local Tax Managing Director, BDO USA, Grand Rapids. To learn more, please click [here](#). □