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



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Note from the Editor

By Eugene J. Gibilaro

Welcome to the November 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 Louisiana appellate court decision affirming that the Louisiana Board of Tax Appeals can hear a taxpayer's appeal *de novo* (anew)
- A New York Administrative Law Judge decision concluding that e-mail tracking and analytics services are not subject to New York sales tax
- A Pennsylvania Commonwealth Court decision holding that out-of-state online marketplace sellers are not obligated to collect sales tax

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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Louisiana Parishes Don't Have Home Court Advantage on Appeal

By Mitchell A. Newmark

We have so often heard adversaries incorrectly assert that their agencies can be judge and prosecutor in their own cause. The saying is as old as the hills that “no man shall be a judge in his own cause.” *Exec. Comm’n on Ethical Standards v. Salmon*, 295 NJ Super 86, 97 (N.J. Super. Ct. App. Div. 1996), citing *Bonham’s Case*, 8 Co., 113 b, 118 a, 77 Eng. Rep. 646, 652 (K.B. 1610). We have also so often heard adversaries incorrectly assert that jurisdiction for an appeal is incorrect (or more offensive, when there were two potential places of jurisdiction and both were perfected, an adversary asserting in each jurisdiction that the other jurisdiction is the only correct one!). When Jefferson Parish, Louisiana, told the Louisiana Board of Tax Appeals (“BTA”) that the BTA could not fully hear a taxpayer’s appeal from an assessment of sales and use taxes by the Parish, the Board told the Parish to pound SALT. *Kellogg Brown & Root, LLC v. Lopinto*, No 22-C-204 (La. Ct. App. 5th Cir Nov. 2, 2022). The appellate court affirmed that the BTA is an independent reviewing body having *de novo* (anew) jurisdiction of all matters related to state and local taxes or fees. The BTA stands up for its jurisdiction and so should you.

When Jefferson Parish, Louisiana, told the Louisiana Board of Tax Appeals (“BTA”) that the BTA could not fully hear a taxpayer’s appeal from an assessment of sales and use taxes by the parish, the Board told the Parish to pound SALT.

The Facts: Kellogg Brown & Root, LLC (“KBR”) performed work for its client at its client’s ammonia factory in Jefferson Parish and purchased tangible personal property in connection with that work. The Parish tax division audited and issued a proposed assessment. A hearing was timely requested and a Parish-level hearing was held over three days. Following the protest hearing, a revised assessment was issued. KBR timely filed a petition for redetermination against the Sheriff and Ex-Officio Tax Collector for the Parish; the Parish Sheriff’s Office; and the Parish Bureau of Revenue and Taxation, Sales and Use Tax Division (collectively, the “Collector”) at the BTA.

The Collector filed exceptions asserting that the BTA’s jurisdiction had been improperly invoked. The Collector theorized that the BTA can only act as an appellate court when deciding an appeal for redetermination of an assessment under La. R.S. 47:337.51 (uniform local sales tax appeals procedures) when prior to the BTA a hearing had been held at the Parish protest level under La. R.S. 47:337.49 (protest to collector’s determination of tax due). At its essence, the Collector asserted that procedurally, KBR was not entitled to a trial *de novo* (anew) at the BTA because there was a Parish-level protest hearing—that the BTA was to sit as an appellate court and review the record made at the Parish level. The Local Tax Judge sitting for the Local Tax Division of the BTA explained the history and responsibilities of the BTA, found that the BTA is a trial court that hears appeals *de novo*, including appeals from Parish sales and use tax assessments.

The Decision: The Court of Appeal affirmed the BTA. *Kellogg*, slip op at 6. In so affirming the BTA, it also bolstered the BTA’s status as against naysaying Parishes by tracing the BTA’s authority in the Louisiana Constitution, in the Louisiana statutes, and through the BTA’s 80-year history. The Louisiana Legislature created the BTA as an independent agency to hear and decide questions of law and fact arising between taxpayers and tax collectors. The BTA has traditionally acted as a trial court. Further, the BTA’s decisions are reviewed by appellate courts with the type of deference that befits a decision from a trier of fact. The BTA is specifically given jurisdiction over “all matters related to state and local taxes or fees....” *Kellogg*, quoting La Const. art V, Sec 35. Therefore, the Court of Appeal found that “the BTA must accept new evidence and hear testimony, like a trial court, in order to develop a sufficient record for review by a court of appeal.” *Kellogg*, slip op at 7. It would not surprise us if Jefferson Parish appeals to the Louisiana Supreme Court—at least for the Collector to be able to say it took it all the way. The Court of Appeals decision is thorough and well reasoned and should withstand further appeal if taken.

The Takeaway: Respect the protest-level hearings. However, know that you get a trial *de novo* at the BTA from Parish sales and use tax assessments. □



KARA M. KRAMAN

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ALJ Determines E-Mail Tracking and Analytics Services Not Subject to New York Sales Tax

By Kara M. Kraman

An Administrative Law Judge (“ALJ”) recently issued a determination cancelling the notices of determination issued by the New York State Department of Taxation and Finance and finding that the taxpayer’s e-mail tracking and analytics services were not subject to sales tax as the sale of pre-written software. *In re Yesware, Inc. et al.*, DTA Nos. 829638, 829639 & 829640 (N.Y. Div. of Tax App., Sep. 29, 2022).

The Facts: Yesware, Inc. (“Yesware”) provided an analytics service which it described in its promotional materials as permitting customers to “make smarter decisions, faster, with detailed analytics on emails sent, opens, and response rates across your entire sales team.” Yesware’s customers were required to download a browser extension in order to enable Yesware to perform its services. The browser extension, which was software, was licensed by Yesware to its customers. Yesware’s customers generally paid a flat fee for Yesware’s services and did not separately pay a fee for the browser extension.

Yesware analyzed the information it received from its customers with more than 60 proprietary software applications, each of which performed a unique function. Yesware’s customers did not have access to the proprietary software applications; did not license the proprietary software; and could not use, modify, or manipulate the proprietary software. Yesware provided the reports it created through the data it collected to its customers through Yesware’s website or through the browser extension.

On audit, the auditor determined that the service sold by Yesware was a bundled service, and that the software was not incidental to that service. Therefore, Yesware was selling a taxable license to use software.

The Decision: After analyzing all the facets of the service provided by Yesware, the ALJ determined that Yesware’s service was a bundled non-taxable information service. In reaching her conclusion, the ALJ applied the “primary function test,” which states that when the service being offered is an integrated service, it should be taxed according to its primary function. In this case, the ALJ found that the primary function of Yesware’s services was to provide

The question of whether bundled services that include a software license are subject to sales tax has been the subject of several ALJ and Tribunal decisions and usually turns on the specific facts of the case.

its customers with custom reports regarding what activity occurred with the e-mails they sent to prospective clients. The ALJ also noted that Yesware’s customers did not have use of the software that does the analysis and tracking.

The question of whether bundled services that include a software license are subject to sales tax has been the subject of several ALJ and Tribunal decisions and usually turns on the specific facts of the case. In general, however, for there to be a taxable sale or license of prewritten software (whether or not it is part of a bundled transaction), the customer must receive the right to use and control the software. While this decision is a favorable one for taxpayers, it should be remembered that ALJ determinations are not precedential. As of November 14, 2022, the Department had not yet filed an appeal. □



IRWIN M. SLOMKA

SENIOR COUNSEL

Pennsylvania Commonwealth Court Holds That Out-of-State Online Marketplace Sellers are Not Obligated to Collect Sales Tax

By Irwin M. Slomka

Can an online merchant have nexus with a state because its merchandise *may* be stored in the state? And what is the scope of the government’s authority to make inquiries of the out-of-state online merchant to obtain information about its in-state activities? Both questions are the subject of a recent Pennsylvania Commonwealth Court decision. *Online Merchants Guild v. Hassell*, No. 179 M.D. 2021 (Pa. Commw. Ct., Sept 9, 2022). The Commonwealth Court held that the Department of Revenue failed to demonstrate that the out-of-state online merchants had sufficient in-state contacts under the Due Process Clause to permit it to require responses to inquiries contained in questionnaires mailed to those merchants. The decision illustrates that *Wayfair’s* Commerce Clause analysis may not be the final word on nexus because of the Due Process Clause. It also shows that states do not have unfettered authority to subject out-of-state businesses to audit scrutiny absent a sufficient connection with the state.

The Facts: Petitioner, Online Merchants Guild (“Online Merchants”), is a trade association comprising online businesses that sell merchandise through Amazon’s “Fulfillment by Amazon” Program. Under that program, businesses send products to Amazon fulfillment centers and when customers make an online purchase, Amazon processes and ships the order to the customer. To participate in the program, the merchant must ship its merchandise to a warehouse location designated by Amazon—which could be in Pennsylvania—after which the merchant had “no further control” over the merchandise, unless it withdrew it from sale. Merchants had no contact with customers and asserted that they did not know how much of their inventory Amazon actually stored in Pennsylvania (or in any state) on their behalf.

In 2017, Pennsylvania enacted a marketplace facilitator sales tax law requiring that online facilitators collect sales tax on sales made on behalf of marketplace sellers under a fulfillment program. However, the Department of Revenue began pursuing uncollected sales tax from marketplace merchants for periods prior to the effective date of the law, beginning with the mailing of approximately 11,000 business activities questionnaires to nonresident merchants in the Amazon program. Those questionnaires stated that the merchants “may have” a physical presence in Pennsylvania—the tax periods in question included periods that predated the 2018 U.S. Supreme Court decision in *Wayfair*—and noted that the storage of inventory in

Pennsylvania created a tax collection obligation. The questionnaires gave the merchants 15 days to respond under the threat of “additional enforcement actions.”

Online Merchants brought an action for summary judgment, asserting that the Department’s questionnaires violated the merchants’ constitutional rights under the Due Process Clause. It argued that the Department had not established sufficient “minimum contacts” that would give the Department jurisdiction over the merchants, claiming that mere participation in the Amazon program did not create meaningful contacts with the state. The Department denied that the merchants’ due process rights were violated by what it described as a “demand for information.”

The decision illustrates that *Wayfair’s* Commerce Clause analysis may not be the final word on nexus because of the Due Process Clause. It also shows that states do not have unfettered authority to subject out-of-state businesses to audit scrutiny absent a sufficient connection with the state.

The Decision: The Commonwealth Court ruled in favor of the merchants, finding that the Department failed to provide sufficient evidence that the online merchants—whose connections to Pennsylvania involved the storage of merchandise in Amazon’s Pennsylvania warehouse—had enough contacts to be required to collect and remit sales tax. Addressing the requirements to satisfy due process under prior Pennsylvania court decisions, rather than the requirements under the Commerce Clause under which *Wayfair* was decided, it agreed with Online Merchants that the merchants had no control over the merchandise sent to Amazon’s designated warehouse, and whether merchandise remained at that location was solely up to Amazon. The court concluded that having failed to establish minimum contacts to satisfy the Due Process Clause, the Department was without authority to examine the merchants’ records based merely on a suspicion that the merchant was in violation of the Pennsylvania tax law. □

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. In addition to the media highlights and articles below, we invite you to attend our speaking engagements, 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.

Eugene J. Gibilaro Recognized in Marquis Who's Who

- ▶ [Blank Rome LLP](#) is pleased to announce that [Eugene J. Gibilaro](#) has been recognized in Marquis Who's Who, the world's premier publisher of biographical profiles. To learn more, please click [here](#). □

Spotlight Article Featured in Pratt's Government Contracting Law Report

- ▶ [Irwin Slomka](#)'s article from the September edition of Spotlight analyzing a decision by the U.S. District Court for the Southern District of New York, under the New York False Claims Act was recently featured in Pratt's Government Contracting Law Report. To learn more, please click [here](#). □

2022 Annual Institute on State and Local Taxation

- ▶ Blank Rome State + Local Tax of counsel [Eugene J. Gibilaro](#) and State + Local Tax partner [Mitchell A. Newmark](#) will serve as panelists at the [NYU School of Professional Studies](#)' 2022 Annual Institute on State and Local Taxation, being held December 12 and 13, 2022, in New York, New York. Blank Rome LLP is pleased to be a sponsor of the program. To learn more, please click [here](#). □

The 2023 National Multistate Tax Symposium

- ▶ Blank Rome State + Local Tax partner [Craig B. Fields](#) will serve as a speaker at the [2023 National Multistate Tax Symposium](#), presented by Deloitte Tax LLP in collaboration with the Tax Section of the Florida Bar, being held February 8 through 10, 2023, in Lake Buena Vista, Florida. Craig's session, "Multistate Income/Franchise Tax Hot Topics: P.L. 86-272 and Related-Party Transactions," will take place on Friday, February 10. □

Telecommuting Tax Traps

- ▶ Blank Rome State + Local Tax partner [Nicole L. Johnson](#) and State + Local Tax partner [Craig B. Fields](#) will present the [Lorman](#) live webinar "Telecommuting Tax Traps" on Thursday, March 2, 2023. In this webinar, Nicole and Craig will discuss the tax traps faced by businesses with an increasingly mobile workforce. □