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THE BR STATE + LOCAL TAX SPOTLIGHT

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Note from the Editor

By Eugene J. Gibilaro

Happy New Year and welcome to the January 2023 edition of *The BR State + Local Tax Spotlight.* We understand the importance of staying up-to-date on State + Local Tax developments, which appear often and across numerous jurisdictions. Staying informed on important 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:

- Slightest Presence Nexus Attack Fails in Massachusetts for Pre-Wayfair Years
- Despite Valid Resale Certificate, Rhode Island Vendor is Held Liable for Tax, Interest, and Penalties
- New York State Judge Determines Individual Member of LLC Personally Liable for 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.

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Slightest Presence Nexus Attack Fails in Massachusetts for Pre-Wayfair Years

By Mitchell A. Newmark

A Massachusetts tax auditor once said to me with pride, "They don't call us 'Taxachusetts' for nothing!" when I explained that the Department's position was unsupported. Recently, Massachusetts was reminded that its Taxachusetts moniker may be well deserved when the Supreme Judicial Court of Massachusetts (the State's high court) held that "cookies" and other electrons did not constitute taxable nexus for periods prior to the U.S. Supreme Court's decision in *South Dakota v. Wayfair,* 138 S. Ct. 2080 (2018). *U.S. Auto Parts Network, Inc. v. Commissioner of Revenue,* 199 N.E.3d 840, SJC-13283 (Mass. Dec. 22, 2022).

In *Wayfair,* the U.S. Supreme Court reversed the physical presence requirement that had existed for more than 50 years, leaving us with nexus standards the parameters of which will be debated for years to come. However, for periods prior to *Wayfair,* the purported taxpayer must have a "substantial nexus" that is more than the "slightest presence" and electrons nexus (whether by applications, cookies, or CDNs) doesn't fly. Not at all a "shocking" result!

A Massachusetts tax auditor once said to me with pride, "They don't call us 'Taxachusetts' for nothing!" when I explained that the Department's position was unsupported.

The Facts: U.S. Auto Parts Network, Inc. (the "Company") was organized under the laws of a state other than Massachusetts; was headquartered outside Massachusetts; had no offices (leased or owned), inventory, facilities, or equipment in Massachusetts; had no employees or representatives in Massachusetts; and delivered its goods to Massachusetts customers by common carrier from locations outside Massachusetts. The Company sold automobile parts via the Internet through websites and mobile applications (an "online" retailer) to customers located in Massachusetts. The sales and use tax period at issue was October 1, 2017, to October 31, 2017, for which the Company did not register for or collect and remit sales or use tax.

The Company's business included three activities. A customer could download mobile applications onto portable devices located in Massachusetts. When customers accessed the Company's website the Company delivered small data and text files to customers' computers (the files, referred to as "cookies," record and maintain data about the customer's online activities) to the Internet browser of the customer's device. The Company also used content delivery networks (each a "CDN") operated by third parties that enabled website users to access the third-party servers rather than a website host's servers to speed communications by shortening the transmission distance for certain information.

A Massachusetts DOR ("MADOR") regulation stated that commencing October 1, 2017, a non-domiciliary vendor that otherwise met sales thresholds and employed applications, cookies, or CDNs in connection with sales in Massachusetts had to register and collect/remit Massachusetts sales or use tax. MADOR explained the purported incursions to its jurisdiction via the applications, cookies, and CDNs "as 'electrons' existing in the Commonwealth" that created nexus by application of its regulation and retroactive application of the *Wayfair* decision.

The Decision: The Supreme Judicial Court of Massachusetts held that *Wayfair* could not be applied retroactively in conjunction with the pre-*Wayfair* regulation. It further held that under the U.S. Supreme Court's earlier case law (holding that a sales or use tax collection obligation could not be imposed by a state on a non-domiciliary vendor that did not have a physical presence in that taxing state and delivered goods to customers in the state via common carrier or U.S. Mail reasoning so based on the dormant Commerce Clause of the U.S. Constitution), the purported "electrons" existing in the Commonwealth did *not* constitute a substantial nexus. □

CRAIG B. FIELDS
PARTNER

Despite Valid Resale Certificate, Rhode Island Vendor Liable for Tax, Interest, and Penalties

By Craig B. Fields

The Rhode Island Division of Taxation ("Division") recently ruled that a vendor that had accepted a valid resale certificate was nonetheless subject to taxes, interest, and penalties from the transaction based on the timing of its acceptance of the resale certificate from its customer. While it is doubtful that the legislature would have intended this result, unless and until the decision is overturned by the courts, if a seller does not receive an exemption certificate at the time of sale or within 90 days thereof, it may be prudent for the seller not to request it from the customer until the Division asks for it on audit. *In re: Taxpayer, R.I. Dept. of Rev., Div. of Tax,* Administrative Hearing Decision, No. 2022-20, 2022 WL 17969832 (Dec. 22, 2022).

The Facts: A limited liability company based in Rhode Island ("Vendor") sells various goods and services. It invoiced a Rhode Island company ("Customer") for goods and services on August 31, 2016, and remitted sales tax to the Division on September 19, 2016.

The Customer later provided Vendor with a Rhode Island Resale Certificate dated December 16, 2016. Vendor generated a credit memo for the Customer for the tax it previously collected and claimed a tax credit for the sales tax on its Rhode Island returns. After reviewing Vendor's sales tax returns, the Division issued notices asserting that Vendor owed the sales tax as well as interest and negligence penalties. The Hearing Officer accepted that Vendor's sales to Customer were for resale.

Rhode Island adopted the streamlined sales and use tax agreement ("SSUTA"). The state statute provides that a seller is relieved of tax if it obtains a fully completed exemption certificate within 90 days of the date of the sale. Another provision states that if the seller has not so obtained an exemption certificate, it may within 120 days of a request for substantiation by the Division either obtain a properly completed exemption certificate or prove that the transaction was not subject to tax.

The Decision: The transaction was held taxable by the Hearing Officer simply because of when the resale certificate was obtained. The Hearing Officer first ruled that the resale certificate did not come within the first exemption to taxability because it was not received by Vendor at the time of sale or within 90 days of the sale (it was received on December 16, 2016, which is 107 days after the August 31, 2016, sale). The Hearing Officer then determined that the second exemption (which provides sellers 120 days to provide a resale certificate or other proof of nontaxability) did not apply since it only applies when a resale certificate is not received and the tax department ***requests*** proof of nontaxability. Here, Vendor did in fact receive a resale certificate and, according to the Hearing Officer, the second exemption was therefore inapplicable. The Hearing Officer then determined that, in addition to tax being due, Vendor owed interest on the tax plus negligence penalties.

> **The transaction was held taxable by the Hearing Officer simply because of when the resale certificate was obtained.**

It is hard to believe that a legislature would have intended such a harsh result. If Vendor had not accepted the resale certificate in December 2016 but, instead, waited for the Division to request proof that the transaction was exempt from tax, then the transaction would have been nontaxable. However, merely because of the timing of receipt of the certificate, Vendor is held liable not only for tax and interest but also penalties. For now, sellers in Rhode Island, and perhaps other SSUTA states, should be careful if they do not receive an exemption certificate at the time of sale or within 90 days of the sale. □

KARA M. KRAMAN
OF COUNSEL

New York State ALJ Determines Individual Member of LLC Personally Liable for Sales Tax

By Kara M. Kraman

An Administrative Law Judge ("ALJ") recently determined that an individual member of a limited liability company ("LLC") was personally liable for an LLC's sales tax deficiency, both because he was a member of the LLC, and because he was a person required to collect and remit tax under New York law. *Matter of Ben-Zion Suky,* DTA No. 829768 (N.Y.S. Div. of Tax App., Dec. 15, 2022).

The Facts: US Suite Management LLC (the "LLC") failed to timely file a New York sales and use tax return for the period December 1, 2014, through February 28, 2015 ("period at issue"). Consequently, the Division issued a notice of estimated determination to Ben-Zion Suky, as a person responsible for the sales tax of the LLC.

The Division's issuance of the notice to Mr. Suky was based on his membership in the LLC and his signature on multiple documents including his signature on a check payable to the Division, the LLC's partnership return, a consent to extension of time for the audit, and a power of attorney form for the LLC which listed Mr. Suky as the "Managing Member," among other documents. At the hearing, Mr. Suky testified that he was not the managing member of the LLC and described himself as a "limited partner" in the LLC. He testified that he acted on behalf of the LLC because he was authorized to do so by a company of which he was not a member called Aura U-Trend, which he testified was the actual managing member of the LLC.

The Decision: The tax statute applicable to the period at issue provided that every person "required to collect [sales] tax" shall be personally liable for the tax imposed. The statute further defined the "persons required to collect tax" to include any employee or manager of an LLC that is under a duty to act for such LLC to comply with the sales tax, or that has so acted, and *any member* of a partnership or limited liability company." Tax Law § 1131 (1). The ALJ held that Mr. Suky was liable for the sales tax because the applicable law during the period at issue imposed strict liability for the sales tax upon all members of LLCs and he admitted that he was a limited partner in the LLC. The ALJ also determined that regardless of whether Mr. Suky was a member of the LLC, the record demonstrated that he had sufficient control and authority over the affairs of the LLC so as to be an individual personally liable on the grounds that he was person who was under a duty to act for the LLC to comply with the sales tax.

> **The statute further defined the "persons required to collect tax" to include any employee or manager of an LLC that is under a duty to act for such LLC to comply with the sales tax, or that has so acted, and *any member* of a partnership or limited liability company."**

While the Tax Law was amended effective April 12, 2018, to provide relief from liability for limited partners and members of LLCs and partnerships that hold a minority interest and are not under a duty to act by limiting their share of the liability to the percentage of their interest in the LLC or partnership, this provision was not in effect during the period at issue. Regardless, this amendment would not have helped Mr. Suky as the ALJ determined he was under a duty to act to comply with the sales 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. 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.

Nonresident and Mobile Workers: Nexus Triggers, State Tax Traps

- Blank Rome State + Local Tax Partner 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 16, 2023. To learn more, please click here.

Apportionment of Services and Intangibles, Section 18

- Blank Rome State + Local Tax Partner Craig B. Fields will serve as a panelist at the 2023 ABA/IPT Advanced Tax Seminars, hosted by the American Bar Association ("ABA") Section of Taxation and the Institute for Professionals in Taxation ("IPT"), being held March 13 through 17, 2023. To learn more, please click here.

Telecommuting Tax Traps

- Blank Rome State + Local Tax partners Nicole L. Johnson and 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.

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 8through 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. To learn more, please click here.

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