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



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## Note from the Editor

By Eugene J. Gibilaro

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**Welcome to the February 2023 edition of *The BR State + Local Tax Spotlight*.** We know the importance of remaining up-to-date on State + Local Tax developments, which appear often and across numerous jurisdictions. Staying informed on significant legislative developments and judicial decisions helps tax departments function more efficiently, along with improving 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:

- Unconstitutional Discrimination: States Cannot “Level the Playing Field” for In State Businesses
- NYS Tax Tribunal Rules Manufacturer Entitled to 100 Percent Empire Zone Investment Tax Credit and \$152 Million Refund
- English 101: Prepositions Matter When Determining Where Services Are Rendered

**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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## Unconstitutional Discrimination: States Cannot “Level the Playing Field” for In State Businesses

By Eugene J. Gibilaro

On February 3, 2023, the Sixth Circuit for the U.S. Court of Appeals held that an Illinois coal producer was likely to succeed on the merits of its claim that a Kentucky law directing Kentucky utilities purchasing coal to evaluate the reasonableness of coal bid prices after subtracting severance taxes from the actual bid price, including Kentucky’s own severance tax, discriminated against interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

*Foresight Coal Sales, LLC. V. Chandler*, No. 21-6069 (6th Cir. 2023). The Court found that the law was discriminatory in practice, making coal from states with severance taxes, like Kentucky, cheaper for Kentucky utilities by the amount of the severance taxes and rejected Kentucky’s argument that the purpose of the law was to “level the playing field” for Kentucky coal producers disadvantaged by Kentucky’s own severance tax. The case is an important reminder that laws that discriminate against interstate commerce, including discriminatory tax laws, are “virtually per se invalid” and challengers of discriminatory laws should have the upper hand in litigation against states seeking to defend them.

**The Facts:** Some states impose severance taxes on the value of natural resources, such as coal, that are “severed” from the land within the state’s borders. Only the state from which a natural resource is extracted can impose a severance tax on the natural resource. Kentucky imposes on Kentucky coal producers a severance tax equal to 4.5 percent of the gross value of coal extracted in Kentucky. Utilities in Kentucky are regulated by the Kentucky Public Service Commission and are generally encouraged to purchase coal at the cheapest prices available, which puts Kentucky coal producers at a disadvantage against coal producers in states that do not impose severance taxes, such as Illinois, as coal producers not subject to severance taxes can afford to sell coal at lower prices.

In 2021, Kentucky passed a law requiring the Commission to “evaluate the reasonableness of fuel costs in contracts and competing bids based on the cost of the fuel less any coal severance tax imposed by any jurisdiction.” Ky. Rev. Stat. Ann. § 278.277(1). An Illinois coal producer, Foresight Coal

Sales, LLC (“Foresight”), brought a lawsuit and sought a preliminary injunction to prevent the law from going into effect. The threshold question in determining whether to grant the injunction was whether Foresight had a strong likelihood of success on the merits of its claim that the Kentucky law unconstitutionally discriminated against interstate commerce. The district court held that Foresight did not have a strong likelihood of success on the merits of its discrimination claim and Foresight appealed to the Sixth Circuit.

**The case is an important reminder that laws that discriminate against interstate commerce, including discriminatory tax laws, are “virtually per se invalid” and challengers of discriminatory laws should have the upper hand in litigation against states seeking to defend them.**

**The Decision:** The Court held that, whether on its face or in effect, the Kentucky law discriminated against out-of-state coal businesses. Kentucky argued that its law could not be discriminatory because it was necessary to “level the playing field” for Kentucky coal producers competing against coal producers from other states that did not impose severance taxes. However, the court observed that “the ‘leveling’ effect may be precisely what is discriminatory.” While the Kentucky law permitted the Commission to consider other state severance taxes and coal producers from other states imposing severance taxes could also benefit from the law, the Court found that the law’s “discrimination isn’t alleviated either by the fact that some states already impose severance taxes (in varying amounts) and that others *may* choose to impose severance taxes of their own.” According to the Court, a state’s “policy is discriminatory if its claim to neutrality depends on another state enacting the same policy.”

Inasmuch as the Court concluded that Foresight was likely to succeed on the merits of its claim that the Kentucky law unconstitutionally discriminated against interstate commerce, the case was remanded to the district court for it to consider the remaining preliminary injunction factors. □





CRAIG B. FIELDS

PARTNER

## NYS Tax Tribunal Rules Manufacturer Entitled to 100 Percent Empire Zone Investment Tax Credit and \$152 Million Refund

By Craig B. Fields

Highlighting the importance of the wording of a statute, the New York State Tax Appeals Tribunal, reversing an Administrative Law Judge, held that a manufacturer was allowed both a refund of 50 percent of its Empire Zone investment tax credit (“EZ ITC”) as a “new business” and a refund of 50 percent of its EZ ITC as the owner of a qualified investment project (“QUIP”) or significant investment project (“SCIP”). As a result, the manufacturer was entitled to a refund of 100 percent of the credit carryover, totaling over \$152 million. *GlobalFoundries U.S. Inc.*, Docket No.829184 (NYS Tax App. Trib. Jan. 19, 2023).

The issue in the case was whether the New York Tax Law, which provides that a taxpayer that is a new business may elect to receive a refund of 50 percent of its EZ ITC carryover and that a taxpayer that is the owner of a QUIP or a SCIP may elect to receive a refund of 50 percent of its EZ ITC carryover, permits a taxpayer that is both a new business and an owner of a QUIP or SCIP to elect to receive both such refunds in a single year, resulting in a refund of 100 percent of the credit carryover for that year.

**The Facts:** GlobalFoundries manufactures semiconductor products in a designated Empire Zone in New York. On its initial New York tax returns, it filed for and received a refund of 50 percent of its EZ ITC carryover for its taxable year 2014. It subsequently filed an amended return seeking a refund of the remaining 50 percent.

It was undisputed that GlobalFoundries qualified as both a new business and as the owner of a QUIP or SCIP. Its entitlement to the EZ ITC in the claimed amounts was also undisputed as was its right to carry over the credit.

The Division of Taxation, however, denied the refund claim on the basis that a taxpayer was only entitled to a refund of 50 percent of the carryover.

**The Decision:** Although finding that the statute should be strictly construed against the taxpayer, the Tribunal nonetheless ruled for GlobalFoundries. The statute at issue, Tax Law Section 210-B(3)(d), first contains a carryover provision for new businesses. The next sentence, which begins with the words “In addition,” contains the carryover provision for owners of a QUIP or SCIP. Finding the statute facially unambiguous, the Tribunal interpreted it based on its plain meaning, finding that the “words ‘in addition,’ of course, mean ‘also.’” Consequently,

“[t]he statute as written thus provides two benefits, one ‘in addition’ to the other, each available to ‘any’ taxpayer that qualifies.”

The Tribunal found additional support for its conclusion in

the fact that another Empire Zone carryover provision specifically limited the carryover to either new businesses **or** owners of a QUIP or SCIP. Finally, the Tribunal held that for one of the two years at issue, GlobalFoundries had not timely filed a refund claim and, therefore, that refund claim was untimely.

Inasmuch as New York cannot appeal decisions of the Tax Appeals Tribunal, this decision is final. It does, moreover, demonstrate the importance of the words contained in a statute. □

**It was undisputed that GlobalFoundries qualified as both a new business and as the owner of a QUIP or SCIP.**



NICOLE L. JOHNSON

PARTNER

## English 101: Prepositions Matter When Determining Where Services Are Rendered

By Nicole L. Johnson

Ascertaining where services are rendered has been a challenge faced by numerous companies operating throughout the United States. For example, for Louisiana corporate franchise tax purposes, revenue from certain services is sourced based on the “location at which the services are rendered.” La. Rev. Stat. Ann. § 47:606(A)(1)(f). The Louisiana Department of Revenue interpreted the location where rendered to be the location “where they are received by the customer.” La. Admin. Code 61:I.306(A)(1)(d)(ii). However, a recent decision conflicts with that interpretation. In *Boles v. City of St. Louis*, Cause No. 2122-CC00713 (Mo. Cir. Ct. Jan. 19, 2023), taxpayers challenged that “rendered” means where the customer (or employer in this case) is located.

**The Facts:** Since 1959, the City of St. Louis has imposed an Earnings Tax on nonresidents “for work done or services performed or rendered in the City.” In 2020, the taxpayers worked from home, outside of St. Louis, for the majority of the year. Their employers withheld the Earnings Tax and the taxpayers sought a refund for those days worked outside of St. Louis. Despite issuing refunds on the same basis for 2018 and 2019, the 2020 refund claims were denied.

The taxpayers argued that the phrase “rendered in” in the Earnings Tax statute was limited to when a nonresident was physically present and working in the city. The city argued that “rendered in” meant that the benefit of the services was received in St. Louis.

**The Decision:** Upon review, the court agreed with the taxpayers. The court held that the preposition “in” commonly refers to a location. Thus, the phrase “rendered

in” refers to services that were physically conducted in St. Louis. In part, the court reached its decision because St. Louis provided refunds to the taxpayers in 2018 and 2019 for work performed outside of the city. The city argued that the Earnings Tax always applied to work conducted outside of St. Louis for employers located in the city, but the city never enforced such collection for teleworkers. Perceptively, the court noted that “it strains credibility to think Defendants always believed they were entitled to more tax dollars but just decided for reasons unknown not to attempt to collect them.”

**The taxpayers argued that the phrase “rendered in” in the Earnings Tax statute was limited to when a nonresident was physically present and working in the city. The city argued that “rendered in” meant that the benefit of the services was received in St. Louis.**

While this case is another in the string of cases related to local taxes on the mobile workforce, its application may not be so limited. When interpreting a taxing statute, it is imperative to focus on the words of that statute—in this case “rendered in”—as opposed to one single word in the statute. English teachers everywhere are rejoicing at the reminder that prepositions matter. □

# 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.

## North Atlantic Regional State Tax Seminar

- ▶ Blank Rome State + Local Tax partners [Craig B. Fields](#), [Eugene J. Gibilaro](#), [Nicole L. Johnson](#), and [Mitchell A. Newmark](#) will serve as speakers at the Council on State Taxation's ("COST") [North Atlantic Regional State Tax Seminar](#), being held March 29, 2023, from 8:30 a.m. to 3:15 p.m. Blank Rome is pleased to co-sponsor the event with Deloitte Tax LLP and host the Seminar at our office in New York, New York. A reception and networking will follow. □

## 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. To learn more, please click [here](#). □

## Sales Tax Conference & Audit Session

- ▶ Blank Rome State + Local Tax Partners [Nicole L. Johnson](#) and [Craig B. Fields](#) will present at the 2023 Council on State Taxation's ("COST") Sales Tax Conference & Audit Session on Wednesday, February 22nd, and Friday, February 24th. This three day in-person conference will feature presentations on the most recent transactional tax developments, initiatives, and case law topics. To learn more, please click [here](#). □