



APRIL 2023

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



CONTENTS

1. Note from the Co-Editors
2. Bait and Switch in the Big Easy
3. New York Appellate Court Finds That IBM Cannot Deduct Foreign Royalty Payments
4. State Solutions to a Mobile Workforce
5. What's Shaking: Blank Rome State + Local Tax Roundup

STATE + LOCAL TAX TEAM:

Craig B. Fields | craig.fields@blankrome.com

Nicole L. Johnson | nicole.johnson@blankrome.com

Mitchell A. Newmark | mitchell.newmark@blankrome.com

Irwin M. Slomka | irwin.slomka@blankrome.com

Eugene J. Gibilaro | eugene.gibilaro@blankrome.com

Kara M. Kraman | kara.kraman@blankrome.com

Joshua A. Sivin | joshua.sivin@blankrome.com

Philip M. Tatarowicz | phil.tatarowicz@blankrome.com

Madison A. Ball | madison.ball@blankrome.com

Note from the Co-Editors

By Eugene J. Gibilaro and Joshua M. Sivin

Welcome to the April 2023 edition of *The BR State + Local Tax Spotlight*. We understand 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:

- Bait and Switch in the Big Easy
- New York Appellate Court Finds That IBM Cannot Deduct Foreign Royalty Payments
- State Solutions to a Mobile Workforce

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.

Co-Editors, *The BR State + Local Tax Spotlight*

EUGENE J. GIBILARO

Partner

813.255.2316

eugene.gibilaro@blankrome.com



JOSHUA M. SIVIN

Of Counsel

212.885.5025

joshua.sivin@blankrome.com



EUGENE J. GIBILARO

PARTNER

Bait and Switch in the Big Easy

By Eugene J. Gibilaro

When a local taxing authority extends the deadline for paying taxes due, can taxpayers rely on that extension? According to an intermediate appellate court in Louisiana, the answer is “no.” *In NOHC, Inc. v. Erroll G. Williams, Assessor, Parish of Orleans, et al.*, No. 2022-CA-0248 (La. Ct. App. Mar. 22, 2023), the City of New Orleans extended the deadline for taxpayers to pay their property taxes and when NOHC, Inc. paid property taxes under protest after the original deadline but before the extended deadline and filed a lawsuit in court seeking reimbursement of taxes paid, the City argued, and the Court of Appeal agreed, that the lawsuit was time-barred because NOHC, Inc. had failed to timely pay the taxes under protest by the original deadline. This case is a cautionary tale for taxpayers about relying on guidance from state and local taxing authorities when it comes to complying with statutory deadlines and the danger of waiting until close to a statutory deadline before taking the steps necessary to ensure that all compliance requirements have been satisfied.

The Facts: NOHC, Inc. is an Internal Revenue Code Section 501(c)(3) nonprofit corporation that received exemptions from both federal and state income taxes and owned property in New Orleans. After receiving its Section 501(c)(3) designation, NOHC, Inc. applied to the Orleans Parish Assessor’s Office for a property tax exemption in connection with the property that it owned in New Orleans. On December 16, 2019, the Assessor denied NOHC, Inc.’s application and issued a bill for property taxes due, which stated that the bill would become delinquent on February 1, 2020.

After the bill was issued but before February 1, 2020, the City announced an extension of time to February 14, 2020 for the timely payment of property taxes and NOHC, Inc. paid under protest on February 12, 2020, and filed its lawsuit shortly thereafter. In its initial decision on the City’s contention that NOHC, Inc.’s lawsuit was time barred for failure to timely pay the taxes due under protest, the Court of Appeal ruled for NOHC, Inc., finding that it had

detrimentally relied on the City’s extension of the payment deadline. The City asked the Court of Appeal to reconsider its decision, and the Court of Appeal granted rehearing.

The Decision: The Court of Appeal held on reconsideration that the doctrine of detrimental reliance did not apply under these facts as detrimental reliance cannot apply to a representation of law and “the City’s purported extension of that deadline constituted a representation of law, which

This case is a cautionary tale for taxpayers about relying on guidance from state and local taxing authorities when it comes to complying with statutory deadlines and the danger of waiting until close to a statutory deadline before taking the steps necessary to ensure that all compliance requirements have been satisfied.

was in direct conflict with those statutes.” The relevant statutes provided that in order to challenge an assessment, the taxpayer must “timely pay the disputed amount of tax under protest” and, with respect to timely payment, “taxes shall become delinquent on the first day of February....” La. R.S. 47:2134 and La. R.S. 47:1997. Finally, the Court explained that a heightened burden is necessary to apply the doctrine of detrimental reliance against a government entity, including proving that the government entity had provided “unequivocal advice.” Here, the Court reasoned, “[w]hile the City extended the deadline to pay taxes in the year 2020, NOHC has not offered evidence to establish that the City announced that this extension also applied to taxes paid under protest.” □



JOSHUA M. SIVIN
OF COUNSEL

New York Appellate Court Finds That IBM Cannot Deduct Foreign Royalty Payments

By Joshua M. Sivin

A New York intermediate appellate court upheld a New York State Tax Appeals Tribunal determination finding that International Business Machines Corp. and its combined affiliates (together, “IBM”) improperly deducted royalty payments from related foreign entities. *Matter of International Business Machs. Corp. & Combined Affiliates v. Tax Appeals Trib. of the State of N.Y.*, 2023 N.Y. App. Div. LEXIS 1356, 2023 NY Slip Op 01326 (3d Dep’t 2023). The Court found that IBM could not deduct royalties received from foreign affiliates for the use of intangible assets because the affiliates were not New York taxpayers subject to the state’s addback laws and the royalty payments would escape taxation.

The Court found that IBM could not deduct royalties received from foreign affiliates for the use of intangible assets because the affiliates were not New York taxpayers subject to the state’s addback laws and the royalty payments would escape taxation.

The Facts: IBM is organized under the laws of New York and specializes in, among other things, developing and selling computer hardware and software. IBM owns certain intangible property, including the IBM brand, and operates partly outside of the United States through subsidiary companies (“foreign affiliates”). IBM World Trade Corporation (“WTC”), a wholly owned subsidiary of IBM headquartered in New York, manages and develops the marketing of IBM’s products and equipment outside the United States. Foreign affiliates paid royalty payments to IBM and WTC in exchange for, among other things, the right to exploit intangible property relating to IBM’s hardware and software. IBM and WTC deducted the royalty payments received from the foreign affiliates in calculating their New York State tax liability.

The Decision: IBM argued that New York law permitted taxpayers to deduct royalty payments received from related entities regardless of whether the related entity was itself a New York taxpayer. The Court rejected IBM’s statutory argument determining that it was “nearly identical” to the argument raised and decided by the Court in the recent case *Matter of Walt Disney Co. & Consol. Subsidiaries v. Tax Appeals Trib. of the State of N.Y.*, 210 A.D.3d 86 (3d Dep’t 2022), stating that “we find no reason to depart from our recent holding on this issue.” The Court then went on to address IBM’s dormant Commerce Clause arguments which were “distinguishable” from those raised in *Walt Disney*. Specifically, IBM argued that the State’s interpretation of the royalty income exclusion failed both the internal and external consistency tests. To pass internal consistency, a tax must be structured so that if every state imposed the identical tax, no multiple taxation would result. IBM argued that if every state imposed the royalty expense addback and the royalty income exclusion, transactions with non-New York licensees would be taxed more than those with New York licensees. The Court rejected the argument as “too narrow,” because it neglects “the fact that there are two taxable events occurring, one being the payment and the other being receipt of that payment.” The Court determined that “[w]hen these two actions are properly recognized and balanced based on the whole scheme of taxation, non-New York licensees would not be subject to greater taxation than those with New York licensees because non-New York licensees would be able to realize a deduction.”

Turning to the external consistency test, which asks whether a state has taxed values not fairly attributable to the taxpayer’s activity within the state, the Court highlighted that IBM was organized under New York law and that both IBM and WTC have their head offices in New York. The Court went on to determine that IBM “has enjoyed rather significant tax credits under the New York tax scheme it now complains of; when measured against the challenged royalty income exclusion, it cannot be said that these benefits are unreasonable in comparison. □



NICOLE L. JOHNSON

PARTNER

State Solutions to a Mobile Workforce

By Nicole L. Johnson

A mobile workforce has countless benefits. However, there are many tax consequences that accompany it. While many taxpayers hoped for a federal solution to some of the tax issues created by a mobile workforce, some states have resolved (or at least partially resolved) those issues on their own. For example, in 2019, Illinois enacted legislation effective January 1, 2020, whereby nonresidents are not subject to personal income tax in Illinois if they work for 30 days or less in the state and employers are not required to withhold on the employee's wages in that situation. Ill. S.B. 1515 (2019). As always, there are some caveats to the general rule, such as income earned by professional athletes. *See* Ill. Dep't of Rev. Pub. 130 (Aug. 1, 2022).

In 2022, West Virginia enacted similar legislation, which provides a 30-day safe harbor for nonresidents working in the state. W. Vir. H.B. 2026 (2022). Louisiana also enacted mobile workforce legislation effective January 1, 2023, which provides a 25-day safe harbor. LA Act No. 383. The Louisiana Department of Revenue recently enacted a regulation related to the new law. LAC 61:I.1923 (eff. Feb. 20, 2023).

Under the Louisiana provisions, there are a series of requirements for the nonresident's income to be exempt from Louisiana taxation and for the employer to be relieved of withholding responsibilities. R.S. 47:248(B); LAC 61:I.1923(A)(2). Most of those requirements are relatively benign—such as requiring the employee to have worked 25 days or less in the state or that the nonresident must have performed work in more than one state during the calendar year. *Id.* However, there is one requirement that may create compliance issues.

Specifically, one of the following must apply to the nonresident: (1) the nonresident's income must be exempt from

taxation under the U.S. Constitution or federal statute; (2) the nonresident's state of residence does not impose a personal income tax; or (3) the nonresident's state of residence provides a substantially similar exemption. *Id.* The first option is redundant—if a nonresident's income is exempt from tax, then withholding is not required and the nonresident is not subject to tax on that income in Louisiana.

For the second option, there are currently only nine states, including Florida, Texas, and Wyoming, which do not impose a personal income tax. Thus, if the employee resides in one of those states, then the exemption may apply.

For the third option, neither the statute nor the regulation defines "substantially similar." *Id.* For example, would

Illinois' provisions be substantially similar even though its safe harbor is 30 days? What if the resident state's provision does not require other states to enact similar provisions? The answer is unclear. Arguably, such provisions are still substantially

similar. Currently, only a handful of states have provisions that could be classified as similar, including Illinois, North Dakota, and West Virginia. Thus, an employee would need to reside in one of those states for this portion of the exemption to apply.

Those states that have enacted mobile workforce legislation should be commended for their attempts to alleviate some of the tax burdens. However, with provisions such as Louisiana's, the exemption applies to residents from less than half of the states. Both employees and employers need to use caution and confirm that all elements of the exemption apply. □

Those states that have enacted mobile workforce legislation should be commended for their attempts to alleviate some of the tax burdens.

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.

State + Local Tax Summit

- ▶ Blank Rome LLP is pleased to again present our annual State + Local Tax Summit, being held this year on Thursday, June 8, 2023, from 9:00 a.m. to 2:30 p.m., at our New York City office, with a reception to follow. To learn more, please click [here](#). □

Advanced State Taxation Related to Foreign Income

- ▶ On Tuesday, May 9th, [Eugene J. Gibilaro](#) will present at the 2023 Intermediate/Advanced State Income Tax School. This session will further explore state adjustments with a focus on adjustments related to foreign operations and transactions. To learn more, please click [here](#). □

TEI Region 10 43rd Annual Conference

- ▶ Blank Rome State + Local Tax partners [Craig B. Fields](#) and [Nicole L. Johnson](#) will present two sessions at the Tax Executives Institute ("TEI") [Region 10 43rd Annual Conference](#), being held April 26 through 28, 2023, at the Kimpton Shorebreak Resort in Huntington Beach, California. To learn more, please click [here](#). □

COST 2023 Income Tax Conference & Spring Audit Session

- ▶ Blank Rome State + Local Tax of counsel [Phil M. Tatarowicz](#) will be speaking at COST on April 27th in "Foreign Businesses Meet the Wild, Wild World of SALT." The speakers in this session will discuss some of the rules to which non-U.S. businesses must abide, federal constitutional provisions that apply to non-U.S. businesses, threshold taxability issues, and quirky local taxes that routinely fall under the radar of foreign businesses. To learn more, please click [here](#). □

45th Annual Advanced State & Local Tax Institute

- ▶ Blank Rome State + Local Tax partner [Craig B. Fields](#) will serve as a panelist at the 45th Annual Advanced State & Local Tax Institute, hosted by Georgetown Law on April 25, 2023 via Zoom. Craig will be a panelist for a session titled "Unwrapping the Oxymoron of Fair Apportionment and a Single Factor Apportionment Formula Based on Market Sales." To learn more, please click [here](#). □