



May 2023

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



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## Note from the Co-Editors

By Eugene J. Gibilaro and Joshua M. Sivin

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**Welcome to the May 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:

- Findings of Responsible Persons: Employer Withholding Penalty Findings Require Timely Notice
- New Jersey Division of Taxation Issues Guidance on S Corporation Procedures
- New York Governor Signs into Law 2023–24 Budget Bill Containing Important Tax Changes

**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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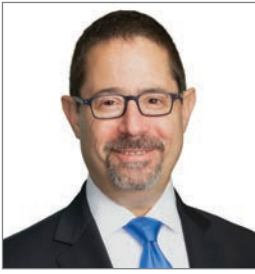
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## Findings of Responsible Persons: Employer Withholding Penalty Findings Require Timely Notice

By Mitchell A. Newmark

Trust fund taxes are typically subject to responsible person laws that provide that people who have the power to remit tax, but fail to remit, are held personally responsible for the failure. Such “trust fund” taxes have that moniker because they involve collecting an amount that is to be remitted to a government entity, such as payroll withholding tax and sales tax. A sticky question is, when does the state have to inform a responsible person who owes the tax? The answer in New Jersey is that it depends on the tax and whether what is really being assessed is a penalty. A recent New Jersey Tax Court decision found that the statutes of limitations for responsible person notices in New Jersey for Employer Gross Income Tax withholding (“ER-GIT”) and Sales and Use Tax (“SUT”) run for the assessment periods applicable to the tax. When there is an additional amount sought by the Division, such as a penalty of doubled tax for ER-GIT, that assessment (or notice of finding of responsible person) also must be issued within the assessment period. *Gill v. Dir, Div of Taxation*, Docket No. 4035-2021 (N.J. Tax Ct. May 1, 2023).

**A sticky question is, when does the state have to inform a responsible person who owes the tax? The answer in New Jersey is that it depends on the tax and whether what is really being assessed is a penalty**

**The Facts:** The Vice President (“VP”) and sole shareholder of a corporation (the “Company”) had decision-making authority including the responsibility to file ER-GIT returns and SUT returns in New Jersey. The Company filed ER-GIT and SUT returns but did not remit amounts for quarters in 2012 and 2013. It filed for bankruptcy protection in 2013. The Bankruptcy Court entered a final decree for Chapter 7 liquidation in 2016 and no amounts were paid to the State of New Jersey. The Division of Taxation issued a notice of finding of responsible person status to VP on March 15, 2019, for ER-GIT and SUT. It is undisputed that VP is a responsible person under the ER-GIT and the SUT.

**The Decision:** An employer is liable for any amount of ER-GIT required to be withheld. When a person willfully fails to collect or pay over an ER-GIT amount required to be withheld, a penalty is imposed that is equal to the total amount of tax not remitted. NJ Stat Ann 54A:9-6(g). The term “person” in that context includes any person who is under a duty to remit the amounts. NJ Stat Ann 54A:9-6(l). An express provision adds that additions to tax and penalties in that statute are assessed, collected, and paid in the same manner as taxes. NJ Stat Ann 54A:9-6(j). Though the Company filed ER-GIT returns that self-assessed the tax (such that the tax amount assessed against the Company did not need a new notice and was assessed within time), VP asserted, and the Tax Court agreed, that the addition to tax that was penalty for failure to remit (i.e., the doubled tax) was a new amount that was required to be assessed within time to issue an assessment of the underlying tax (i.e., three years). Because the responsible person additional amount limitations period ran at the same time as the underlying tax and the notice was issued for the penalty after the expiration of the three years, that responsible person notice for an additional amount was issued too late.

Turning to the SUT, the Tax Court explained that every “person” required to collect the sales tax is personally liable for the tax required to be collected. NJ Stat Ann 54:32B-14. Further, a “person” includes the seller and “any officer or employee of a corporation ... who as such officer or employee is under a duty to act for such corporation in complying with any requirement of” the sales tax. NJ Stat Ann 54:32B-2(w). The Tax Court found that the SUT was self-assessed but not remitted. It ruled that the self-assessment (that did not contain an additional penalty amount) was self-assessed such that the Division of Taxation did not need to issue a responsible person notice for the tax. The self-assessment was assessed within the required time. Again, the responsible person timing for SUT ran at the same time as the assessment of the tax. The SUT was upheld as self-assessed within time.



**KARA M. KRAMAN**

OF COUNSEL

## New Jersey Division of Taxation Issues Guidance on S Corporation Procedures

By Kara M. Kraman

On December 22, 2022, New Jersey enacted P.L. 2022, c. 133, which changed the Corporation Business Tax and Gross Income Tax procedures for S corporations. Most significantly, for privilege periods beginning on or after December 22, 2022, the new law provides that a taxpayer that qualifies as an S corporation or a Qualified Subchapter S Subsidiary (“QSSS”) for federal tax purposes no longer needs to make a separate S corporation or QSSS election for New Jersey tax purposes. In order to be treated as a New Jersey S Corporation or QSSS, a business must be: (i) registered as a corporation with the Division of Revenue and Enterprise Services (“DORES”); (ii) provide proof of its federal S corporation status; and (iii) obtain shareholder consent for the New Jersey tax treatment of that entity. On March 31, 2023, the New Jersey Division of Taxation (“Division”) issued a Technical Bulletin (TB-105) providing Corporation Business Tax and Gross Income Tax Guidance regarding S Corporations and QSSSs. On April 5, 2023, the Division posted supplemental guidance related to TB-105 on its website.

*Shareholder Consents.* The Division’s guidance explains that newly formed S corporations are required to submit a Shareholder Jurisdictional Consent to DORES. If a nonresident shareholder does not consent to New Jersey jurisdiction, then the S corporation must consent to the assumption of any tax liabilities on their behalf when filing Form CBT 100S.

*Hybrid Corporations.* An entity that is treated as an S corporation for federal tax purposes can opt out of being treated as a New Jersey S corporation by making a C Corporation Tax Status Election, which requires the C Corporation Tax Status Election Consent of 100 percent of the shareholders. In this case, a record of the votes taken by the shareholders electing or revoking C corporation status must be retained but need not be submitted to DORES unless requested.

*Mergers and Reorganizations.* For mergers or reorganizations on or after December 22, 2022, the guidance explains that New Jersey generally conforms to the federal rules and revenue procedures regarding mergers and reorganizations. While there is no longer a requirement that the entity make an affirmative New Jersey S corporation (or QSSS) status election if the entity has federal S corporation (or QSSS) status, businesses are required to update their status with DORES.

**The Division’s guidance explains that newly formed S corporations are required to submit a Shareholder Jurisdictional Consent to DORES. If a nonresident shareholder does not consent to New Jersey jurisdiction, then the S corporation must consent to the assumption of any tax liabilities on their behalf when filing Form CBT 100S**

Other topics covered by the guidance include pass-through entity alternative income tax (PTE/BAIT), eligibility for voluntary disclosure agreements (“VDAs”), New Jersey treatment of federal tax-free “F” organizations, revocation of a C corporation election, and failure to make a federal or New Jersey electing small business trust election by an S corporation shareholder. The Division is continuing to work with DORES to create procedures for S corporations to comply with the new rules and will update its website as more information becomes available.



**IRWIN M. SLOMKA**

SENIOR COUNSEL

## New York Governor Signs into Law 2023–24 Budget Bill Containing Important Tax Changes

By Irwin M. Slomka

On May 3, 2023, New York Governor Kathy Hochul signed into law two bills containing several important tax changes, several of which were not in the Governor’s proposed budget: Bill Nos. S4009-C (Budget) and S4008-C (Transportation). Among the more notable changes are the following:

- *Significant increase in the Metropolitan Commuter Transportation Mobility Tax (“MCTMT”) within New York City.* The most significant tax increase is to the top MCTMT rate—imposed on employers and self-employed individuals engaging in business in New York City and the seven surrounding counties—from 0.34 percent to 0.60 percent of payroll expenses, but only for employers engaged in business within New York City. The tax rates for employers and individuals within the seven surrounding counties remain unchanged. The increase for employers takes effect beginning July 1, 2023 (with the top rate on self-employed individuals not fully implemented until 2024). The Governor had proposed a more modest rate increase to 0.50 percent applicable to the entire district, but reportedly faced considerable opposition from legislators in the surrounding counties whose businesses rely less on the transportation services that the tax supports than do businesses in the five boroughs of New York City.
- *Extends “temporary” top corporate tax rate for three more years.* A temporary increase in the tax rate on corporations with business income in excess of five million dollars for the taxable year, from 6.5 percent to 7.25 percent, had been set to expire on January 1, 2024. The legislation extended the top rate for another three years (until January 1, 2027).
- *Extends New York State and City transfer tax rate reductions for real estate investment trusts (“REITs”) for three more years.* The reduced rates for New York State real estate transfer tax and New York City real property transfer tax applicable to conveyances to a REIT, other than upon initial formation, which were scheduled to expire on August 23, 2023, are extended for three more years (until August 31, 2026).

- *Repeals provisions relating to the transfer of investment tax credits.* A provision relating to transfers of New York State investment tax credits for corporate income tax purposes has been repealed.
- *Expands the scope of False Claims Act.* Tax “whistleblowers” will now be allowed to bring false claims actions in the New York courts against non-filers who “knowingly concealed or knowingly and improperly avoided” their state or local tax obligations. This represents a significant expansion since until now the law required actual “false claims” to have been made—that is, the filing of false or fraudulent tax returns. The expanded provision is retroactive to tax obligations knowingly concealed or avoided on or after May 1, 2020.
- *Gives the NYS Tax Department the right to appeal certain decisions of the Tax Appeals Tribunal.* After unsuccessful attempts by successive administrations over many years to give the New York State (“NYS”) Tax Department the right to appeal decisions of the Tax Appeals Tribunal—since its inception more than 35 years ago, only taxpayers have the right to appeal Tribunal decisions into the courts—the legislature approved a somewhat scaled back right of appeal. Under the new law, which applies to Tribunal decisions issued after May 2, 2023, the Tax Department, “in consultation with the attorney general,” has the right to appeal Tribunal decisions that are “premised on interpretation of the federal or state constitution, international law, federal law, or other legal matters that are beyond the purview of the state legislature.” Presumably, the new law is intended to apply to Tribunal decisions that involve matters which cannot be addressed through legislation. Unfortunately, the new law introduces uncertainty as to the finality of Tribunal decisions that will merit clarification.

Among the Governor’s proposals that the legislature declined to enact was a proposed amendment that would have mandated New York State S corporation conformity with the federal tax treatment. This continues to leave New York State among a small minority of states that require a separate state S corporation election, a trap for the unwary.

## 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.

### **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 25th 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." □

### **The 30th Annual Paul J. Hartman State and Local Tax Forum**

- ▶ Blank Rome State + Local Tax partner [Nicole L. Johnson](#) will be speaking at the 30th Annual Paul J. Hartman State and Local Tax Forum which will be held from October 23rd through the 25th in Nashville, Tennessee. Nicole will be a panelist for a session titled "Local Taxes- Current Issues and Litigation/Post-Wayfair, Gross Receipts." To learn more, please click [here](#). □