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



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**STATE + LOCAL TAX TEAM:**

Craig B. Fields | [craig.fields@blankrome.com](mailto:craig.fields@blankrome.com)

Nicole L. Johnson | [nicole.johnson@blankrome.com](mailto:nicole.johnson@blankrome.com)

Mitchell A. Newmark | [mitchell.newmark@blankrome.com](mailto:mitchell.newmark@blankrome.com)

Irwin M. Slomka | [irwin.slomka@blankrome.com](mailto:irwin.slomka@blankrome.com)

Eugene J. Gibilaro | [eugene.gibilaro@blankrome.com](mailto:eugene.gibilaro@blankrome.com)

Kara M. Kraman | [kara.kraman@blankrome.com](mailto:kara.kraman@blankrome.com)

Joshua A. Sivin | [joshua.sivin@blankrome.com](mailto:joshua.sivin@blankrome.com)

Philip M. Tatarowicz | [phil.tatarowicz@blankrome.com](mailto:phil.tatarowicz@blankrome.com)

Madison A. Ball | [madison.ball@blankrome.com](mailto:madison.ball@blankrome.com)

Melanie L. Lee | [melanie.lee@blankrome.com](mailto:melanie.lee@blankrome.com)

## Note from the Editors

By Joshua M. Sivin and Melanie L. Lee

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**Welcome to the July 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 as well as 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:

- Multistate Businesses Subject to the New Jersey Gross Income Tax Beware of Apportionment Change
- New Jersey Makes Substantial Changes to the Corporation Business Tax
- Minnesota Tax Court Addresses What Constitutes Solicitation under Public Law 86-272

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

#### **JOSHUA M. SIVIN**

Of Counsel

212.885.5025

[joshua.sivin@blankrome.com](mailto:joshua.sivin@blankrome.com)



#### **MELANIE L. LEE**

Associate

212.885.5371

[melanie.lee@blankrome.com](mailto:melanie.lee@blankrome.com)

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MITCHELL A. NEWMARK

PARTNER

## Multistate Businesses Subject to the New Jersey Gross Income Tax Beware of Apportionment Change

By Mitchell A. Newmark

It has long been a trap for the unwary, or a helpful tip for those in the know, that multistate income from business that is reported on a New Jersey Gross Income Tax (“GIT”) return is apportioned differently from the way that such income is apportioned if the income was instead subject to the New Jersey Corporation Business Tax (“CBT”). That disparate treatment of businesses for New Jersey’s GIT, its version of an individual income tax, changes this year.

**GIT filers with large multistate businesses that have evolved over the years should consider whether their business conduct and tax perspective should evolve as well.**

For many years, business activity apportionment was aligned (or somewhat aligned) whether the business was subject to the CBT or the GIT. Many years ago, the CBT apportionment formula (New Jersey calls it “allocation”) was an equally weighted three-factor formula of property, payroll, and sales ratios. The CBT has since moved, legislatively, to a hyper-weighted sales factor and then to a single sales factor. However, the GIT did not keep pace.

**The Change:** For tax years beginning on and after January 1, 2023, a taxpayer who is subject to the GIT and conducts a multistate trade or business, regardless of the form of the business, or who is a partner in a partnership or shareholder in an S-Corporation that conducts a multistate business, part of which is conducted in New Jersey, must apportion income using the CBT apportionment rules. In tying GIT apportionment to the CBT apportionment methodology, the legislation specifically identifies CBT statutes N.J.S.A. 54:10A-6 through N.J.S.A. 54:10A 10. Several are highlighted for ease of reference:

- the sales factor (i.e., single sales factor), N.J.S.A. 54:10A-6;
- allocation of non-operational income, N.J.S.A. 54:10A-6.1;
- broker, dealer, or asset manager sourcing, N.J.S.A. 54:10A-6.2;
- airline industry sourcing, N.J.S.A. 54:10A-6.3;
- improper reflection of income alternative apportionment, N.J.S.A. 54:10A-8; and

- income distortion adjustments, N.J.S.A. 54:10A-10.

A.B. 5323 section 13; L. 2023, c. 96.

**Caveats:** The legislation does not merely tie the GIT apportionment to the CBT. It states that if business is conducted partly within and partly outside New Jersey “and, as a result thereof or for other reasons that portion of the income from sources within the State cannot readily or accurately be ascertained, the income from the trade, business, partnership, or S corporation shall be sourced in a manner consistent with the provisions of” N.J.S.A. 54:10A-6 through N.J.S.A. 54:10A 10. A.B. 5323 section 13; L. 2023, c. 96. That quoted phrase “and, as a result... that portion of the income from sources within the State cannot readily or accurately be ascertained” is not defined or explained.

Sourcing of salary, wages, tips, fees, commissions, bonuses, and other remuneration are unchanged by the GIT business income change. A.B. 5323 section 13; L. 2023, c. 96.

**The Old Law:** Through 2022, the GIT apportionment formula was an equally weighted three-factor formula consisting of property, payroll, and sales ratios. The three-factor formula existed only as a matter of the Division of Taxation’s declaration that the three-factor formula be used. It did so by creating a required schedule for multistate business to use when reporting income on a New Jersey GIT return (the form is Form NJ-NR A Business Allocation Schedule). That arbitrary formula existed only by fiat, without a statute or regulation, and is subject to challenge under the right facts.

**Penalty:** The legislation includes a waiver for estimated tax penalty for 2023 for underpayments due to increased taxes that result from the apportionment changes if the taxpayer catches up the estimated payments by the second next estimated tax payment due after enactment. Calendar-year taxpayers have until the January 2024 estimated tax payment to catch up estimated payment amounts. A.B. 5323 section 7; L. 2023, c. 96.



KARA M. KRAMAN

OF COUNSEL

## New Jersey Makes Substantial Changes to the Corporation Business Tax

By Kara M. Kraman

On July 3, 2023, New Jersey Governor Phil Murphy signed into law S.B. 3737 / A.B. 5323 (the “Bill”), which makes significant changes to the Corporation Business Tax (“CBT”). Some of the most noteworthy changes are summarized below.

Effective for privilege periods ending on or after July 31, 2023:

- *Adoption of a Bright-Line Threshold for Economic Nexus.* A non-New Jersey corporation will be deemed to have substantial nexus with New Jersey if it derives New Jersey receipts in excess of \$100,000 or has 200 or more separate transactions delivered to customers in New Jersey during the taxable year. This bright-line nexus standard is in addition to traditional nexus standards, which continue to apply.
- *Adopts Finnegan Method of Combined Reporting.* New Jersey will move from a Joyce to a Finnegan method of combined reporting. Under the Finnegan method, the numerator of the New Jersey receipts factor includes all New Jersey receipts derived from members of the combined group, regardless of whether that member is subject to tax in New Jersey.
- *Repeals the Intercompany Interest and Royalty Payment Addback Provisions.* Corporations will no longer be required to add intercompany interest and royalty payment back to income.
- *Treats GILTI as a Dividend.* Global intangible low-tax income (“GILTI”) is now treated as dividend income and is therefore eligible for the dividend exclusions set forth in N.J.S.A. § 54:10A-4(k)(5).
- *Changes the NOL Sharing Rules for Combined Groups.* Unused and unexpired prior net operating loss conversion carryovers of individual members of the combined group may be shared by the combined group. Unused and unexpired net operating losses (“NOLs”) of members of the combined group may also be shared by the combined group.
- *Includes New Entities in Combined Group.* Captive real estate investment trusts (“REITs”), investment companies (“ICs”), and regulated investment companies (“RICs”) are included in the combined group and taxed as C corporations. There is an exclusion from this rule for REITs, ICs, and RICs that are at least 50 percent owned or controlled by a state or federally chartered bank, savings bank, or savings and loan association with assets of \$15 billion or less.
- *Expands the Definition of a Unitary Business.* Changes the definition of a unitary business from a group of business entities under common ownership “that are sufficiently interdependent, integrated, and interrelated through their activities” to “a group of businesses that are sufficiently interdependent, integrated, or interrelated through their activities . . . .”
- *Allows Adjustment of Closed-Year NOLs.* The Director may make adjustments to NOLs for closed years up to 10 years after the return claiming the NOL was filed.

The amendments highlighted above are just some of the many changes the Bill makes to the CBT. Other amendments relate to New Jersey’s treatment of the I.R.C. § 163(j) limitation, the taxation of the income of non-U.S. corporations, the definition of New Jersey water’s edge group, the calculation of taxable income and ordering of certain deductions, and clarification of CBT return due dates, among other topics.

**The Bill is also notable for something it did not do – it did not extend the 2.5 percent CBT surtax beyond 2023.**



IRWIN M. SLOMKA

OF COUNSEL

## Minnesota Tax Court Addresses What Constitutes Solicitation under Public Law 86-272

By Irwin M. Slomka

The challenges in establishing protection under Public Law 86-272 (“P.L. 86-272”) were on display in a recent decision of the Minnesota Tax Court. *Uline, Inc. v. Commissioner of Revenue*, Minn. Tax Court, No. 9435-R (June 23, 2023).

**Facts:** Uline, Inc. (“Uline”) is a business-to-business catalog and web-based distributor of shipping, industrial, and packaging products throughout North America, having its corporate headquarters in Wisconsin. Uline ships products to customers from seven distribution centers maintained throughout the United States. Through 2013, Uline operated a distribution center in Minnesota, but closed it late that year and opened a new distribution center in Wisconsin, which serviced Minnesota. Thereafter, Uline did not maintain an office, distribution center, or other place of business in the State, although (as discussed below) it did have a sales representative in Minnesota.

Uline filed a final Minnesota tax return for the 2014 tax year, claiming exemption from Minnesota corporate franchise tax under P.L. 86-272. This federal law exempts out-of-state businesses from state and local income tax where the in-state activities do not exceed the solicitation of orders for the sale of tangible personal property. Following an audit, the Minnesota Department of Revenue assessed tax against Uline, concluding that it was subject to tax in both 2014 and 2015, on the grounds that its Minnesota activities exceeded the protections of P.L. 86-272.

Uline employed approximately 24 sales representatives whose territories included Minnesota customers. Between one and four times per year, the sales representatives visited customers in Minnesota to solicit orders and also provided samples and made demonstrations free of charge. While customers could place orders through the Uline web site or by phone, orders were also placed with the sales representatives directly during their visits.

**Tax Court Decision:** The Tax Court evaluated whether Uline’s Minnesota business activities exceeded solicitation within the meaning of P.L. 86-272, applying the guidelines regarding

the phrase “solicitation of orders” set out in the 1992 U.S. Supreme Court decision in *Wisconsin v. Wm. Wrigley, Jr.* The Court first considered the in-state activities of Uline’s non-sales representative employees – specifically, attendance at Minnesota job fairs and an executive who periodically made business calls and answered e-mails from his home in Minnesota – and found they did not result in nexus.

The Court found that the ten occasions (over a two-year period) in which Uline’s in-state sales representatives accepted product returns from customers was not entirely ancillary to protected solicitation but was nonetheless *de minimis* and would not defeat P.L. 86-272 protections. More problematic was another function of the sales representatives – they were required to regularly prepare “market news notes” from customers that they visited, which principally included obtaining information about Uline’s competitors’ pricing and discounts, and what customers were purchasing from those competitors. This information was then made accessible to both sales representatives and non-sales personnel at Uline.

The court concluded that while this practice unquestionably facilitated sales in general, it did not, as found to be essential in *Wrigley*, “facilitate the *requesting of sales*” by Uline’s customers. Moreover, it held that the activity of collecting and reporting competitor data was not *de minimis*, noting that the Minnesota sales representatives together produced more than 1,600 individual market news notes over the two years in issue. Therefore, the Tax Court held that Uline was subject to Minnesota corporate tax.

**One takeaway from this decision is it illustrates how careful a business needs to be to not inadvertently cross the line from protected solicitation to activities that exceed solicitation.**

Another is that a business that files a final state tax return should expect heightened scrutiny by state tax auditors.

## 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.

### **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](#). □