OCTOBER 2023

THE BR STATE + LOCAL TAX SPOTLIGHT

BLANKROME

CONTENTS

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
Melanie L. Lee | melanie.lee@blankrome.com

Note from the Editors

By Joshua M. Sivin and Melanie L. Lee

Welcome to the October 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:

- Receipts from Products Delivered to Ohio Distribution Center for Subsequent Shipment Outside the State Are Not Sourced to Ohio
- Mississippi Supreme Court Finds Online Travel Companies Not Subject to Hotel Tax
- New York Tax Appeals Tribunal Upholds Responsible Person Assessment
- Assess One, Assess All?

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*

JOSHUA M. SIVIN
Of Counsel
212.885.5025
joshua.sivin@blankrome.com

MELANIE L. LEE
Associate
212.885.5371
melanie.lee@blankrome.com

CRAIG B. FIELDS
PARTNER

Receipts from Products Delivered to Ohio Distribution Center for Subsequent Shipment Outside the State Are Not Sourced to Ohio

By Craig B. Fields

The Ohio Board of Tax Appeals held that a manufacturer that delivered its products to a distribution center/warehouse in Ohio successfully demonstrated that a large percentage of those products were subsequently shipped outside of Ohio. Consequently, gross receipts from those sales were not sitused to Ohio under the Ohio Commercial Activity Tax ("CAT"). *VVF Intervest LLC v. Harris,* Case No. 2019-1233 (Ohio Bd. Tax App. Sept. 13, 2023). The decision demonstrates the importance of witness testimony along with documentary support.

Facts: VVF Intervest, LLC ("VVF") is a contract manufacturer of oleochemicals and personal care products. As relevant here, it manufactured soap for a customer, High Ridge Brands ("HRB"), which was shipped to a third-party distribution center/warehouse in Ohio where it was stored until HRB sold the soap and delivered it to its customers.

VVF initially sourced its gross receipts from these sales to Ohio and, subsequently, filed refund claims asserting that since the majority of the soap was ultimately delivered outside of Ohio, that the gross receipts from those sales should not be sourced to Ohio. The Tax Commissioner denied the refund claim and this appeal followed.

The statute at issue provides that gross receipts from the sale of tangible personal property are sitused to Ohio if the property is received by the purchaser in Ohio. "In the case of delivery of tangible personal property by motor carrier or by other means of transportation, **the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property."** R.C. 5751.033(E) (emphasis added).

Decision: The Board first reviewed sourcing cases under the former corporate franchise tax due to the similarities between the sourcing statues under that tax and the CAT. It concluded that under the franchise tax it was clear that a transaction should not be sourced to Ohio simply because Ohio was one stop in a singular delivery process to a purchaser.

The Board then considered three sourcing cases under the CAT. In each case, the Board found that the taxpayer had lost because it had "failed to show Ohio was merely a pit stop not the place where property was ultimately delivered after all transportation has been completed."

The Board concluded that in this case, VVF had established through the testimony of its witnesses, which testimony was corroborated by reports created for management for operations purposes, that the majority of the soap sold to HRB would be shipped from the Ohio facility to HRB's customers outside of Ohio. "Ohio does not become the ultimate delivery point simply because the bars are temporarily held here in a distribution center owned by an entirely unrelated third party."

> **Consequently, ultimate delivery of these bars of soap did not occur in Ohio.**

JOSHUA M. SIVIN
OF COUNSEL

Mississippi Supreme Court Finds Online Travel Companies Not Subject to Hotel Tax

By Joshua M. Sivin

In a recent decision, the Mississippi Supreme Court reversed the trial court's ruling that online travel companies ("OTCs"), such as Priceline.com and Expedia, were hotels within the meaning of Mississippi's hotel tax. The decision reversed a judgment of more than $50 million against the OTCs. *Priceline.com LLC et al. v. Lynn Fitch, Attorney General of the State of Mississippi ex rel. Mississippi,* case number 2021-CA-00868-SCT (MS. Sup. Ct. Sept. 28, 2023).

Facts: OTCs, including Priceline.com, Expedia, and Travelocity.com, are technology companies that operate websites enabling travelers to, among other things, research destinations, plan trips, and request reservations from airlines, hotels, and rental car companies.

The OTCs facilitate bookings from travel suppliers, including traditional hotels. When a consumer books a hotel room through an OTC, the OTC charges the consumer's credit card at the time the hotel issues a reservation. The contracts between hotels and OTCs provide that OTCs are responsible for collecting a "net rate" (the amount to be paid to the hotels) and applicable taxes from the consumers, and if the consumer does not cancel a reservation, the hotel will later collect the net rate and tax from the OTC and remit the tax to the appropriate tax authorities. The State alleged that the OTCs themselves were required to collect and remit sales tax for each rental of a hotel room to consumers and that tax should be charged on the gross amount paid by the consumer, as opposed to the net rate.

The trial court granted the State's motion for summary judgment finding that the OTCs were "hotels" subject to Mississippi's hotel tax. In a subsequent ruling, the trial court awarded the State over $11 million for unremitted tax and applied a 300 percent penalty. The trial court also awarded the State interest. In total, the trial court found the OTCs liable to the State in excess of $50 million.

Decision: Though many issues were raised on appeal, the Mississippi Supreme Court decided only the principal issue—whether OTCs are subject to the sales tax levied against hotels.

> **The Court looked to the definition of "hotel" and determined that in order for OTCs to be "hotels" "they must (1) be 'engaged in the business of furnishing or providing one or more rooms intended or designed for dwelling[,] lodging or sleeping purposes' and (2) they must be 'known to the trade as such[.]'"**

The Court found "that the OTCs meet neither of these requirements and, therefore, are not subject to this tax." With respect to the first requirement, the Court reasoned that OTCs "provide an intermediary service between hotels and customers…. While a customer may reserve a room through an OTC, it is the physical hotel that furnishes or provides a room for the customer when they arrive." As for the second requirement (which the Court did not need to decide because its ruling on the first requirement was dispositive), the Court noted that "it appears very clearly from the record" that OTCs are not known to the trade as hotels.

In a dissenting opinion, Chief Justice Michael K. Randolph argued that OTCs fall under the statute's definition of hotel: "While I agree that if one opened the Yellow Pages, one would not see a listing for an OTC hotel, those companies are judged by the language of the statute."

EUGENE J. GIBILARO
PARTNER

New York Tax Appeals Tribunal Upholds Responsible Person Assessment

By Eugene J. Gibilaro

It happens far too often that states like New York conduct sales and use tax audits of large companies and at the end of the audit, in addition to issuing an assessment of additional tax due to the company, they issue a mirror assessment to a so-called responsible person, who the state asserts is personally liable for the amount of the assessment should the state not be able to collect the amount asserted as due from the company. In many instances, the purported responsible person ends up being an unlucky mid-level employee in the tax department of a large company. Clearly, this should not be how responsible person statutes operate and cannot be what state legislatures intended to happen when enacting such statutes. However, there are occasionally cases that should serve to remind everyone of the actual reason for the existence of responsible person statutes and, by comparison, highlight the absurdity of applying these statutes in the case of large or even mid-sized companies.

In a recent decision by the New York State Tax Appeals Tribunal, the Tribunal upheld a responsible person assessment against the president of a small, closely held used car dealership and auto repair shop. *Petition of Rajni T. Mohnani,* DTA No. 828964 (Sep. 14, 2023). New York audited the business for sales and use tax and it was determined that the books and records of the company were inadequate, so New York estimated the sales and use tax liability for the business from the books and records that were available. At the hearing before the Administrative Law Judge, the president of the business testified that the business had collected sales tax on taxable transactions but failed to remit the amounts to New York and instead used the amounts to pay business expenses.

The Tribunal found that the Administrative Law Judge had properly determined that the president was a responsible person personally liable for the tax at issue. The Tribunal noted that the president had access to and oversaw the business' books and records, identified herself as the president of the business in correspondence with the Department, signed consents for the business extending the period of limitations for assessment, signed corporate tax returns and corporate checks for the business as the president, submitted sales tax returns for the business, and was listed as the responsible person and president of the business in the business' application for a certificate of authority to collect New York sales tax.

> **According to the Tribunal, all these facts taken together were "compelling evidence that petitioner had or could have had sufficient authority and control over the affairs of the business such that she was a responsible person for sales tax purposes."**

The president's only argument against the responsible person assessment was that it was, in fact, her brother who was the responsible person for the business. However, the Tribunal quickly dispensed with this argument explaining that "it is well established that more than one person can be held liable as a responsible officer." This case is a reminder that responsible person assessments properly issued to the owners of small closely held businesses running totally afoul of the sales tax law stand in stark contrast to the responsible person assessments nonsensically issued to employees of large companies simply for them having been put in charge of managing the audit.

NICOLE L. JOHNSON
PARTNER

Assess One, Assess All?

By Nicole L. Johnson

Over the years, taxpayers have argued that an assessment is barred by a claim of equal protection under the Fourteenth Amendment. A recent Tennessee Court of Appeals case highlights the difficulties that taxpayers face in successfully making a claim of equal protection.

At issue in *Smith v. Gerregano* was a taxpayer that provided horse-drawn (and mule-drawn) carriage rides in Nashville, Tennessee. No. M2022-00941-COA-R3-CV (Tenn. Ct. App. Sept. 28, 2023). The Tennessee Department of Revenue assessed sales tax on the rides as admission to a place of amusement. The taxpayer challenged the assessment on two bases: (1) the carriage rides were not "places of amusement;" and (2) the assessment violated the taxpayer's equal protection rights as no other carriage operators were assessed sales tax on the rides.

On the first argument, the Court held that the carriage rides were places of amusement, in part, because carriage rides were an impractical means of transportation due to location and time restrictions. (It is clear that the Court never tried to take a taxi in New York City during rush hour—while impractical, as a snail can outpace the taxi, it is still a means of transportation.) But the holding on the second argument is more interesting.

On the equal protection argument, the Court noted that the taxpayer had the burden to prove that: (1) it was "singled-out" for assessment (*i.e.,* the assessment had a discriminatory effect); and (2) the Department's choice to issue the assessment was based on an impermissible consideration, such as race or gender (*i.e.,* the assessment had a discriminatory purpose).

In support of its argument, the taxpayer stated that no other carriage operators were assessed sales tax on the carriage rides. No other evidence on this issue was submitted. That was largely due to the fact that the taxpayer was denied discovery regarding sales tax assessments issued to other carriage operators. The Department alleged that taxpayer confidentiality prevented it from responding to the discovery requests.

> **As the taxpayer did not provide any evidence of discrimination, the Court dismissed the argument.**

On its face, this evidentiary issue makes an equal protection claim seem almost insurmountable when the Department refuses to provide the support necessary for the claim. However, there may be ways to obtain the requested information without violating taxpayer confidentiality, such as requesting how many carriage operators had been assessed sales tax as a place of amusement or what industries had been assessed as a place of amusement. While it is possible to get affidavits from the other carriage operators, that is unlikely as it could be inviting an assessment for those entities. Although there are certain evidentiary hurdles to the equal protection argument, it should not be tossed aside without further consideration.

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.

COST's 54th Annual Meeting

- Blank Rome State + Local Tax partners Craig B. Fields, Mitchell A. Newmark, Eugene J. Gibilaro, and Nicole L. Johnson will serve as panelists at the Council on State Taxation's ("COST") 54th Annual Meeting, which will be held October 17 through 20, 2023, in Las Vegas, Nevada. Blank Rome LLP is pleased to be a Platinum Sponsor of the program. To learn more, please click here.

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

- Blank Rome State + Local Tax partners Nicole L. Johnson and Mitchell A. Newmark 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 "Here a Local Tax – There a Local Tax – Everywhere a Local Tax!" on October 24th. Mitchell will be a panelist for a session titled "Market-Based Sourcing – Looking Through the Looking Glass" on October 25th. To learn more, please click here.

2023 78th Annual Tax Executives Institute Conference

- Blank Rome State + Local Tax partner Mitchell A. Newmark will be speaking at the 2023 78th Annual Tax Executives Institute Conference, which will be held October 23 through 25, 2023, in New York City. Mitchell will be a panelist for a session titled "Recent Developments in State Income Tax "on October 23rd. To learn more, please click here.

42nd Institute on State and Local Taxation

- Blank Rome State + Local Tax partners Nicole L. Johnson and Mitchell A. Newmark will be speaking at the 42nd Institute on State and Local Taxation which will be held from December 11th through December 12th in New York City. Nicole will be a panelist for a session titled "Going Local" and Mitchell will be a panelist for a session titled "Spare a Square," both on December 11th. To learn more, please click here.

BLANKROME