FEBRUARY 2025

THE BR STATE + LOCAL TAX SPOTLIGHT

BLANKROME

CONTENTS

1. Note from the Editors
2. LLC's Splitting into Six Companies Not Subject to Pennsylvania Realty Transfer Tax
3. New York ALJ Upholds Convenience of Employer Rule Despite Employee Working Remotely Out-Of-State During COVID Lockdowns
4. Procedural Foot Faults are a Trap for the Unwary
5. Indiana Department of Revenue Determines that Video Game Enhancement Offerings are Not Subject to Sales Tax
6. What's Shaking: Blank Rome State + Local Tax Roundup

STATE + LOCAL TAX TEAM:

Craig B. Fields | craig.fields@blankrome.com
Eugene J. Gibilaro | eugene.gibilaro@blankrome.com
Nicole L. Johnson | nicole.johnson@blankrome.com
Mitchell A. Newmark | mitchell.newmark@blankrome.com
Irwin M. Slomka | irwin.slomka@blankrome.com
Joshua M. Sivin | joshua.sivin@blankrome.com
Philip M. Tatarowicz | phil.tatarowicz@blankrome.com
Melanie L. Lee | melanie.lee@blankrome.com
Stephanie N. Terinoni | stephanie.terinoni@blankrome.com

Note from the Editors

By Joshua M. Sivin and Melanie L. Lee

Welcome to the February 2025 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 judicial decisions and legislative developments 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:

- LLC's Splitting into Six Companies Not Subject to Pennsylvania Realty Transfer Tax
- New York ALJ Upholds Convenience of Employer Rule Despite Employee Working Remotely Out-Of-State During COVID Lockdowns
- Procedural Foot Faults are a Trap for the Unwary
- Indiana Department of Revenue Determines that Video Game Enhancement Offerings are Not Subject to Sales Tax

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.

Update from previous editions. In the January 2025 edition of *The BR State+ Local Tax Spotlight,* Melanie L. Lee authored an article titled "Longtime Iowa Taxpayers Lose Out on Capital Gains Deduction" in which she discussed the recent decision of the Court of Appeals of Iowa in *Clark v. Dep't of Revenue.* After their loss at the Court of Appeals, the taxpayers (William Clark, Barry Bengston and their respective spouses) petitioned for further review to the Supreme Court of Iowa. On January 27, 2025, the Supreme Court denied the taxpayer's petition for further review.

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

LLC's Splitting into Six Companies Not Subject to Pennsylvania Realty Transfer Tax

By Craig B. Fields

The Pennsylvania Commonwealth Court held that the statutory division of a limited liability company ("LLC") which resulted in the original LLC and five new companies—with each of the new companies owning a portion of the real estate of the original LLC—was not subject to state and local realty transfer tax as there was no transfer of real estate as contemplated by the statute. *Kunj Harrisburg LLC, et. al. v. Commonwealth,* No. 390 F.R. 2020 (Pa. Cmwlth. Jan. 10, 2025).

The Facts: Kunj Harrisburg LLC ("Kunj") owned a Condominium Association consisting of seven condominium units in Adams County, Pennsylvania. Pursuant to the Entity Transactions Law ("ETL"), it subsequently filed with the Department of State a Statement of Division and an accompanying Plan of Division which divided Kunj into six companies consisting of Kunj and five new companies. Kunj remained the owner of two condominium units and each of the five new companies became the owner of one condominium unit. The six companies recorded deeds in Adams County reflecting the Plan of Division and claimed exemption from the realty transfer tax.

The Department of Revenue issued Notices of Assessment to the five new companies asserting that the deeds did not qualify for exemption and assessing tax. The companies were unsuccessful in their appeals to the Board of Appeals and the Board of Finance and Revenue.

The Decision: The Commonwealth Court first reviewed the realty transfer tax which imposes tax for the recording of any document and which defines a "document" to include any deed which conveys title to real estate in the Commonwealth. It then looked to the ETL which permits an entity to divide into one or more new associations and which states that the property allocated to a new association vests "without reversion or impairment, and the division shall not constitute a transfer, directly or indirectly, of any of that property." 15 Pa.C.S. § 367(a)(3)(ii).

Relying on the "unambiguous language" in the ETL that an association created through a statutory division is a successor to the dividing association and does not acquire its property through the transfer of the property's beneficial interest, the Court concluded that each deed at issue did not convey title to real estate, that each deed was therefore not a "document" as contemplated by the realty transfer tax law, and that no tax was due.

> **This case demonstrates that when there is unambiguous statutory support for a position, while it may take a couple of levels of appeal, a taxpayer should be victorious despite a taxing agency's position.**

JOSHUA M. SIVIN
OF COUNSEL

New York ALJ Upholds Convenience of Employer Rule Despite Employee Working Remotely Out-Of-State During COVID Lockdowns

By Joshua M. Sivin

In yet another challenge to New York's so-called "convenience of the employer" rule, a New York Administrative Law Judge ("ALJ") upheld the application of the rule against a Pennsylvania resident who worked remotely for a New York-based employer during the COVID-19 pandemic. *In the Matter of the Petition of Myers and Langan,* DTA No. 850197 (Jan. 8, 2025).

The Facts: Richard Myers, a resident of Pennsylvania, worked in New York for the Bank of Montreal ("BMO") which provides a broad range of personal and commercial banking, wealth management, global markets, and investment banking products and services. Due to the COVID-19 pandemic, BMO temporarily closed its New York City office on March 16, 2020 and required employees to find alternative working arrangements. Mr. Myers worked from a BMO disaster recovery site in New Jersey on March 16 and March 17 and worked exclusively from his home in Pennsylvania for the remainder of the year. On his New York State nonresident income tax return, Mr. Myers claimed a refund of $104,182, which the New York Division of Taxation partially disallowed, leading to an audit and subsequent recalculation of his income allocation.

The Decision: The ALJ determined that Mr. Myers' wages were correctly allocated to New York under the convenience of the employer rule. The rule provides that any allowance claimed for days worked outside New York for a New York-based employer must be based on the necessity of the employer, not the convenience of the employee. While there was an executive order in place requiring businesses to employ work from home policies to the maximum extent possible (the "Executive Order"), the order did not apply to essential businesses, including banks and related financial institutions, such as BMO. The ALJ found that BMO, as an essential business, was not legally mandated to close its New York office, and therefore, Mr. Myers' remote work from out-of-state was deemed to be for his convenience rather than a necessity imposed by his employer. The ALJ noted that BMO's decision to close its office did not qualify Mr. Myers' remote work as a necessity for the company, and there was no evidence or explanation in the record as to why BMO closed its offices.

The Takeaway: The decision underscores the consistent application of the convenience of the employer rule by New York State Tax Appeals Tribunal ALJs, even during the unprecedented circumstances of the COVID-19 pandemic. The decision highlights the challenges nonresident employees face in proving that their remote work is a necessity for their employer. Unless there is clear evidence that the employer required the employee to work from a location outside New York, the convenience of the employer rule will apply, resulting in the allocation of income to New York.

> **Employers need to be aware of the convenience rule, as well, as they may be required to withhold taxes in the state where the employer's office is located, even if an employee works remotely out-of-state.**

The decision suggests that if BMO were not exempt from the Executive Order as a bank or financial institution, the convenience of the employer rule would not apply, and Mr. Myers would be entitled to a refund. But, as discussed in a prior article I authored regarding application of the convenience rule (see the October 2024 edition of Spotlight, "New York ALJ Finds Convenience of Employer Rule Applicable to Nonresident but Provides a Roadmap for How a Taxpayer May Prove the Rule Is Inapplicable"), even in cases where the employer was not a bank or financial institution and was not exempt from the Executive Order, ALJs have still found that the convenience rule applies.

It remains to be seen whether appellate courts will step in to overrule ALJ decisions and find that when New York offices were closed during an unprecedented world-wide pandemic, employees were not working from their homes merely for their own convenience. I will keep you posted.

NICOLE L. JOHNSON
PARTNER

Procedural Foot Faults are a Trap for the Unwary

By Nicole L. Johnson

Whether filing a tax return, a protest, or an appeal, there are countless procedural requirements that must be met in order to avoid penalties or worse. While those requirements are oftentimes tedious, they are a necessary evil to avoid future headaches.

The recent decision of the Supreme Court of Nevada highlighted one such procedural misstep. In *Hohl Motorsports, Inc. v. Nevada Department of Taxation*, the company filed a petition for judicial review of a deficiency determination. *Hohl,* No. 87189, (Nev. Feb. 10, 2025). Under Nevada law, prior to filing a petition, the company was required to either (1) pay the amount of the determination or (2) enter into a written agreement with the Department of Taxation ("Department") to pay later. The *Hohl* decision centered around what constituted a "written agreement."

In that case, the company emailed a lawyer representative of the Department prior to filing its petition. The Department's response to the company stated that the company would have an additional 90 days to pay the determination and should timely file its petition. The company filed its petition and paid the determination a few weeks later.

Despite its email, the Department moved to dismiss the appeal for failure of the company to comply with the procedural requirements. Specifically, the Department claimed that the company did not have a written agreement with the Department to pay the determination at a later date. Upon review, the Court held that the email from the Department constituted a written agreement, which satisfied the procedural requirements.

Significantly, the Court noted that "[t]axpayers should be able to rely on the advice that they receive from the Department." The Court stated that this is even more true when the taxpayer discusses a particular issue with the Department. The Court admonished the Department for filing the motion to dismiss and asserted that the Department "violated basic notions of justice and fair play."

> **In today's world, where courts often chide taxpayers for not seeking guidance from the Department on filing positions, while also alleging that taxpayers cannot rely on information received from the Department, it is a breath of fresh air for the Supreme Court of Nevada to be a voice of reason.**

While this case was an important victory for the taxpayer on the procedural requirements in Nevada, the best place to be in is to never have potentially faulted at all. Be sure to dot those i's and cross those t's!

STEPHANIE N. TERINONI
ASSOCIATE

Indiana Department of Revenue Determines that Video Game Enhancement Offerings are Not Subject to Sales Tax

By Stephanie N. Terinoni

The Indiana Department of Revenue ("Department") determined last month that a video game publishing company's sales from optional video game enhancement features were not subject to sales tax in Indiana. Ind. Rev. Rul. No. 2024-04-RST (Jan. 7, 2025).

The Facts: A non-Indiana video game publisher (the "Company") sells optional video game features that enhance gameplay experience. The Company does not sell video games itself; rather, video game sales are made by a related entity of the Company. After a video game is purchased, the Company offers three optional features to the video game purchaser: (1) a monthly online subscription that allows the purchaser to play the video game online and in a multi-player setting; (2) in-game items, such as character costumes and weapons; and (3) virtual currency that the purchaser can use to pay for a monthly subscription or in-game items.

The Company requested that the Department issue a revenue ruling regarding the applicability of Indiana's sales tax on its offerings. The Department did and determined that the Company's offerings are not subject to the State's sales tax.

The Law: Indiana imposes a sales tax on retail transactions made in the State and on certain specified services delivered in the State. Indiana tax law generally defines a retail transaction as a transfer of tangible personal property in the ordinary course of business and also sets forth specific examples of "retail transactions."

Relevant here, transfers of prewritten computer software, whether delivered electronically or in a tangible medium, are retail transactions subject to sales tax. Sales tax is not imposed, however, on transactions that merely provide a right to remotely access prewritten computer software over the Internet or on sales of software as a service. Thus, if the transaction does not result in the purchaser having a possessory or ownership interest in the software, then sales tax does not apply.

In addition to transfers of prewritten computer software, electronic transfers—which grant a right of permanent use to an end user—of digital audio works, digital audiovisual works, and digital books are subject to sales tax. "Digital audio works" include works such as songs and ringtones, "digital audiovisual works" include works such as movies, and "digital books" include works that are generally recognized in the ordinary and usual sense as books. These are the only digital products on which Indiana imposes sales tax.

The Ruling: In determining whether the Company's sales were subject to sales tax, the Department analyzed the Company's offerings under the above provisions. Ultimately, the Department ruled that the Company's sales of monthly subscriptions, in-game items, and virtual currency are not subject to sales tax because the sale of such items do not fit into Indiana's definition of a "retail transaction," and the items do not fall within the enumerated services on which Indiana imposes sales tax. The Department reasoned that the Company's offerings are neither tangible personal property nor do they fall within the definitions of digital audio works, digital audiovisual works, or digital books.

> **This revenue ruling is helpful for taxpayers to better understand how the Department interprets Indiana's sales tax law to apply to these digital transactions.**

The Takeaway: While the revenue ruling applies only to the Company's facts and circumstances as described, the ruling expressly states that other taxpayers with substantially identical factual situations may rely on the ruling in preparing returns and making tax decisions. Furthermore, taxpayers can and should use revenue rulings to try to persuade taxing authorities that their position is the correct one.

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.

ABA-IPT Advanced State Income Tax Seminar

- Blank Rome State + Local Tax partner Nicole L. Johnson will be speaking at the ABA-IPT Advanced State Income Tax Seminar in New Orleans, Louisiana on March 11, 2025. Nicole's speech is titled "Rocking Reserves! How to Manage Compliance Issues for Fun and Profit." To learn more, please click here.

Chicago Tax Club Webinar

- Blank Rome State + Local Tax partner Nicole L. Johnson will be speaking at the Chicago Tax Club webinar on March 18, 2025. Nicole's speech is titled "Check Your Receipt: An Update on Sales Factor Apportionment Issues." To learn more, please click here.

Tax Executives Institute 2025 Midyear Conference

- Blank Rome State + Local Tax partner Eugene J. Gibilaro will be speaking at the Tax Executives Institute Midyear Conference in Washington, D.C. on March 19, 2025. Eugene's speech is titled "State Tax Complexities in Intercompany Debt and Other Transactions: Best Practices." To learn more, please click here.

Tax Executives Institute Orange County SALT Day

- Blank Rome State + Local Tax partners Nicole L. Johnson, Craig B. Fields, and associate Melanie L. Lee will be speaking at the Tax Executives Institute SALT Day event in Fountain Valley, California on April 24, 2025. To learn more, please click here.

COST Spring Conference

- Blank Rome State + Local Tax partners Nicole L. Johnson, Craig B. Fields, and Eugene J. Gibilaro will be speaking at the COST Spring Conference in New Orleans, Louisiana on April 29 and 30, 2025. Nicole's speech (April 29th) is titled "Business Purpose and Economic Substance Principles are In Focus Once Again," Craig's speech (April 30th) is titled "Key Apportionment Issues," and Eugene's speech (April 30th) is titled "The Apportionment of Foreign Source Income." To learn more, please click here.

Start-Up

- Blank Rome State + Local Tax partners Craig B. Fields and Nicole L. Johnson will be speaking at the Start-Up conference in Charlotte, North Carolina on May 7, 2025. Their speech is titled "State of the States."

COST 2025 Intermediate/Advanced Sales & Use Tax School Conference

- Blank Rome State + Local Tax partner Eugene J. Gibilaro will be speaking at the COST 2025 Intermediate/Advanced Sales & Use Tax School Conference in Dallas, Texas on May 20, 2025. Eugene's speech is titled "Taxation of Foreign Income." To learn more, please click here.

COST 2025 SALT Basics School Conference

- Blank Rome State + Local Tax partner Mitchell A. Newmark will be speaking at the COST 2025 SALT Basics School Conference in Dallas, Texas on May 22, 2025. Mitchell's speech is titled "Restrictions on a State's Ability to Tax." To learn more, please click here.

© 2025 Blank Rome LLP. All rights reserved. Please contact Blank Rome for permission to reprint. Notice: The purpose of this update is to identify select developments that may be of interest to readers. The information contained herein is abridged and summarized from various sources, the accuracy and completeness of which cannot be assured. This update should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

BLANKROME