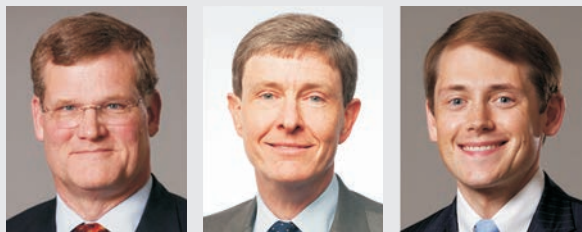


Blurred Lines: State Taxation of Nonresident Partners

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In this article, the authors discuss nexus as it relates to nonresident owners of passthrough entities. The authors focus on recent cases from California, Missouri, and Ohio addressing the issue and argue that some states have addressed the issue by looking only to statutory questions and have failed to properly reckon with the related constitutional questions.

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I. Introduction

On May 4, just a few days before the American Bar Association Section of Taxation's annual meeting in Washington, the Ohio Supreme Court issued its landmark decision in *Corrigan v. Testa*.¹ The proximity of the decision's issuance to the date of the meeting precluded a panel discussion on it. However, practitioners in attendance discussed the case privately with great interest.² *Corrigan* is the latest in a long line of cases involving a state — in this case Ohio — attempting to impose its net-income-based tax on nonresidents whose only connections with the state are their ownership interests in passthrough entities operating there.

¹No. 2014-1836, slip op. 2016-Ohio-2805 (May 4, 2016).

²Yes, sadly, these are the types of conversations that go on at ABA Tax Section meetings.

The significance of nonresident owner nexus cases rests not only in their interpretation of long-standing constitutional provisions³ but, more importantly, in their widespread applicability. Indeed, passthrough entities⁴ have replaced corporations as the most common business structure. In fact, more than half of all business net income now flows through noncorporate passthrough entities, that is, partnerships and limited liability companies.⁵

Given that passthrough entities have become so prevalent and are generally not subject to an entity-level tax, states have searched for ways to tax the income derived by the passthrough entity from sources in their state and distributed (either actually or for income tax accounting purposes) to nonresident owners. Their search has led them to use a variety of mechanisms to attempt to tax these nonresident owners.

The most common approach to taxing the income earned by a passthrough entity distributable to its nonresident owners is to require the entity to either withhold tax on the distributions or file composite returns on behalf of those owners. In fact, 38 states have some form of nonresident withholding provisions or composite return filing requirement.⁶

Although less common, a more direct (but likewise more questionable) approach is taken by a handful of states like Idaho⁷ and Kentucky,⁸ which expressly provide (either by

³Typically, the commerce and due process clauses of the 14th Amendment of the U.S. Constitution.

⁴In this column, the term "passthrough entities" describes entities taxed under either Subchapter K or Subchapter S of the Internal Revenue Code of 1986. The term includes general partnerships, limited partnerships, limited liability companies, and S corporations.

⁵Jason DeBacker and Richard Prisinzano, "The Rise of Partnerships," *Tax Notes*, June 29, 2015, p. 1563.

⁶See, e.g., Cal. Rev. & Tax Code section 25125(d) and Ala. Code section 40-18-24.2. See also Ely, Grissom, and Thistle, "An Update on the State Tax Treatment of LLCs and LLPs," *State Tax Notes*, Feb. 15, 2016, p. 505.

⁷Idaho Admin. Code r. 35.01.01.620(02) (providing that for income tax purposes a corporation is considered to be doing business in Idaho solely by virtue of an ownership interest in a partnership doing business in the state).

⁸Ky. Rev. Stat. Ann. section 141.010(25)(e) and (f); Ky. Admin. Regs. 16:240, section 4 (providing that the term "doing business" includes maintaining an interest in a passthrough entity doing business in Kentucky and deriving income from or attributable to sources

(Footnote continued on next page.)

statute or regulation) that a nonresident owner of a passthrough entity is doing business in the state and thus is subject to the state's income tax simply by virtue of its ownership interest in a passthrough entity that itself is doing business in the state. Similarly, effective January 1, 2017, corporate partners of partnerships that own or use capital, plant, or other property in Louisiana will be subject to Louisiana's corporation franchise tax.⁹

A more recent and apparently increasingly popular approach to capturing the income attributable to nonresident owners of passthrough entities is through "factor presence nexus," which is nothing more than an arbitrary bright-line nexus threshold. A growing number of states, including Alabama,¹⁰ California,¹¹ Colorado,¹² Connecticut,¹³ Michigan,¹⁴ New York,¹⁵ Ohio,¹⁶ and Tennessee,¹⁷ assert nexus for income and some other business activity taxes over out-of-state taxpayers whose in-state sales or receipts exceed a defined threshold.

Alabama, which adopted the Multistate Tax Commission's model factor presence nexus threshold standards, provides that for Alabama income tax and financial institution excise tax (FIET) purposes, a taxpayer is deemed to have nexus with Alabama if, in any tax period, the taxpayer has:

- \$50,000 or more in property or payroll;
- \$500,000 or more in sales; or
- 25 percent of its total property, payroll, or sales, apportioned to Alabama.¹⁸

Because threshold amounts are applied at the entity level, if a passthrough entity's payroll, property, or sales exceed the threshold amounts, its *owners* are deemed automatically subject to income tax or FIET on their distributive share of the entity's Alabama-source income. Consequently, nonresident owners of passthrough entities may be subject to Alabama income tax or FIET on their distributive shares, regardless of whether the nonresident owner has any physical or other economic presence in the state or holds only a limited interest in terms of management. The result of this

within Kentucky, including deriving income directly or indirectly from a disregarded special member LLC that is doing business in Kentucky).

⁹L. 2016, H. 19 (1st Extra. Sess.) (Act 12) (eff. Jan. 1, 2017) (legislatively overturning at least two recent decisions by the Louisiana Court of Appeal, which are cited below in footnote 21).

¹⁰Ala. Code section 40-18-31.2 (effective for tax years beginning after Dec. 31, 2014).

¹¹Cal. Rev. & Tax. Code section 23101(b).

¹²Colo. Rev. Stat. section 39-22-301(1)(d); Colo. Code Regs. section 39-22-301.1(1).

¹³Conn. Gen. Stat. section 12-216a.

¹⁴Mich. Comp. Laws Ann. section 206.621(1).

¹⁵N.Y. Tax Law section 209.1(b).

¹⁶Ohio Rev. Code Ann. sections 5751.01(H), 5751.01(I).

¹⁷Tenn. Code Ann. section 67-4-2004(49); Tenn. Code Ann. section 67-4-2004(14) (for tax years beginning on or after Jan. 1, 2016).

¹⁸Ala. Code section 40-18-31.2(a)(2).

statute is that many nonresident owners will now have Alabama filing obligations if their passthrough entities exceed any of the above-listed thresholds.

While one could argue that a state can constitutionally require a passthrough entity with operations in that state to withhold that state's income tax from its nonresident owners' distributive shares of the state-source income,¹⁹ it is not at all clear that the jurisdiction to tax income within a state's borders extends to jurisdiction to tax the nonresident owner directly either (1) through the statutory declaration that owning an interest in a passthrough entity doing business in the state constitutes doing business in the state by the nonresident owner or (2) by establishing a bright-line nexus threshold through the apportionment factors of the passthrough entity.

Regardless of whether a state has a clear statutory basis for asserting nexus over a nonresident owner of a passthrough entity, as Walter Hellerstein recently noted:

states almost invariably treat nonresident partners (both general and limited) as well as owners of interests in other flow-through entities (including S corporation shareholders and members of LLCs that elect partnership status) as having nexus in the states in which their flow-through entities have nexus on the basis of the aggregate theory of partnership.²⁰

Despite numerous states'²¹ position regarding their ability to assert nexus over nonresident owners of passthrough

¹⁹See *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435, 444 (1944) (approving a withholding regime imposed upon corporate dividend payments to nonresident shareholders reflecting income earned within the state). States regularly cite *International Harvester* as support for their entity-level withholding mechanisms, which are designed to collect tax from nonresidents on income earned from sources within the taxing state. *Id.* at 441 ("A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions, which occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers").

²⁰Hellerstein, "Substance and Form in Jurisdictional Analysis: *Corrigan v. Testa*," *State Tax Notes*, June 13, 2016, p. 849 (internal citations omitted).

²¹It should be noted that many states (or state courts) have not taken this position. See, e.g., Alabama Department of Revenue Rul. 98-002 (May 4, 1998); Tennessee Department of Revenue Letter Ruling No. 97-49 (Dec. 2, 1997); *Lanzi v. State Department of Revenue*, 968 So. 2d 18 (Ala. Civ. App. 2006), *cert. denied*, No. 2040298 (Ala. 2007); *Vogt v. State Department of Revenue*, Admin. L. Div., Dkt. No. Inc. 11-660 (Jan. 3, 2013); *UTELCOM Inc. and UCOM Inc. v. Bridges*, 77 So. 3d 39 (La. App. 1st Cir. 2011), *writ denied*, 2011-C-2632 (La. 2012); and *Bridges v. Polychim USA Inc.*, 2014-CA-0307 (La. Ct. App. 2015). Moreover, the positions of some states (e.g., California) are affected by the type of passthrough entity involved. See, e.g., Kathleen Wright, "Unintended Consequences: Tax Traps for Flow-Through Entities," *State Tax Notes*, July 11, 2016, p. 123 (providing a helpful discussion of California's interpretation of nonresident owner nexus with respect to general partnerships, LLCs, and limited partnerships).

entities doing business in their state, whether merely holding an interest in a passthrough entity creates nexus with the state in which the entity does business remains a frequently litigated topic.²² The remainder of this article discusses recent cases and rulings in California, Missouri, and Ohio, while examining the different approaches each state (and its courts) have taken in determining whether a nonresident owner is taxable in the state.

II. Engaged in Business Cases

As noted above, a number of states have statutorily declared that a nonresident owner of a passthrough entity is doing business in a state, and thus subject to taxation, simply by virtue of their ownership interest in the passthrough entity doing business in the state. Others have taken the position that nexus exists if the nonresident owner's distributive share of the passthrough entity's in-state apportionment factors exceed a defined threshold. California is a state that has managed to combine both approaches.²³ As the readers may sense, the authors have constitutional concerns with each approach.

A. California

Since 2011 California has enforced a broad standard for doing business that affects out-of-state corporations and passthrough entities (and their owners) that have property, payroll or sales attributable to the Golden State.²⁴ Part of California's doing business standard looks to inflation-adjusted factor presence nexus thresholds, which are declared to include the pro rata or distributive share attributable to an ownership interest in a passthrough entity.²⁵

Also, in July 2014, very likely as a result of pending litigation, the California Franchise Tax Board issued Legal Ruling 2014-01,²⁶ which addressed when a business entity²⁷ is required to file a California franchise or income tax return and is subject to tax based on its membership interest in an LLC that has elected to be treated as a partnership for federal and state income tax purposes. Specifically, if an LLC

meets the standard for doing business in Cal. Rev. & Tax. Code section 23101, its members will also be treated as doing business in California regardless of whether its members' own operations in the state exceed the sales, property, and payroll thresholds and regardless of whether the member is a managing or a non-managing member.²⁸

The FTB continues to assert that *Appeals of Amman & Schmid Finanz AG*²⁹ does not apply to non-managing members of LLCs. In *Amman & Schmid*, the California State Board of Equalization carved out a limited exception to the doing business standard regarding limited partners of limited partnerships by finding that limited partners are not active participants in partnerships and therefore are not "actively engaging in profit-seeking transactions."³⁰ In Legal Ruling 2014-01, the FTB concluded that the BOE's decision in *Amman & Schmid* hinged on the right to manage or control the decision-making process of the entity, not whether a partner had limited liability.³¹ The FTB ruling attempts to distinguish the control and management rights of general and limited partners and reasons that because the default rules in California's LLC act provide that all members have the right to manage the LLC, all members of LLCs should be treated similarly to general partners in the partnership context. Thus, the LLC's activities should be attributable to all its members.³² Therefore, according to the FTB, if an LLC classified as a partnership for income tax purposes is doing business in California, its members will be deemed to be doing business in California as well.³³

The FTB issued Legal Ruling 2014-01 while *Swart Enterprises Inc. v. California Franchise Tax Board*³⁴ was pending, seemingly in an attempt to establish its position on the doing business standard. That effort failed, however, as the California Superior Court, relying heavily on the BOE's decision in *Amman & Schmid*, concluded that an Iowa corporation was not doing business in California through its mere ownership of a 0.2 percent interest in an LLC treated as a partnership and resident in San Francisco. The Iowa corporation was engaged in farming activities in Kansas and Nebraska but held an interest in an LLC with a San Francisco mailing address that leased and disposed of capital equipment in various states, including California. In its opinion, the trial court distinguished the Iowa corporation's activities from those described in Legal Ruling 2014-01, noting that like the foreign corporations in

²²See, e.g., *CRIV Investments Inc. v. Department of Revenue*, No. 4046 (Ore. Tax Ct. 1997); *Borden Chemicals & Plastics LP v. Zehnder*, 726 N.E.2d 73 (Ill. App. 2000); *SAHI USA Inc. v. Commissioner of Revenue*, No. C262668 (Mass. App. Tax Bd. 2006); *Revenue Cabinet v. Asworth Corp.*, Ky. Ct. App., Dkt. Nos. 2007-CA-002549-MR, 2008-CA-000023-MR, Nov. 20, 2009, as modified Feb. 5, 2010, 2009 WL 3877518, cert. denied, Ky. S. Ct., Dkt. No. 2009-SC-000816 (Aug. 18, 2010), opinion not published, cert. denied 131 S.Ct. 1046 (Jan. 24, 2011); see also cases cited in footnote 21, *supra*.

²³See Wright, *supra* note 21.

²⁴Cal. Rev. & Tax. Code section 23101(b).

²⁵*Id.*

²⁶California Franchise Tax Board Legal Ruling 2014-01, "Business Entities that are Members of Multiple-Member Limited Liability Companies Classified as Partnerships for Tax Purposes" (July 22, 2014) (specifying when corporate members of an LLC are subject to California's franchise tax).

²⁷Legal Ruling 2014-01 does not specifically address individuals.

²⁸*Id.* at 4.

²⁹*Appeals of Amman & Schmid Finanz AG*, 96-SBE-008, 1996 Cal. Tax LEXIS 62 (Cal. State Bd. of Equal. 1996).

³⁰*Id.*

³¹California Franchise Tax Board Legal Ruling 2014-01, at 5.

³²*Id.*

³³*Id.* at 4.

³⁴*Swart Enterprises Inc. v. California Franchise Tax Board*, No. 13CECG02171 (Cal. Super. Ct. Fresno Cnty, Nov. 13, 2014) (unpublished), appeal docketed F070922 (Cal. Ct. App. 5th Dist.).

Amman & Schmid, the Iowa corporation also lacked the authority to manage or control the LLC. Ultimately, the court concluded that the Iowa corporation's passive investment in the LLC doing business in California was not enough to be considered to be doing business in California under the statute and, therefore, Swart Enterprises could not be held liable for the \$800 minimum California franchise tax. In January 2015 the FTB appealed the trial court's decision. The appeal remains listed on the FTB's litigation roster as awaiting a date for oral argument.

California has fared better in enforcing its position in the context of general partnerships.³⁵ Most recently, in *Matter of the Appeal of CFL LP*,³⁶ the BOE ruled that an Arizona LP that was a general partner in a California general partnership was doing business in California and thus subject to the minimum \$800 franchise tax. The Arizona LP was engaged in real estate investment in Arizona but owned a 12.5 percent interest in the California general partnership, which owned a single commercial real estate property in Tucson, Arizona. In a "guilt by association" ruling, the BOE concluded that the California general partner, which owned the remaining 87.5 percent of the California general partnership and managed its day-to-day operations, was doing business in California. Accordingly, the Arizona LP was likewise deemed to be doing business in California and was therefore subject to the minimum tax — not because of its own activities in California but because of the activities of its partner.

These are just a few examples of California's hotly contested position that if a passthrough entity is doing business in California, then so are its nonresident owners. What is interesting is that in none of these cases did the BOE or FTB take up the constitutional requirement that the nonresident owner must itself have a substantial nexus with California.

B. Missouri

One of the most recent opinions addressing whether a nonresident owner's interest in a passthrough entity creates sufficient nexus with a state was handed down by the Missouri Supreme Court last year in *Southwestern Bell Telephone Co. v. Director of Revenue*.³⁷

The taxpayer in *Southwestern Bell* was a Delaware holding corporation formed as the result of a 2001 restructuring. The holding corporation's purpose was to manage a telecommunications business's Missouri operations, but it did not directly own any assets in the state. Rather, its only contact with Missouri was its ownership interest in an LP

engaged in business there.³⁸ In determining whether the holding corporation was subject to Missouri franchise tax, the Missouri Supreme Court stated the issue as follows:

Whether a foreign corporation that has been engaged in business in this state and paying Missouri franchise taxes for decades can escape all liability for such taxes — even though it continues to be engaged in the same business in the same locations using the same assets merely by inserting a wholly owned limited partnership to own and operate those assets.³⁹

Based on the manner in which the question was framed, it came as no surprise that the court quickly and adamantly answered in the negative, finding the holding corporation-partner liable for Missouri franchise taxes for the 2003-2005 tax years.

In reaching its conclusion, the court focused exclusively on whether the holding corporation-partner was engaged in business in Missouri, which is the sole statutory prerequisite for a foreign corporation to be subject to Missouri franchise tax.⁴⁰ The court found that the holding corporation was engaged in the same business in Missouri that the predecessor taxpayer was engaged in before the 2001 restructuring.⁴¹ The test was whether the holding corporation was employing assets in Missouri, regardless of whether it directly owned the assets.⁴² The court explained that a foreign corporation is engaged in business in Missouri, whether it does so directly or indirectly through a wholly owned LP. Specifically, the court wrote:

For purposes of deciding whether Holdings was subject to franchise tax under section 147.010.1, it does not matter whether Holdings engaged in business in this state by employing a wholly owned limited partnership (that is, LP) or whether it engaged in business here by employing LP's assets directly. Instead, under the plain language of [the statute], the only thing that matters is whether Holdings was "engaged in business in this state."⁴³

In other words, it didn't matter whether the holding corporation-partner engaged in business in the state through a wholly owned LP or whether it engaged in business by using the LP's assets directly.

Notably, nowhere in its opinion did the court utter the word "nexus," nor did it touch on any potential constitutional limitations on the state's jurisdiction to impose tax on the holding corporation partner, even though the holding

³⁵See, e.g., *Sup Inc. v. California State Board of Equalization*, No. 571262 (Cal. State Bd. of Equal. 2012) (released for publication on Mar. 7, 2013) (not to be cited as precedent).

³⁶*In the Matter of the Appeal of CFL LP*, No. 764609 (Cal. State Bd. of Equal. 2014) (released for publication in July 2015) (not to be cited as precedent).

³⁷454 S.W.3d 871 (Mo. 2015).

³⁸Technically, the holding corporation was the sole limited partner in the LP, through which it directly held a 99 percent ownership interest in the LP. Also, the holding corporation was the single member of an LLC, which was the 1 percent general partner of the LP.

³⁹*Id.* at 871.

⁴⁰Mo. Rev. Stat. section 147.010(1).

⁴¹*Southwestern Bell*, 454 S.W.3d at 874.

⁴²*Id.*

⁴³*Id.* at 874-75 (footnote omitted).

corporation briefly mentioned these issues in its brief to the court. Rather, the court's exclusive focus was on whether the holding corporation was engaged in business in Missouri. While this omission suggests an analytically incomplete opinion, perhaps it is understandable given the company's history with Missouri, which provides a painful illustration of bad facts making bad law. As the Missouri Department of Revenue pointed out and the court echoed, the predecessor entity paid substantial Missouri corporation franchise taxes from at least 1975 to 2001,⁴⁴ which may explain the seemingly harsh tone the court used in framing the issue.

III. Constitutional Limitations on States' Jurisdiction to Tax

As noted above, the courts in Missouri and California seemed to focus their analyses exclusively on whether the nonresident owners' activities fell within the statutory definition of doing business, without any consideration of constitutional limitations on state jurisdiction to tax. And from an analytical standpoint, it makes sense to "consider issues of state statutory jurisdiction before addressing federal constitutional restraints on state taxing jurisdiction, because it is only when a taxpayer's activities subject it to jurisdiction under the state statute that one even needs to invoke federal constitutional restraints on state taxing power."⁴⁵ Nevertheless, the failure to even consider the federal constitutional restraints arguably renders those decisions incomplete. Perhaps that is why taxpayers and practitioners alike have been so interested in the *Corrigan* case in Ohio, which focused exclusively on the constitutional issues raised by the taxpayer.⁴⁶

In *Corrigan*, the Ohio Supreme Court concluded that the federal 14th Amendment due process clause barred Ohio from imposing a personal income tax on the capital gain a nonresident realized from the sale of his equity interest in an LLC that was doing business in Ohio.⁴⁷ At the outset, it must be noted that this was *not* a case in which the state was attempting to tax the distributive share of the LLC's operating income to its nonresident members.⁴⁸

⁴⁴ *Southwestern Bell Tel. Co. v. Director of Revenue*, No. 12-576 RF (Mo. Admin. Hearing Comm'n 2013).

⁴⁵ Hellerstein and Hellerstein, *State Taxation*, 6.16 (2001 and Supp. 2016-1).

⁴⁶ Not all of the attention given to the *Corrigan* opinion has been favorable. For a thoughtful, albeit highly critical review of the Ohio Supreme Court's decision in *Corrigan*, see Hellerstein, *supra* note 20.

⁴⁷ See, e.g., *[Taxpayer] v. North Carolina Department of Revenue*, Final Agency Decision, OAH Dkt. No. 09 REV 5669 (Apr. 21, 2011) (finding that an out-of-state corporate limited partner whose only contact with the state was its LP interest did not have to apportion any part of the gain on the sale of its LP interest to North Carolina, even though it had been paying North Carolina income tax for a number of years on its distributive share of North Carolina source income. The corporate LP and the partnership were found not to be unitary).

⁴⁸ See, e.g., *Wirth v. Commonwealth of Pennsylvania*, 95 A.3d 822 (Pa. 2014), *cert. denied*, S. Ct. Dkt. No. 14-638 (2015) (upholding a

(Footnote continued in next column.)

In 2000, Patton R. Corrigan, a nonresident of Ohio, acquired an interest in Mansfield Plumbing LLC, which was unquestionably doing business in Ohio as well as in the 49 other states and some foreign countries.⁴⁹ Corrigan owned just over 79 percent of Mansfield Plumbing and held the title of manager, although he evidently was not involved in overseeing the company's day-to-day operations.⁵⁰ In 2004 Corrigan sold his membership interest in Mansfield Plumbing to an unrelated third party and realized a capital gain of about \$27 million.⁵¹ For Ohio personal income tax purposes, Corrigan treated the entire amount of this capital gain as nonbusiness income that was allocable outside Ohio.⁵²

During the tax year at issue, Ohio law provided that:

A pass-through entity investor that owns, directly or indirectly, at least twenty percent of the pass-through entity at any time during the current taxable year or either of the two preceding taxable years shall apportion any income, including gain or loss, realized from the sale, exchange, or other disposition of a debt or equity interest in the entity as prescribed in this section. For such purposes, in lieu of using the method prescribed by sections 5747.20 and 5747.21 of the Revised Code, the investor shall apportion the income using the average of the pass-through entity's apportionment fractions otherwise applicable under section 5747.21 of the Revised Code for the current and two preceding taxable years. If the pass-through entity was not in business for one or more of those years, each year that the entity was not in business shall be excluded in determining the average.⁵³

Applying Ohio Rev. Code section 5742.212, the Ohio Department of Taxation assessed Corrigan personal income tax on the deemed Ohio-based portion of the capital gain realized from the sale of his membership interest in Mansfield Plumbing.⁵⁴

Unlike the Missouri Supreme Court in *Southwestern Bell*, the Ohio Supreme Court focused its analysis on the due process clause,⁵⁵ ultimately concluding that "the assessment

determination that a single-purpose LP was subject to Pennsylvania personal income tax commensurate with the total discharge of indebtedness, including the portion attributable to accrued but unpaid interest, as a result of the foreclosure of partnership property and that the partnership's nonresident limited partners were liable for Pennsylvania personal income tax in amounts proportionate to their ownership percentage in the partnership).

⁴⁹ *Corrigan v. Testa*, slip op. at 3.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 4.

⁵³ See *id.* at 9, quoting Ohio Rev. Code section 5742.212. The current statute is substantively the same.

⁵⁴ *Id.* at 5.

⁵⁵ For a discussion of the impact of recent due process clause decisions by the U.S. Supreme Court on state taxation, see Mary T.

(Footnote continued on next page.)

of a tax on Corrigan's capital gain cannot be sustained under the basic due-process test for the exercise of proper tax jurisdiction⁵⁶ because in the absence of a unitary relationship between Corrigan and Mansfield Plumbing, "Corrigan's sale of his interest in Mansfield Plumbing did not avail him of Ohio's protections and benefits in any direct way."⁵⁷

While most state and local tax practitioners rejoiced at *Corrigan's* outcome and many similarly situated taxpayers have likely begun preparing their refund claims, that joy may be short-lived if the department elects to petition the U.S. Supreme Court for *certiorari*.⁵⁸ As Hellerstein noted,⁵⁹ the decision conflicts with the New York Court of Appeals'

Benton and Clark Calhoun, "Has the Due Process Clause Gotten Its Groove Back?" *State Tax Notes*, June 4, 2012, p. 721; and Clark Calhoun and Andrew W. Yates, "More Adventures in Due Process," *State Tax Notes*, May 26, 2014, p. 471.

⁵⁶*Id.* at 6. That conclusion obviated any need for a separate analysis under the commerce clause.

⁵⁷*Id.* at 13. For a similar result in a gain case, see *[Taxpayer] v. North Carolina Dept. of Rev.*, *supra* note 47.

⁵⁸At the time this article was submitted, the department's deadline to file a petition had not expired.

⁵⁹Hellerstein, *supra* note 20.

decision in *Allied-Signal I*,⁶⁰ which may increase the likelihood that the Court would take up the case on appeal. Although the Court has issued a spate of pro-defendant due process clause cases in just the past few years — albeit none in the state tax context — it is unclear how that would affect the likelihood that four justices may vote in favor of issuing the writ.

IV. Conclusion

As the above discussion shows, the state taxation of passthrough entities and their owners is ever evolving regarding both the case law and statutory and regulatory changes. Thus, it is important for the owners of and tax advisers to passthrough entities to closely monitor these developments. It is also important for nonresident owners facing tax assessments based solely on their ownership of passthrough entities to consider whether the state has the authority to impose the tax, both from a statutory perspective as well as from a constitutional standpoint. ■

⁶⁰*Allied-Signal Inc. v. Commissioner of Finance*, 588 N.E.2d 731 (N.Y. 1991).