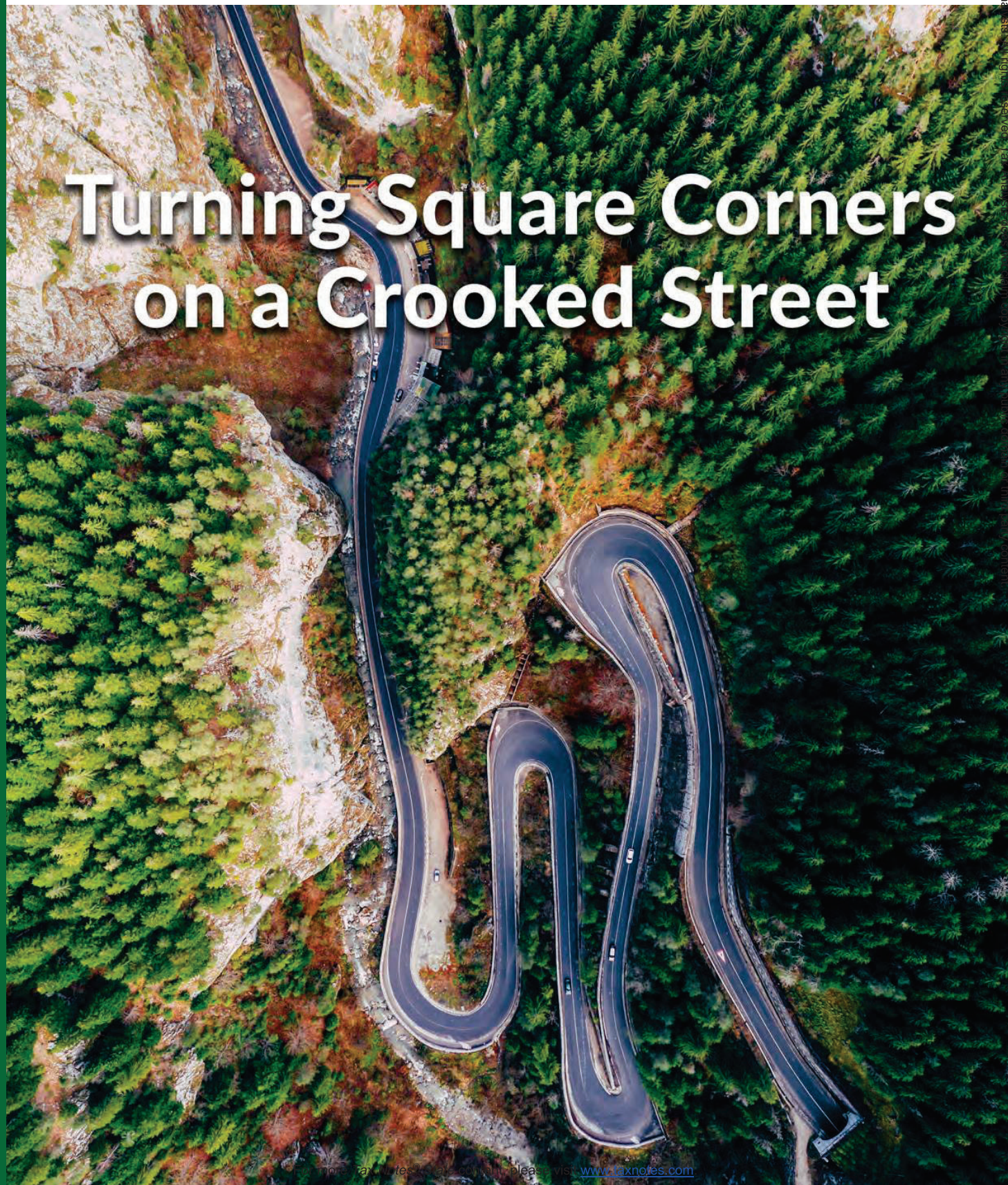


Turning Square Corners on a Crooked Street



Turning Square Corners on a Crooked Street

by David Uri Ben Carmel



David Uri Ben Carmel

David Uri Ben Carmel is the principal of 349 East Multistate Tax Planning LLC (www.349east.com). Previously, he was the partner in charge of state and local taxation at two international law firms and was the chair of the American Bar Association State Tax Committee's Income and Franchise Taxes Subcommittee.

In this article, Ben Carmel continues the theme of seeking non-litigated resolutions to tax disputes, a subject that he has addressed in two previously published pieces.

Copyright 2024 David Uri Ben Carmel.
All rights reserved.

"Men must turn square corners when they deal with the Government."

—Justice Oliver Wendell Holmes Jr.¹

Some years ago, I assisted a client's accountants in the preparation of a state tax filing. The problem: a "gotcha" question on a required form. Analysis demonstrated that the question had no basis in the jurisdiction's law nor was it justified under the administrative body's enabling authority. But there it was.

This was neither the first nor the last time that I have encountered such an issue. Other examples (among quite a few) include department of revenue bulletins (or unpublished internal guidance) purporting to describe a binding

interpretation of the law or prescribe an administrative policy without complying with the jurisdiction's Administrative Procedures Act; errant form instructions that are unsupported by or actually conflict with state law; and flawed audit notices naming another business even as the jurisdiction's representatives pressured my client demanding a "response" before a statute of limitations closes.

This listing of occurrences is not exhaustive. Nevertheless, a common thread is what to advise a law-abiding taxpayer confronting a tax compliance or tax planning issue created by an administrative action that does not follow the jurisdiction's laws. The ubiquity and power of the administrative state means that this issue extends far beyond subnational taxation to the many areas of life administered by agencies of the federal and subnational governments.

Court Chastised Administrative Agency

For multistate tax practitioners, consideration of relevant U.S. Supreme Court decisions is an appropriate starting point for understanding how to respond to governmental overreach. Fortunately, one need not look far, as in 2021 the Court clearly expressed its view of that government conduct.²

Niz-Chavez involved the federal government's notice practices relating to the removal of nonpermanent resident aliens from the United States. Under federal law, a nonpermanent resident alien may be eligible for relief from removal upon demonstrating continuous presence in the United States for at least 10 years. However, the period of continuous presence is "deemed to end . . . when the alien is served a

¹*Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920).

²*Niz-Chavez v. Garland*, 593 U.S. 155 (preliminary print), 141 S. Ct. 1474 (2021).