

Massachusetts Legislature Overrides Governor's Veto of Transportation Bill and Enacts Changes to the Corporate Excise Tax and Sales and Use Tax

July 26, 2013

Overview

On July 24, 2013, the Massachusetts Legislature overrode Governor Deval Patrick's veto of H3535, **An Act Relative to Transportation Finance** (the "Bill"), which contains a number of provisions intended to generate increased tax revenues in order to finance transportation projects in the Commonwealth. The more significant tax related changes in the Bill provide for the following:

- For apportionment of the net income and non-income measures of the corporate excise tax, sales of other than tangible personal property will be sourced on a market basis;¹
- Sales of other than tangible personal property to jurisdictions where the taxpayer is not taxable will be "thrown out" of the sales factor numerator and denominator;²
- Utility corporations will be taxed as general business corporations at a rate of 8%;³
- Services related to planning, consulting or designing of computer systems as well as modification, integration, enhancement, installation or configuration of standardized software will be subject to sales and use tax;⁴ and
- Cigarette and gasoline excise tax rates will be increased.⁵

In this Tax Alert we summarize the significant corporate excise tax and sales and use tax elements of these legislative changes.

Corporate Excise Tax

The Bill contains provisions that will affect the apportionment of net income and non-income measures of the corporate excise tax and revoke the Massachusetts utility corporation designation for tax years beginning on or after January 1, 2014.

Market Sourcing of Sales of other than Tangible Property and Throwout Rule

The Bill makes two major changes to the apportionment of corporate excise tax: (1) the sourcing of receipts to Massachusetts from sales of other than tangible personal property ("TPP") on a market basis; and (2) the requirement that receipts from sales other than sales of TPP made to customers in jurisdictions where the corporation is not taxable, be excluded from both the numerator and denominator of the sales factor ("throwout rule").

Under current law, sales of other than TPP are sourced to the state if the greater portion of the cost of performance are incurred more in Massachusetts versus any other state. Under the Bill, sales of other than TPP are treated as made in Massachusetts if "the corporation's market for the sale is in the commonwealth." Sales will now be sourced to Massachusetts based on rules dependent upon the nature of the sale.

If the state to which the sales should be assigned cannot be reasonably approximated or the corporation is not taxable in the state to which the sale is assigned, the receipts must be thrown out of the sales factor.⁶ Massachusetts currently only has a throw-back rule for sales of TPP.

¹ *An Act Relative to Transportation Finance*, St. 2013, c. 46, H3535, at § 37. See: [Session Laws: CHAPTER 46 of the Acts of 2013](#).

² *Id.*

³ *Id.* at §§ 35, 36 and 39.

⁴ *Id.* at §§ 48-49.

⁵ *Id.* at §§ 43-47.

Utility Corporation Classification

Utility corporations, which include public utilities such as telephone companies, electricity providers, etc. are currently taxed at a rate of 6% and apportion income on an evenly weighted three-factor basis. For years beginning on or after January 1, 2014, utility corporations will be taxed like other general business corporations using the applicable apportionment factor at a rate of 8%. Currently, utility corporations are not permitted to deduct net operating losses (“NOLs”). Under the Bill, companies formerly taxed as a utility corporation will not be permitted to carry over any NOLs generated prior to 2014 but will be allowed to utilize post-2013 NOLs incurred as a general business corporation.⁷ Finally, any utility switching equipment is expressly exempted from local property tax to allow companies formerly taxed as utility corporations to retain their exemption upon conversion to general business corporations.⁸

Sales and Use Tax

The Bill imposes sales and use tax on computer system design services and the modification, integration, enhancement, installation or configuration of standardized software.⁹ Historically the only services subject to sales and use tax were telecommunications services. Computer system design services are defined as “the planning, consulting or designing of computer systems that integrate computer hardware, software or computer technologies and are provided by a vendor or a third party.” The changes will take effect beginning July 31, 2013.¹⁰

On July 25, 2013, the Department of Revenue issued Technical Information Release (“TIR”) 13-10 to provide initial guidance regarding these new sales tax provisions, including applicable sourcing rules, transition rules for existing contracts, electronic filing requirements, calculation of use tax liability and the effective date and its impact on filings and payments.

If you have questions regarding the Bill or other Massachusetts matters, please contact any of the following Deloitte Tax professionals.

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⁶ *Id.* at § 37.

⁷ *Id.* at § 70.

⁸ *Id.* at §§ 29-31.

⁹ *Id.* at §§ 48-49.

¹⁰ *Id.* at § 89. Ma. DOR TIR 13-10 (7/24/2013). Available at: [TIR 13-10: Computer and Software Services Law Changes](#).