

“Tax Haven” Proposals in Kentucky, Maine, Massachusetts and New Hampshire

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Overview

Legislatures in Kentucky, Maine, Massachusetts, and New Hampshire are currently considering “tax haven” proposals. In an effort to combat the state impact of perceived international income shifting, these proposed laws would generally require an otherwise water’s-edge filing group to include the income and apportionment factors of certain related corporations incorporated or doing business in a purported “tax haven” foreign jurisdiction. Alaska, Montana, Oregon, Rhode Island, West Virginia, and the District of Columbia have already enacted versions of these laws.¹

In this Tax Alert we outline the states’ current approaches for defining “tax havens” and summarize the tax haven proposals and amendment efforts that are under consideration by various state legislatures.

“Tax Haven” Defined

The states have generally adopted two different approaches for defining “tax haven” jurisdictions: (1) identifying by name specific nations considered to be “tax havens” (“Blacklist” Approach); or (2) designating a nation as a “tax haven” based on certain criteria (“Subjective Approach”). Regardless of approach, these provisions have provided state tax agencies with discretion to determine which jurisdictions are “tax havens.”

“Blacklist” Approach

Montana and Oregon have incorporated into their tax haven laws a “blacklist” of nations. Montana, for example, requires that a return under a water’s-edge election must include the income and apportionment factors of a unitary member that is incorporated in a listed “tax haven.”² Montana currently lists the following jurisdictions as “tax havens”:

Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Grenada, Guernsey-Sark-Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherlands Antilles,³ Niue, Panama, Samoa, San Marino, Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Turks and Caicos Islands, U.S. Virgin Islands, and Vanuatu.⁴

Oregon has incorporated a similar “blacklist” into its statute.⁵ However, Oregon does not consider Panama a “tax haven” nation.⁶

Each state following this approach also requires that its Department of Revenue reevaluate the “blacklist” every two years and report to the respective legislature any recommended additions or subtractions to the list.⁷

Subjective Approach

Tax haven laws in Alaska, Rhode Island, West Virginia, and the District of Columbia designate nations as “tax havens” based on certain criteria.⁸ These states generally require the inclusion of income and apportionment

¹ Alaska Stat. § 43.20.145(a)(5); D.C. Code Ann. § 47-1810.07(a)(2)(F)(i); Mont. Code Ann § 15-31-322(1)(f); Or. Rev. Stat. § 317.715(2)(a); R.I. Stat. 44-11-4.1(d); W. Va. Code § 11-24-13f(a)(7).

² Mont. Code Ann. § 15-31-322(1)(f).

³ The Netherlands Antilles was dissolved on October 10, 2010.

⁴ Mont. Code Ann. § 15-31-322(1)(f).

⁵ Or. Rev. Stat. § 317.715(2)(b).

⁶ *Id.*

⁷ Mont. Code Ann. § 15-31-322(2); Or. Rev. Stat. § 317.717.

⁸ Alaska Stat. § 43.20.145(a)(5); D.C. Code Ann. § 47-1801.04(49); R.I. Stat. 44-11-1(8); W. Va. Code § 11-24-13a(a)(38).

factors of any member that is doing business or incorporated in a “tax haven.”⁹ Rhode Island, West Virginia, and the District of Columbia consider a member to be doing business or incorporated in a “tax haven” if the jurisdiction meets certain statutory criteria, based on the Multistate Tax Commission model combined reporting statute (“MTC model”). Under the MTC model, a “tax haven” is defined as a jurisdiction that has no or a nominal effective tax rate on the relevant income and:

- a) has laws or practices that prevent effective exchange of information for tax purposes with other governments on taxpayers benefiting from the tax regime;
- b) has a tax regime that lacks transparency;
- c) facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy;
- d) explicitly or implicitly excludes the jurisdiction’s resident taxpayers from taking advantage of the tax regime’s benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction’s domestic market; or
- e) has created a tax regime that is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial/other-services sector relative to its overall economy.¹⁰

In addition to these criteria, West Virginia includes nations identified by the Organization for Economic Cooperation and Development as “tax havens” or as having a harmful preferential tax regime.¹¹

Alaska does not follow the MTC Model but instead defines a “tax haven” as:

[A] country that does not impose an income tax, or that imposes an income tax at a rate lower than 90 percent of the United States income tax rate on the income tax base of the corporation in the United States, if (A) 50 percent or more of the sales, purchases, or payments of income or expenses, exclusive of payments for intangible property, of the corporation are made directly or indirectly to one or more members of a group of corporations filing under the water’s[-]edge combined reporting method; (B) the corporation does not conduct significant economic activity.¹²

Legislative Developments

Tax Haven Legislation Proposed in Kentucky, Maine, Massachusetts, and New Hampshire

Recently, tax haven legislation has been proposed in Kentucky, Maine, Massachusetts, and New Hampshire.¹³ Similar to current laws in Montana and Oregon, the proposals would incorporate a “blacklist” approach.¹⁴ However, the state proposals differ in regard to the list of nations identified as “tax havens.”

Kentucky’s proposed legislation would identify the following nations as “tax havens”:

Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Grenada, Guernsey-Sark-Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherlands Antilles,¹⁵ Niue, Panama, Samoa, San Marino, Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Turks and Caicos Islands, U.S. Virgin Islands, and Vanuatu.¹⁶

⁹ Alaska’s standard for including a corporation is “a corporation that is incorporated in or does business in” a “tax haven.” Alaska Stat. § 43.20.145(a)(5). The District of Columbia’s and West Virginia’s statutes provide a doing business standard. D.C. Code Ann. § 47-1810.07(a)(2)(F)(i); W. Va. Code § 11-24-13f(a)(7). Rhode Island’s standard relies on whether the entity is incorporated in a “tax haven.” R.I. Stat. 44-11-4.1(d).

¹⁰ Multistate Tax Commission, Proposed Model Statute for Combined Reporting, § 1(I).

¹¹ W. Va. Code § 11-24-3a(a)(38).

¹² Alaska Stat. § 43.20.145(a)(5).

¹³ H.B. 374, 2015 Leg., Reg. Sess. (Ky. 2015); Legis. Doc. 341, 127th Leg., 1st Reg. Sess. (Me. 2015); H.D. 1234, 189th Gen. Court, Reg. Sess. (Ma. 2015); S.D. 1699, 189th Gen. Court, Reg. Sess. (Ma. 2015); H.B. 551, 2015 Leg., Reg. Sess. (N.H. 2015).

¹⁴ *Id.*

¹⁵ The Netherlands Antilles was dissolved on October 10, 2010.

¹⁶ H.B. 374, 2015 Leg., Reg. Sess. (Ky. 2015).

Maine's proposed legislation would incorporate a "blacklist" similar to that contemplated in Kentucky but would not include the Netherland Antilles and Panama.¹⁷ The list would also identify Ireland and the Caribbean Netherlands as "tax havens."¹⁸

Massachusetts has a pair of tax haven companion bills that would also incorporate a similar "blacklist" as that proposed in Kentucky.¹⁹ However, under MA H.D. 1234, the "blacklist" would not include the Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, and Samoa. Under MA S.D. 1699, the "blacklist" would not include the Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, and Samoa, and would include the Kingdom of the Netherlands. Both bills would also identify Hong Kong, Singapore, and Switzerland as "tax havens."²⁰

Finally, New Hampshire's proposed legislation would incorporate a "blacklist" similar to that contemplated in Kentucky but would not include the Netherland Antilles and Panama.²¹ The proposed legislation would include the Caribbean Netherlands on the "blacklist" and define a "tax haven" in accordance with the MTC model.²²

Amendments to "Blacklist" Nations in Montana and Oregon

Montana's and Oregon's legislatures are also considering proposed legislation that would amend their current statutory list of "tax haven" nations.²³ The proposals in both states would add Guatemala, Hong Kong, the Kingdom of the Netherlands, Switzerland,²⁴ and Trinidad and Tobago and would remove Monaco and the Netherland Antilles.²⁵ Montana's proposed legislation would also add Ireland to the statutory list of identified "tax havens."²⁶

Considerations

Taxpayers with current international operations and those considering international expansion should monitor the status of the above-referenced legislative proposals and others that may arise, as these proposals could potentially impact the tax base and apportionment factors of a water's-edge filing group.²⁷

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If you have questions regarding tax haven legislation or other state legislative efforts focused on certain international structures, please contact any of the following Deloitte Tax LLP professionals.

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¹⁷ Legis. Doc. 341, 127th Leg., 1st Reg. Sess. (Me. 2015).

¹⁸ *Id.*

¹⁹ H.D. 1234, 189th Gen. Court, Reg. Sess. (Ma. 2015); S.D. 1699, 189th Gen. Court, Reg. Sess. (Ma. 2015).

²⁰ *Id.*

²¹ H.B. 551, 2015 Leg., Reg. Sess. (N.H. 2015).

²² *Id.*

²³ S.B. 167, 64th Leg., Reg. Sess. (Mt. 2015); H.B. 2099, 78th Leg. Assem., Reg. Sess. (Or. 2015).

²⁴ While Switzerland is not currently listed in OR H.B. 2099, members of the legislative staff have acknowledged that the omission was due to a drafting error.

²⁵ S.B. 167, 64th Leg., Reg. Sess. (Mt. 2015); H.B. 2099, 78th Leg. Assem., Reg. Sess. (Or. 2015).

²⁶ S.B. 167, 64th Leg., Reg. Sess. (Mt. 2015).

²⁷ For additional information on other state legislative and enforcement efforts focused on certain international structures, see our **October 16, 2014, Alert**.

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