



Multistate Tax

State Tax Matters

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In this issue:

Articles: Tax Credit Carryforwards, Less May be More	1
Income/Franchise: US Supreme Court Holds Invalid Maryland's Failure to Allow Credit Against County Tax	2
Sales/Use/Indirect: New York: Taxpayer's Sales of Cloud Computing Product Constitute Nontaxable Services	2
Multistate Tax Alerts	3

Articles:

Tax Credit Carryforwards, Less May be More

Just because jurisdictional tax credits may be generated by a company, it doesn't mean that the company will necessarily derive benefit from the credits. In fact, many companies are often left asking: Can I carry my excess tax credits forward and will I be able to fully utilize them? Did these credits come with a cost? The answer to these questions may not be straightforward as it seems because credit utilization may be limited due to net operating losses, the mechanics of the credit itself, or state-imposed restrictions that apply to credit utilization in general. Also, depending on the company's future plans related to corporate structure or relocation, credit utilization may be further limited or, worse yet, non-existent.

In this article, Kevin Potter and Nancy Foster of Deloitte Tax LLP highlight some of these important issues, including possible options for utilizing excess credits and helping preserve the benefit, and how companies should consider whether they can utilize tax credits before incurring significant costs to secure them.

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/tax-credit-carryforwards-less-may-be-more.html?id=us:em:na:stm:eng:tax:052215>

Income/Franchise:

US Supreme Court Holds Invalid Maryland's Failure to Allow Credit Against County Tax

Comptroller of the Treasury of Maryland v. Wynne, U.S. (5/18/15). The US Supreme Court held unconstitutional Maryland's tax scheme of disallowing a credit against the county portion of the income tax for taxes paid to other states by Maryland residents. In finding that the Maryland tax scheme violated the dormant Commerce Clause, the Court applied the internal consistency test, "which looks to the structure of the tax at issue to see whether its identical application by every State...would place interstate commerce at a disadvantage as compared with commerce intrastate." The Court found that Maryland's income tax scheme failed the internal consistency test because if every state adopted Maryland's tax structure, interstate commerce would be taxed at a higher rate than intrastate commerce. The Court concluded further that Maryland's tax scheme "operates as a tariff[.]" which the Court deemed "fatal because tariffs are '[t]he paradigmatic example of a law discriminating against interstate commerce.'"

URL: http://www.supremecourt.gov/opinions/14pdf/13-485_o7jp.pdf

— Dave Vistica (Washington, DC)
Director
Deloitte Tax LLP
dvistica@deloitte.com

Joe Carr (McLean)
Director
Deloitte Tax LLP
josecarr@deloitte.com

Sales/Use/Indirect:

New York: Taxpayer's Sales of Cloud Computing Product Constitute Nontaxable Services

TSB-A-15(2)S, N.Y. Dept. of Tax. & Fin. (4/14/15). Regarding a taxpayer's sale of product which allows its customers to access "computing power" – i.e., a specific array of a processor, memory, and storage referred to as "computer instances" – a recent advisory opinion issued by the New York Department of Taxation and Finance ("Department") explains that such sales and access to operating systems and applications by a provider of cloud computing infrastructure as a service are *not* subject to state sales tax because they constitute nontaxable services. Under the facts, the taxpayer's customers purchase the computer instances to run their own software applications, and the applications the customers run on the taxpayer's cloud computing product include data analysis software, intranet software, and e-commerce software. In purchasing an instance, a customer is provided with an operating system that is necessary for the instance to interact with the taxpayer's server network – and this operating system, the Department explains, represents prewritten software. The customer then uses the operating system to perform certain administrative functions, such as to download an application, delete an application, or search for a file.

URL: http://www.tax.ny.gov/pdf/advisory_opinions/sales/a15_2s.pdf

To this end, the Department states that by granting the right to use the third-party operating system, the taxpayer is transferring the right to use prewritten computer software under state law. However, the Department reasons that a customer does *not* subscribe to the taxpayer's

cloud computing product in order to use the operating system. Rather, it subscribes to the product in order to run an application of its choosing using the taxpayer's computing power. According to the Department, this makes the taxpayer's cloud computing product "different from those products where the vendor's transfer of the right to use prewritten software to the customer is what the customer primarily wants from the vendor."

The Department additionally notes that the taxpayer's advertising demonstrates that the purpose of its cloud computing product is to provide customers with the right to use the computing power to run an application, and that the taxpayer's website emphasizes the scalability of its computer power, the ease of accessing it, and its reliability and security. Therefore, the transfer of the right to use the operating system software is only an incidental part of the taxpayer's product, which primarily consists of the sale of its computing power – and because providing a customer with computing power is *not* an enumerated taxable service under state law, the taxpayer in this case "need not collect sales tax on its sales of its cloud computing product."

— Stephanie Csan (Parsippany)
Director
Deloitte Tax LLP
scsan@deloitte.com

Shona Ponda (New York)
Senior Manager
Deloitte Tax LLP
sponda@deloitte.com

Multistate Tax Alerts

What's new in the States? Our Multistate Tax Alerts highlight selected state tax developments relevant to taxpayers, tax professionals, and other interested persons. Read our more recent alerts below or visit the archive for ones you may have missed.

[Archive: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive0.html?id=us:em:na:stm:eng:tax](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive0.html?id=us:em:na:stm:eng:tax)

Florida Tax Law Update

On May 14, 2015, Governor Scott signed Florida House Bill 7009 ("H.B. 7009"), which includes the following modifications to the Florida Corporate Income Tax Code: i) updates Florida's federal tax conformity date to the Internal Revenue Code ("IRC") as in effect on January 1, 2015, and ii) decouples from federal bonus depreciation and IRC § 179 expense deductions (to the extent that such § 179 expense deductions exceed \$128,000) for assets placed in service during taxable years ending after December 31, 2013 and before January 1, 2015. This Multistate Tax Alert summarizes these law changes.

[Issued: May 15, 2015]

[URL: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-florida-tax-law-update.html?id=us:em:na:stm:eng:tax:052215](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-florida-tax-law-update.html?id=us:em:na:stm:eng:tax:052215)

Indiana Amends Tax Code, Updates IRC Conformity and Authorizes an Amnesty

Indiana Governor Pence recently signed into law Senate Bill 441 and House Bills 1472, 1271 and 1001, which collectively include the following modifications to the Indiana tax code: i) elimination of the sales factor "throwback" rule; ii) revision of the intercompany expense "addback" statute; iii) redefinition of "business income;" iv) updated conformity to the Internal

Revenue Code; v) adoption of several changes to Indiana sales and use tax law; and vi) authorization of a new amnesty program. This Multistate Tax Alert summarizes these law changes, which have various effective dates as specified.

[Issued: May 20, 2015]

[URL: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-indiana-amends-tax-code-updates-irc-conformity-and-authorizes-an-amnesty.html?id=us:em:na:stm:eng:tax:052215](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-indiana-amends-tax-code-updates-irc-conformity-and-authorizes-an-amnesty.html?id=us:em:na:stm:eng:tax:052215)

Missouri Adopts Market-based Sourcing for Optional Single Sales Factor

Missouri Governor Nixon recently signed Senate Bill 19, which clarifies that the optional single sales factor apportionment method applies to sales other than the sale of tangible property and establishes market-based sourcing rules for such sales. This Multistate Tax Alert summarizes these law changes.

[Issued: May 20, 2015]

[URL: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-missouri-adopts-market-based-sourcing-for-optional-single-sales-factor.html?id=us:em:na:stm:eng:tax:052215](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-missouri-adopts-market-based-sourcing-for-optional-single-sales-factor.html?id=us:em:na:stm:eng:tax:052215)

Texas Court Holds Movie Auditorium Costs Included in COGS Subtraction

The Court of Appeals, 3rd District of Texas (“Court of Appeals”), recently held that American Multi-Cinema Inc. (the “Taxpayer”) was entitled to include certain facility-related exhibition costs, such as rent and depreciation associated with the square footage of movie theater auditoriums, as direct costs of producing its product (i.e., film exhibition) for purposes of calculating the Texas franchise tax cost of goods sold (“COGS”) subtraction.

The case, *American Multi-Cinema, Inc. v. Hegar*, involved Texas Tax Code (“TTC”) § 171.1012, which defines “goods” for purposes of the COGS deduction as “tangible personal property sold in the ordinary course of business,” and defines “tangible personal property” to include “personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner.” The Texas Comptroller (“Comptroller”) argued the Taxpayer’s product of film exhibition did not constitute a “good” but rather an intangible or a film watching service, and therefore Taxpayer’s related exhibition costs are not includable in the COGS calculation. The Court of Appeals disagreed, siding with Taxpayer, and concluded Taxpayer was entitled to include its exhibition costs in its COGS subtraction.

On May 11, 2015, the Court of Appeals granted the Comptroller’s request for extension of time to file a motion for rehearing and/or reconsideration *en banc*, thus extending the deadline for filing such motion to May 29, 2015. Accordingly, the case remains pending.

This Multistate Tax Alert summarizes the proceedings and arguments in this case and offers some taxpayer considerations.

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[URL: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-texas-court-holds-movie-auditorium-costs-included-in-cogs-subtraction.html?id=us:em:na:stm:eng:tax:052215](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-texas-court-holds-movie-auditorium-costs-included-in-cogs-subtraction.html?id=us:em:na:stm:eng:tax:052215)

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