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Income/Franchise:
Louisiana: DOR Explains New Law that Revises Corporate Income Tax Apportionment Formulas

Revenue Information Bulletin No. 16-038, La. Dept. of Rev.(7/19/16). The Louisiana Department of Revenue has issued an administrative bulletin pursuant to recently enacted legislation [see previously issued Multistate Tax Alert for more details on this new law] that includes the following changes to Louisiana corporate income tax law:
URL: http://revenue.louisiana.gov/LawsPolicies/RIB16-038.pdf
URL: http://www2.deloitte.com/us/en/pages/tax/articles/louisiana-2nd-special-session-legislative-update.html?id=us:2em:3na:stm:awa:tax:072916

1. A single sales factor apportionment regime for most industries;
2. Double weighted sales factor apportionment for certain oil and gas taxpayers;
3. Market-based sourcing for services and certain other revenues; and
4. A sales factor apportionment “throw-out” rule.

More specifically, this administrative bulletin explains applicable apportionment calculations for the transportation industry (e.g., air and pipeline), service enterprises, manufacturing and merchandising companies, and oil and gas companies. The bulletin also notes that this new law became effective on June 28, 2016, and applies to all tax periods beginning on or after January 1, 2016.

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Income/Franchise:
New York: ALJ Sustains $3.5 Million Tax Assessment, Ruling that Combined Reporting was Required with Related Entity

Determination DTA No. 826409 [In the Matter of the Petition of Whole Foods Market Group, Inc.], N.Y. Div. of Tax App. (7/14/16). An administrative law judge (ALJ) from the New York State Division of Tax Appeals recently ruled in favor of the New York State Division of Taxation (Division), denying the petition brought by Whole Foods Marketing Group, Inc. (WFMG) claiming that it had no obligation to file an Article 9-A corporation franchise tax combined report with an affiliated entity, Whole Foods Marketing IP, LP (WFMIP), during the tax periods ending September 28, 2008 through September 26, 2010 (audit period). An important question in this ruling concerned which set of statutory rules must be applied first: the combined reporting rules or the “add-back” modification to intercompany royalties (i.e., making such royalty expenses nondeductible). Had the add-back modification to intercompany royalties applied first in this case, it would have eliminated the underlying intercompany transaction and thus eliminated the combined reporting requirement with WFMIP. If the combined reporting rules applied first in this case, the underlying intercompany transaction would survive, thereby requiring combined reporting with WFMIP.
URL: http://www.dta.ny.gov/pdf/determinations/826409.det.pdf

The Division and WFMG agreed that, under the facts, two of the three requirements under then applicable state law were met for combined reporting to apply. Specifically, WFMG and WFMIP were related entities, as each was 100 percent owned and controlled, directly or indirectly, by Whole Foods Market, Inc. Also, WFMG and WFMIP were deemed engaged in a unitary business throughout the audit. Regarding the third combined reporting requirement under then applicable state law, the Division and WFMG agreed that WFMIP received more than 50 percent of its total receipts from WFMG for each of the years of the audit period (i.e., the statutory threshold for qualifying as substantial intercorporate transactions). However, WFMG claimed that it was not required to file a combined report with WFMIP because this third requirement for combined reporting (i.e., existence of substantial intercorporate transactions) was not in fact met. Specifically, WFMG asserted that there were no substantial intercorporate transactions between the entities due to New York’s royalty add-back modification eliminating intercompany transactions.

The Division argued that the add-back modification statute requires taxpayers to first determine if combined reporting is warranted before applying the royalty add-back modification; applying that approach, WFMG and WFMIP met the substantial intercorporate transaction requirement because WFMIP received more than 50 percent of its receipts from WFMG during the audit period. As a result, the Division maintained that all the requirements were met under then applicable state law requiring WFMG and WFMIP to file a combined report pursuant to N.Y. Tax Law § 211(4) during the audit years. The ALJ agreed with the Division and ruled that i) determining whether combined reporting was required must precede application of the royalty add-back modification, and ii) only if combination was *not* warranted would the royalty add-back modification apply. In this case, the ALJ held that the substantial intercorporate transactions requirement was satisfied because payments made by WFMG as royalties for the use or license to use the intellectual property owned by WFMIP constituted in excess of 50 percent of its total receipts for each of the years during the audit period. As such, because all of the combined reporting requirements under then applicable state law pursuant to N.Y. Tax Law § 211(4) were met, combined reporting was required by WFMG and WFMIP during the audit years.

Note that an ALJ determination generally is not precedent in the New York Division of Tax Appeals or any New York State judicial proceeding, and may be appealed.

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Sales / Use / Indirect:
Federal: Proposed Legislation Would Codify a Physical Presence Nexus Standard

Proposed H.R. 5893 – No Regulation Without Representation Act of 2016, introduced in US House 7/14/16. Proposed legislation, if enacted into law, generally would permit the states to i) impose an obligation on a person for the collection of a sales, use, or similar tax, or the reporting of any information with respect thereto, on a person; ii) assess a sales, use or similar tax on a person; or iii) treat a person as doing business in a state for purposes of such a tax, only if such person had a "physical presence" in the State during the calendar quarter with respect to which the obligation or assessment is imposed. For such purposes, a person is deemed to have a physical presence in a State only if such person's business activities in the State include any of the following during the calendar year:
URL: https://www.congress.gov/bill/114th-congress/house-bill/5893

1. Owns, holds a leasehold interest in, or maintains real property such as a retail store, warehouse, distribution center, manufacturing operation, or assembly facility in the State;
2. Leases or owns tangible personal property (other than computer software) of more than *de minimus* value in the State;
3. Has one or more employees, agents or independent contractors present in the State who engage in specific solicitations toward obtaining product or service orders from customers in that State, or prospective customers in that State, on behalf of the person;
4. Has one or more employees or independent contractors present in the State who provide on-site design, installation, or repair services on behalf of the remote seller; or
5. Maintains an office in the State at which it regularly employs three or more employees for any purpose.

The legislative proposal defines "*de minimus* physical presence" as not including:

1. Entering into an agreement under which a person, for a commission or other consideration, directly or indirectly refers potential purchasers to a person outside the State, whether by an Internet-based link or platform, Internet website or otherwise;
2. Any physical presence in a State (as described above) for less than 15 days in a taxable year (or a greater number of days if provided by State law);
3. Delivery and product placement services offered by an interstate or in-state common carrier; and
4. Internet advertising services provided by in-state residents which are not exclusively directed towards, or do not solicit exclusively, in-state customers.

Various other relevant underlying definitions are also included in the bill proposal. If enacted, this legislation would apply with respect to calendar quarters beginning on or after January 1, 2017.

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Sales/Use/Indirect:
Pennsylvania: Bulletin Explains New Law Imposing Tax on Electronically or Digitally Delivered Goods

Sales, Use & Hotel Occupancy Tax Bulletin 16-001, Pa. Dept. of Rev. (7/21/16). The Pennsylvania Department of Revenue has issued an administrative bulletin pursuant to recently enacted legislation [H.B. 1198 (Act 84)] that generally imposes state sales and use tax on electronically or digitally delivered, streamed or accessed video; photographs; books; any other otherwise taxable printed matter; applications (i.e., "apps"); games; music; any other audio, including satellite radio service; canned software; or any other otherwise taxable tangible personal property. The bulletin explains that, effective August 1, 2016, licensees are required to collect tax on such digitally or electronically delivered or streamed items regardless of whether accessed and purchased singly, or by subscription or in any other manner. Any maintenance, updates or support on these items are also taxable. As such, the bulletin notes that taxable sales on these items made on or after August 1, 2016, must be included when filing state sales tax returns, and that the date of sale is the date of the invoice or other similar document.
URL: http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Tax%20Bulletins/SUT/st_bulletin_16-001.pdf
URL: http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2015&sind=0&body=H&type=B&bn=1198

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Multistate Tax Alerts

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Estimated $3 Billion Corporate Gross Receipts Tax Proposal on Oregon's November 8 Ballot
On November 8, 2016, Oregon voters will have the opportunity to approve or reject Initiative Proposal 28 (IP 28) that would implement a 2.5% gross receipts tax on Oregon sales made by C corporations doing business in Oregon for tax years beginning on or after January 1, 2017. If enacted, it is estimated that IP 28 would raise between $2.7 – $3.1 billion per year in additional tax revenues. The gross receipts tax would be imposed through a revision to Oregon's corporate minimum tax, and it is estimated that the payments under the revised corporate minimum tax would comprise 94% of Oregon income tax revenues collected from C corporations.

This Multistate Tax Alert summarizes IP 28, and provides some taxpayer considerations.
[Issued: July 26, 2016]
URL: http://www2.deloitte.com/us/en/pages/tax/articles/estimated-3-billion-dollar-corporate-gross-receipts-tax-proposal-on-oregons-november-8-ballot.html?id=us:2em:3na:stm:awa:tax:072916