



## In this issue:

Articles: Navigating a Rewarding Financing Tool: New Markets Tax Credit.....	1
Income/Franchise: Puerto Rico: Federal Appeals Court Holds AMT Provisions are Facially Unconstitutional.....	2
Sales/Use: California: Guidance Issued on Refund Claims for Sales/Purchases of Non-Custom Software Transferred on Storage Media as Part of TTA .....	2
Sales/Use: Colorado: Taxpayer Asks US Supreme Court to Review 10th Circuit Ruling Upholding Remote Seller Reporting Requirements.....	3
Sales/Use: Washington: DOR Issues Emergency Amendments to B&O Tax Rule on Financial Institution Apportionment to Conform with MTC Changes.....	3
Multistate Tax Alerts .....	4

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## Articles:

### Navigating a Rewarding Financing Tool: New Markets Tax Credit

Before the end of the year, the US Treasury Department will announce a total of \$7 billion in federal New Markets Tax Credit (NMTC) awards to Community Development Entities, each with a tailored mission of stimulating investment in low-income urban neighborhoods and rural communities. This edition of "Credits & Incentives Talk with Deloitte," a monthly column by Kevin Potter of Deloitte Tax LLP featured in the *Journal of Multistate Taxation and Incentives* (a Thomson Reuters publication), offers an overview and practical insights into seeking the benefits of NMTC financing – discussing how the NMTC program offers valuable financial incentives for organizations with the right facts and circumstances.

**URL:** <http://www2.deloitte.com/us/en/pages/tax/articles/navigating-a-rewarding-financing-tool-new-markets-tax-credit.html?id=us:2em:3na:stm:awa:tax:090216>

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## Income/Franchise:

### Puerto Rico: Federal Appeals Court Holds AMT Provisions are Facially Unconstitutional

*Wal-Mart P.R., Inc. v. Zaragoza-Gomez*, 1st Cir. (8/24/16). The United States Court of Appeals for the First Circuit (the 1st Circuit) has affirmed a district court decision that had struck down certain provisions of the alternate minimum tax regime (AMT) of the Puerto Rico Internal Revenue Code of 2011, as amended – thereby continuing the injunction against enforcement of the AMT specific to the taxpayer at issue. In doing so, the 1st Circuit stated that the AMT is a discriminatory statute that does not meet the heightened level of scrutiny required to survive under the dormant Commerce Clause. The 1st Circuit explained that the amended AMT facially discriminates in that it only taxes cross-border transactions between a Puerto Rico corporate taxpayer and a home office or related entity outside of Puerto Rico. In addition, the 1st Circuit concluded that the existence of various alternatives with respect to enforcing transfer pricing provisions was sufficient to invalidate the AMT under the dormant Commerce Clause.

URL: <http://media.ca1.uscourts.gov/pdf.opinions/16-1370P-01A.pdf>

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## Sales/Use:

### California: Guidance Issued on Refund Claims for Sales/Purchases of Non-Custom Software Transferred on Storage Media as Part of TTA

*Special Notice*, Cal. State Board. of Equal. (8/16). The California State Board of Equalization (Board) recently issued a notice discussing a 2015 California Court of Appeals ruling involving the state sales and use tax treatment of switch-specific software programs [see previously issued Multistate Tax Alert for more details on this ruling], and how this ruling may require the Board to amend California Sales and Use Tax Regulation 1507, *Technology Transfer Agreements*, and California Sales and Use Tax Regulation 1502, *Computers, Programs, and Data Processing*. According to the notice, these regulatory amendments may be necessary to clarify when an agreement for the transfer of software is a “technology transfer agreement,” and to make the regulations consistent with the 2015 California Court of Appeals decision. To this end, the notice:

URL: <http://www.boe.ca.gov/pdf/L468.pdf>

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/california-supreme-court-denies-review-of-lucent-boe-addresses-refunds.html?id=us:2em:3na:stm:awa:tax:090216>

- Defines a technology transfer agreement.
- Explains the underlying 2015 California Court of Appeals decision.
- Advises when the Board will hold public meetings (i.e., interested parties meetings) to discuss proposed amendments to the administrative regulations.
- Provides guidance on filing claims for refunds on sales or purchases of non-custom software (i.e., software that is not a custom computer program as defined in Regulation 1502) transferred on storage media as part of a technology transfer agreement.
- Provides information about existing claims for refunds based on software transactions similar to the software technology transfer agreements in the underlying 2015 California Court of Appeals case.
- Provides resources for additional information about the underlying 2015 California Court of Appeals case.

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## Sales/Use:

### Colorado: Taxpayer Asks US Supreme Court to Review 10th Circuit Ruling Upholding Remote Seller Reporting Requirements

*Direct Mktg. Ass'n v. Brohl*, US (petition for certiorari filed 8/29/16). The taxpayer has asked the US Supreme Court to review the US Court of Appeals for the Tenth Circuit (the 10th Circuit) decision from earlier this year [see previously issued Multistate Tax Alert for more details on this February 2016 ruling], which held in favor of the Colorado Department of Revenue by reversing the US District Court's determination that Colorado's remote seller reporting requirements violated the Commerce Clause of the US Constitution. In reaching its decision, the 10th Circuit had determined that the US Supreme Court's holding in *Quill Corp. v. North Dakota* was limited to sales and use tax collection and concluded that Colorado's remote seller reporting requirements do not discriminate against or unduly burden interstate commerce.

URL: <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15a1259.htm>

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-us-tax-mts-10th-circuit-upholds-colorado-remote-seller-reporting-requirements.html?id=us:2em:3na:stm:awa:tax:090216>

In filing its petition, the taxpayer set forth the following three issues before the US Supreme Court:

1. Whether a state statute that imposes regulatory obligations that apply, as a matter of law, solely to out-of-state companies, but does not use "language explicitly identifying geographical distinctions" in its text, discriminates against interstate commerce.
2. Whether the Tenth Circuit erred in adopting a "comparative burdens" test for discrimination, under which the burden of regulatory requirements imposed solely on out-of-state retailers may be offset by different obligations imposed on in-state retailers.
3. Whether the Tenth Circuit erred in concluding that out-of-state retailers that do not collect Colorado sales tax are "not similarly situated" to their direct in-state competitors who collect Colorado sales tax.

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## Sales/Use:

### Washington: DOR Issues Emergency Amendments to B&O Tax Rule on Financial Institution Apportionment to Conform with MTC Changes

*Emergency Amended WAC 458-20-19404*, Wash. Dept. of Rev. (eff. 8/23/16). The Washington Department of Revenue (Department) has reissued emergency amendments to its administrative rule addressing how financial institutions must apportion gross income for state business and occupation (B&O) tax purposes when they engage in business both within and outside of Washington. These emergency amendments are issued pursuant to state law authorizing the Department to adopt financial institution apportionment rules that are consistent with the model adopted by the Multistate Tax Commission (MTC). Accordingly, the Department explains, its administrative rule has been amended on an emergency basis to remain consistent with the MTC's change in its model method of apportionment for financial institutions, which became effective for tax years starting on or after January 1, 2016.

URL: <http://dor.wa.gov/Docs/Rules/draft/20-19404cr3efrmdraftAugust2016.pdf>

The Department notes that these changes are adopted on an emergency basis effective August 23, 2016, and that this emergency adopted version may be used to determine tax liability until December 20, 2016, "unless the Department adopts a permanent rule prior to this date."

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## 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.

*No new alerts were issued this period. Be sure to refer to the archives to ensure that you are up to date on the most recent releases.*

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