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Income/Franchise: US Supreme Court Denies Review of California Multistate Tax Compact Election Case

The Gillette Company, et. al. v. California Franchise Tax Board, US (cert. denied 10/11/16). The US Supreme Court has denied review of the California Supreme Court’s 2015 ruling [see previously issued Multistate Tax Alert for more details on this 2015 ruling], which had unanimously reversed the California Court of Appeal’s 2012 decision and denied the taxpayers’ election to change their state corporation franchise tax apportionment formula to apply the provisions of the Multistate Tax Compact contained in California Revenue & Taxation Code (CRT) Section 38006. The taxpayers in this case had sought to use the equally weighted, three-factor apportionment formula (property, payroll, and sales)

available under the Multistate Tax Compact in lieu of the three-factor formula with double-weighted sales provided in CRTS Section 25128.

URL: https://www.supremecourt.gov/orders/courtorders/101116zor_7khn.pdf

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-california-supreme-court-disallows-mtc-election-to-change-apportionment-formula.html?id=us:2em:3na:stm:awa:tax:101416>

See forthcoming Multistate Tax Alert for more details on this denied review, as well as related taxpayer considerations.

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Income/Franchise:

New York: Due Date Changed for Certain New York City Unincorporated Business Tax Filers

A10266, signed by gov. 9/30/16. Effective immediately, new law revises the due date for certain New York City Unincorporated Business Tax (UBT) filers that had been amended earlier this year under the 2016-2017 Budget Act (S6409C/A9009C) (Budget Act) [see previously issued Multistate Tax Alert for more details on this earlier legislation, which was signed into law in April 2016]. Previously, the Budget Act had changed the filing/payment date of the New York City UBT from the fifteenth day of the *fourth* month following the close of the tax year (i.e., April 15 for calendar year taxpayers) to the fifteenth day of the *third* month following the close of the tax year (i.e., March 15 for calendar year taxpayers) for tax years beginning on or after January 1, 2016. Under this most recent legislation, only taxpayers classified as partnerships for federal income tax purposes are subject to the New York City UBT due date revision in the Budget Act – i.e., only taxpayers classified as partnerships for federal income tax purposes will have their filing/payment date of the New York City UBT changed to the fifteenth day of the *third* month following the close of the tax year for tax years beginning on or after January 1, 2016. Correspondingly, all other taxpayers subject to the New York City UBT will retain the original filing/payment date deadline of the fifteenth day of the *fourth* month following the close of the tax year.

URL: http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10266&term=2015&Summary=Y&Actions=Y&Text=Y

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/new-york-2016-2017-budget-act-amends-state-tax-law.html?id=us:2em:3na:stm:awa:tax:101416>

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Income/Franchise:

Ohio: Guidance on Equity Investor's Apportionment of Gain from Sale of Closely-Held Business, Potential Refunds

IT 2016-01 – Guidance Relating to an Equity Investor's Apportionment of a Gain from the Sale of a Closely-Held Business (R.C. 5747.212), Ohio Dept. of Tax. (10/7/16). The Ohio Department of Taxation (Department) has issued an information release intended to provide guidance relating to an equity investor's apportionment of a gain from the sale of a closely held business for Ohio personal income tax purposes in light of the Ohio Supreme Court's 2016 decision in *Corrigan v. Testa*, 2016-Ohio-2805 [see previously issued Multistate Tax Alert for more details on this ruling], which held that an Ohio statute, Ohio Rev. Code § 5747.212, as applied to the taxpayer at issue was unconstitutional under the Due Process Clause. To those taxpayers having utilized Ohio Rev. Code § 5747.212 in their calculation of Ohio income tax liability, the Department notes the following concerning underlying refunds:

URL: http://www.tax.ohio.gov/Portals/0/ohio_individual/individual/information_releases/IR-IT201601.pdf

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/ohio-supreme-court-holds-taxation-of-capital-gain-from-llc-sale-is-invalid.html?id=us:2em:3na:stm:awa:tax:101416>

- If a taxpayer has already filed a refund application or petitioned an assessment relating to the applicability of Ohio Rev. Code § 5747.212, "nothing more is needed at this time; such cases will automatically be reviewed in light of the Corrigan decision." However, if a taxpayer has additional information that, after reading the Corrigan decision, further supports the taxpayer's position, this information should be sent to the Department as soon as possible.
- If a taxpayer believes that a refund of amounts previously paid is warranted based on the holding in Corrigan v. Testa, such taxpayer may file amended tax returns for open years consistent with this stance under delineated instructions and requirements listed in the guidance, including providing a detailed statement outlining the factual and legal reasons why the Corrigan decision is applicable to the Ohio Rev. Code § 5747.212 adjustment reported on the original return(s) or determined to be applicable by the Department via an audit.
- To the extent an individual taxpayer recognizes a capital gain to which Ohio Rev. Code § 5747.212 does not apply, that gain is considered nonbusiness income allocable to the taxpayer's state of domicile under Ohio Rev. Code § 5747.20(B)(2)(c). Also, because this gain is considered nonbusiness income, it is not eligible for Ohio's "Small Business Deduction" for tax years 2013 and 2014, or Ohio's "Business Income Deduction" for tax years 2015 and forward under Ohio Rev. Code § 5747.01(A)(31).

In this respect, Ohio nonresident individuals who have paid tax under Ohio Rev. Code § 5747.212 on the sale of an interest in a pass-through entity (including partnerships, S corporations, and limited liability corporations) may want to consider whether a refund opportunity may be available based on the *Corrigan* decision. Additionally, there may be potential considerations in other states with similar regimes as Ohio to apply partnership apportionment to a partner's gain. Please contact us with any related questions.

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Sales/Use/Indirect:

Arizona: Online Marketplace Business May Be Taxable "Retailer," Affecting Tax Collection Responsibility

Transaction Privilege Ruling (TPR) No. 2016-3, Ariz. Dept. of Rev. (9/20/16). The Arizona Department of Revenue (Department) has issued a ruling intended to specify when and under what circumstances an online marketplace business is a "retailer" for purposes of Arizona's retail transaction privilege tax (TPT) on sales of tangible personal property to Arizona customers. The ruling states that a business operating an online marketplace and making online sales of tangible personal property on behalf of third-party merchants as evidenced by the online marketplace:

URL: <https://www.azdor.gov/Portals/0/Rulings/TPR16-3.pdf>

- providing a primary contact point for customer service;
- processing payments on behalf of the merchant; and
- providing or controlling the fulfillment process,

is considered a “retailer” conducting taxable sales for Arizona TPT purposes. Accordingly, the gross receipts of that marketplace business derived from sales of tangible personal property to Arizona purchasers are subject to retail TPT, “provided that the business already has nexus for Arizona TPT purposes.” That is, an online marketplace business with Arizona nexus that derives gross receipts from acting as agent of third-party merchants by providing customer service, processing payments and refunds *and* has control over the fulfillment process is deemed to be a retailer subject to Arizona’s retail TPT. The ruling additionally explains that under Arizona’s broad definition of the terms “retailer” and “sale” and based on the fact that the sales are consummated by such online marketplace businesses, these businesses may be subject to Arizona’s retail TPT “regardless of what party may hold title to the underlying merchandise before the sale.”

Regarding nexus, the ruling notes under the US Constitution and applicable Arizona statutes, “there is no requirement that a sale occur in Arizona before transaction privilege tax may be imposed” and that, instead, the business activities which surround the sale must occur in Arizona for assessment of the TPT to be permitted. The ruling also notes Arizona case law has established that nexus may be shown where a taxpayer’s activities are “significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales,” and references another recent Department ruling, Transaction Privilege Ruling (TPR) No. 2016-1, concerning remote sellers generally and including some examples on when nexus is established for online marketplace businesses.

[URL: https://www.azdor.gov/Portals/0/Rulings/TPR16-1.pdf](https://www.azdor.gov/Portals/0/Rulings/TPR16-1.pdf)

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Sales/Use/Indirect:

Tennessee: New “Economic Presence” Rule Imparts Substantial Nexus on Out-of-State Dealers Making Threshold Sales into Tennessee

Amended Administrative Rule 1320-05-01-.63; New Administrative Rule 1320-05-01-.129, Tenn. Dept. of Rev. (eff. 1/1/17). The Tennessee Department of Revenue (Department) has issued an administrative rule that imparts “substantial nexus” for state sales and use tax purposes on out-of-state dealers that:

[URL: http://share.tn.gov/sos/rules_filings/10-02-16.pdf](http://share.tn.gov/sos/rules_filings/10-02-16.pdf)

1. Engage in the regular or systematic solicitation of consumers in Tennessee “through any means,” and
2. Make sales that exceed \$500,000 to consumers in Tennessee during the previous twelve-month period.

Such out-of-state dealers must register with the Department for state sales and use tax purposes by March 1, 2017, to “affirmatively acknowledge that they will begin to collect and remit sales and use taxes to the Department by July 1, 2017.”

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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.

Foreign Entity's 2015 Taxable Year California Water's-edge Election – October 17 Due Date

Unitary foreign affiliates that are "doing business" in California for taxable year 2015 under California's economic nexus standard, and that are *not* eligible to apply California Franchise Tax Board Notice 2016-02, must file standalone California corporate franchise/income tax returns for taxable year 2015 and make their own water's-edge election. Failure to do so may potentially expose the worldwide group to California franchise/income tax. For taxpayers that are required to file their 2015 California tax returns by October 17, 2016, such standalone returns must be filed by that same date.

This Multistate Tax Alert summarizes elements of Notice 2016-02, as well as provides some related taxpayer considerations.

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URL: <http://www2.deloitte.com/us/en/pages/tax/articles/foreign-entity-2015-taxable-year-california-waters-edge-election.html?id=us:2em:3na:stm:awa:tax:101416>

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