**State Tax Matters**
The power of knowing.
December 9, 2016

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## Articles:
## California Employment Training Panel

This edition of "Credits & Incentives Talk with Deloitte," a monthly column by Kevin Potter of Deloitte Tax LLP featured in *Journal of Multistate Taxation and Incentives* (a Thomson Reuters publication), is co-authored by Lesley Miller of

Deloitte Tax LLP and provides an overview of the California Employment Training Panel (ETP), a California-wide business/labor training and economic development program.
**URL:** https://www2.deloitte.com/us/en/pages/tax/articles/california-employment-training-panel.html?id=us:2em:3na:stm:awa:tax:120916

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## Amnesty:
## Coming in April 2017 – Pennsylvania's Amnesty Program Offering Potential 100% Penalty Waiver and 50% Interest Waiver; 5% Non-Participation Penalty May Apply

*PA Tax Update (No. 187, October/November 2016)*, Penn. Dept. of Rev. (Oct/Nov 2016). Pursuant to legislation enacted earlier this year [*H.B. 1198 (Act 84)*] requiring the Pennsylvania Department of Revenue (Department) to establish a 60-day amnesty program ending no later than June 30, 2017, the Department reminds that such tax amnesty program will run from April 21, 2017 through June 19, 2017. The 2017 tax amnesty program will generally apply to all taxes administered by the Department that are delinquent as of December 31, 2015, whether known or unknown to the Department. Under this program, amnesty will be granted for eligible taxes to qualifying taxpayers, and potentially will permit 100% waiver of the underlying penalties and 50% waiver of the underlying interest. Individuals, businesses and other entities that participated in Pennsylvania's 2010 tax amnesty program are ineligible to participate in this upcoming 2017 tax amnesty program. The Department also reminds that this 2017 tax amnesty program includes a non-participation penalty of 5% of the unpaid tax liability and penalties and interest, which would be levied against a taxpayer subject to an eligible tax if the taxpayer failed to remit an eligible tax due or had an unreported or underreported liability for an eligible tax on or after June 20, 2017.
**URL:** http://www.revenue.pa.gov/GeneralTaxInformation/News%20and%20Statistics/Documents/Tax%20Update/taxupdate_187.pdf
**URL:** http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2015&sind=0&body=H&type=B&bn=1198


— Kenn Stoops (Philadelphia)
Managing Director
Deloitte Tax LLP
kstoops@deloitte.com

Stacy Ip-Mo (Philadelphia)
Senior Manager
Deloitte Tax LLP
sipmo@deloitte.com


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## Income/Franchise:
## California: Franchise Tax Board Announces 2016 Inflation-Indexed "Bright-Line Nexus" Threshold Amounts

*Doing Business in California*, Cal. FTB (12/16). The California Franchise Tax Board (FTB) has announced that the new indexed "nexus" threshold requirements of California Revenue and Taxation Code (R&TC) Section 23101, which defines "doing business" in California, are $54,771 (originally, $50,000) of property, $54,771 (originally, $50,000) of payroll, or $547,711 (originally, $500,000) of sales for tax years beginning on or after January 1, 2016. Accordingly, a taxpayer is now deemed to be "doing business" in California if:
**URL:** https://www.ftb.ca.gov/businesses/Doing-Business-in-California.shtml

- The taxpayer actively engages in any transaction in California for the purpose of financial or pecuniary gain or profit;
- The taxpayer is organized or commercially domiciled in California;
- The taxpayer's sales, as defined in subdivision (f) of R&TC Section 25120, including sales by the taxpayer's agents and independent contractors, exceeds the lesser of $547,711 or 25% of the taxpayer's total sales;
- The taxpayer's real and tangible personal property in California exceeds the lesser of $54,771 or 25% of the taxpayer's total real and tangible personal property; or
- The amount paid in California by the taxpayer for compensation, as defined in subdivision (c) of R&TC Section 25120, exceeds the lesser of $54,771 or 25% of the total compensation paid by the taxpayer.

The FTB additionally explains that in determining the amount of a taxpayer's sales, property, and payroll for doing business purposes, the taxpayer's pro rata or distributive share of sales, property, and payroll from partnerships, limited liability companies treated as partnerships, and S corporations are included.


— Christopher Campbell (Los Angeles)
Principal
Deloitte Tax LLP
cwcampbell@deloitte.com

Steve West (Los Angeles)
Managing Director
Deloitte Tax LLP
stevewest@deloitte.com

Valerie Dickerson (Washington, DC)
Managing Partner
Deloitte Tax LLP
vdickerson@deloitte.com

Shirley Wei (Los Angeles)
Senior Manager
Deloitte Tax LLP
shiwei@deloitte.com


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## Income/Franchise: Proposed Amended Apportionment Rules Issued in Illinois; Comment Period Ends Soon

*Proposed Amended 86 Ill. Adm. Code Secs. 100.3380 and 100.3390*, Ill. Dept. of Rev. (11/15/16). The Illinois Department of Revenue (Department) has issued proposed amended apportionment rules that would eliminate the "double throwback" rule provisions, expand the "occasional sales" rule to include gross receipts from the sale of stock in a subsidiary, and revise alternative apportionment provisions to allow or require such use when the standard statutory formula does not fairly represent the "market" for the taxpayer's goods and services in Illinois (rather than the extent of the taxpayer's business activities in Illinois under prior law). The proposal also reflects other current Department policies related to apportionment of business income.
**URL:** http://tax.illinois.gov/LegalInformation/Prules/Parts_100.3380_and_100.3390_PA.pdf

Note that comments on these proposed rule changes must be submitted in writing to the Department "by no later than 45 days after publication" of this notice. Please contact us with any question


— Brian Walsh (Chicago)
Managing Director
Deloitte Tax LLP
briawalsh@deloitte.com

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


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## Income/Franchise: Indiana: Direct Mail Services Company Successfully Shows Receipts Sourced Out-of-State Based on Costs of Performance

*Letter of Findings No. 02-20150523*, Ind. Dept. of Rev. (11/30/16). An Indiana Department of Revenue letter of findings recently held that a direct mail services company successfully showed that for purposes of computing its sales factor for state adjusted gross income tax purposes, the costs associated with its production of various income streams were mostly incurred outside Indiana, and thus it was entitled to source such income outside Indiana based on a "cost of performance" analysis to more fairly reflect its income from Indiana sources. The letter of findings specifically considered whether the amounts the company received from i) preparing and distributing advertising materials to Indiana customers, ii) delivering pre-printed advertising materials to Indiana customers, and iii) selling advertising space on labels used to deliver advertising materials should be sourced to a state other than Indiana based on the company's submitted "cost of performance" analysis. The company had provided a detailed study analyzing all the direct costs it incurred in performing these various services – most of which were incurred in a state other than Indiana. The various costs associated with the company's Indiana location, including assembling and addressing the mailings, were found to be "much lower" than its out-of-state costs of creating, managing, and maintaining the marketing data which was deemed as the foundation of the company's mail services.
**URL:** http://www.in.gov/legislative/iac/20161130-IR-045160513NRA.xml.pdf

Please contact us with any questions.


— Marc Weinstein (Chicago)
Managing Director
Deloitte Tax LLP
maweinstein@deloitte.com

Amanda Suasnabar (Indianapolis)
Managing Director
Deloitte Tax LLP
asuasnabar@deloitte.com

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

Tom Engle (St. Louis)
Manager
Deloitte Tax LLP
tengle@deloitte.com


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## Income/Franchise:
## New York City Taxpayers Warned Not to Rely on Previous Broker-Dealer Rulings Involving Receipts Allocation Rules

*Update on Audit Issues: Business Income Taxes Income Allocation*, N.Y.C. Dept. of Fin. (11/25/16). The New York City Department of Finance (Department) recently released an "Update on Audit Issues" (Update) addressing issues of income allocation relevant to certain New York City business income taxes. More specifically, the Update addresses two issues:
**URL:** http://www1.nyc.gov/assets/finance/downloads/pdf/16pdf/audit_issues_11232016.pdf

1. Whether an entity may invoke the receipts allocation provisions (collectively referred to herein as the Broker-Dealer Provisions) of N.Y.C. Admin. Code Secs. 11-508(e-3) (i.e., under the Unincorporated Business Tax (UBT)), 11-654.2(5)(b) (i.e., under the Corporate Tax of 2015), or 11-604(3)(a)(10) (i.e., under the General Corporation Tax (GCT), as applicable to federal S corporations) if it is not a registered securities or commodities broker or dealer (Registered); and
2. Whether an entity may invoke the registration status of a Registered single-member limited liability company, which it owns and treats as a "disregarded entity" for federal income tax purposes (SMLLC), in order to apply the Broker-Dealer Provisions to receipts from activities the SMLLC does not conduct.

The Broker-Dealer Provisions generally permit a registered securities or commodities broker or dealer to use unique customer-based rules for allocating specific categories of receipts, including: brokerage commissions, margin interest, certain underwriting revenues, interest on certain loans to affiliated entities, account maintenance fees, fees for management or advisory services and, for purposes of the UBT and the GCT, gross income from principal transactions.

The Update states that the Department has observed that some taxpayers have interpreted the terms "registered securities or commodities broker or dealer" and "registered securities broker or dealer" broadly, apparently on the basis of two Finance Letter Rulings under which the Department permitted unregistered limited partnerships to characterize themselves as Registered. See, Finance Letter Rulings #12-4934/UBT (August 19, 2013) and #13-4950/UBT (March 28, 2014, together, referred to herein as the Broker-Dealer Rulings). The Update notes that the Broker-Dealer Rulings relied on representations that the taxpayers were entitled to, and did, function as securities or commodities brokers or dealers under an exemption from Securities and Exchange Commission registration requirements and pursuant to specific Commodities Future Trading Commission registrations.

The Update also states that the Department has been reviewing whether the sole member of a Registered SMLLC may use the SMLLC's registration status as a basis for claiming that the sole member is Registered for purposes of allocating all its receipts. The New York State Department of Taxation and Finance has ruled in an advisory opinion that a taxpayer may characterize itself as a broker-dealer for purposes of allocating the receipts that the SMLLC generated. See, New York State Department of Taxation and Finance Advisory Opinion TSB-A-13(11)C (Dec. 20, 2013).

The Update reminds taxpayers that they may not rely on the Broker-Dealer Rulings, which are not precedential, to take the position that unregistered entities may characterize themselves as Registered under the Broker-Dealer Provisions. Furthermore, the Update states that "the Broker-Dealer Rulings do not reflect the current analysis of [the Department] with respect to the application of the Broker-Dealer Provisions because [the Department] has determined

that the Representations in the Broker-Dealer Rulings are not reliable." The Update states that under the Department's current analysis, the Broker-Dealer Rulings did not establish certain facts related to the unregistered entities being characterized as Registered for purposes of qualifying for the Broker-Dealer Provisions. The Update also states that the Department will not permit entities to apply the Broker-Dealer Provisions on the same facts as set forth in the Broker-Dealer Rulings. Nevertheless, the Department will consider applying the Broker-Dealer Provisions on a case-by-case basis to entities that establish they are legally acting in the capacity of a broker or dealer with respect to receipts that are specifically enumerated in the Broker-Dealer Provisions. Similarly, the Department stated that no basis exists, under TSB-A-13(11)C or otherwise, for extending the application of the Broker-Dealer Provisions to unregistered owners of Registered SMLLCs, apart from receipts the SMLLCs earn.

Note that some tax practitioners in the community have since questioned whether the Department's position on this issue is proper, given that New York City has adopted the federal tax treatment of disregarded entities – which is to treat a SMLLC and its owner as one taxpayer – because the Department's guidance in this Notice arguably appears to impose separate entity treatment for purposes of applying the Broker-Dealer Provisions. Note also that, apparently, a Department representative informally has indicated that this Notice was issued as a clarification and thus applies to all open tax years.

Please contact us with any questions.


— Abe Teicher (New York)
Partner
Deloitte Tax LLP
ateicher@deloitte.com

Don Roveto (New York)
Partner
Deloitte Tax LLP
droveto@deloitte.com

Ken Jewell (Parsippany)
Managing Director
Deloitte Tax LLP
kjewell@deloitte.com

Dennis O'Toole (New York)
Managing Director
Deloitte Tax LLP
deotoole@deloitte.com

Mary Jo Brady (Jericho)
Senior Manager
Deloitte Tax LLP
mabrady@deloitte.com


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## Income/Franchise:
## Texas: Amended Franchise "Margin" Tax Rule Reflects Various Law and Policy Changes

*Amended Rule 34 TAC §3.584*, Tex. Cmptrlr. (11/18/16). The Texas Comptroller has finalized an amended administrative rule that implements a number of state franchise "margin" tax law changes enacted during the 2011, 2013, and 2015 legislative sessions, and includes various technical corrections, revised and added definitions (e.g., "primarily engaged in retail or wholesale trade," "retail trade," "wholesale trade," and "unrelated entity,") and clarifying provisions and examples. Among other items, these rule amendments reflect:
**URL:** http://www.sos.state.tx.us/texreg/archive/December22016/Adopted%20Rules/34.PUBLIC%20FINANCE.html#199

- Franchise tax rate reductions for certain entities primarily engaged in retail or wholesale trade that are effective for reports originally due on or after January 1, 2016 [see previously issued Multistate Tax Alert for more details on some of these prior tax law changes];
  **URL:** https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-texas-amends-franchise-tax-rate-rehab-credit-and-broadcaster-apportionment.html?id=us:2em:3na:stm:awa:tax:120916
- A policy change that retroactively allows the method of computing margin to be amended to the cost of goods sold or compensation methods regardless of which method was elected on an original report;
- An added fourth method for computing margin for reports due on or after January 1, 2014; and
- Expanded eligibility for the "EZ computation" method.

Stay tuned for a forthcoming Multistate Tax Alert that further discusses these recent administrative rule changes, as well as related taxpayer considerations.


— Russell Brown (Dallas)
Partner
Deloitte Tax LLP
rubrown@deloitte.com

Robert Topp (Houston)
Director
Deloitte Tax LLP
rtopp@deloitte.com


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## Sales / Use / Indirect: Indiana: Various Cloud Computing and Remote Storage Services are Not Taxable

*Revenue Ruling No. 2012-05ST*, Ind. Dept. of Rev. (11/30/16). An Indiana Department of Revenue ruling explains to a taxpayer offering a variety of web services that support Internet infrastructure for businesses that its cloud computing and remote storage services, as well as data transfer fees, constituted nontaxable services under Indiana's sales and use tax laws. More specifically, under the facts, such services did *not* constitute or include taxable sales of tangible personal property, specified digital products, prewritten computer software, or telecommunication services. Regarding the taxpayer's cloud computing and remote storage services, the facts showed that underlying third-party software was never transferred to the taxpayer's customers, and the customers never possessed, controlled, or held title in the software. The taxpayer's fees to transfer data were also not subject to state sales and use tax because they were never transferred in conjunction with tangible personal property and thus constituted nontaxable professional or personal services under state law.
**URL:** http://www.in.gov/legislative/iac/20161130-IR-045160524NRA.xml.pdf


— Robyn Staros (Chicago)
Senior Manager
Deloitte Tax LLP
rstaros@deloitte.com

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


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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.

**California FTB Issues Notice 2016-04 Outlining Automatic Extension Due Dates for TY 2016 California Tax Returns**
On November 4, 2016, the California Franchise Tax Board issued Notice 2016-04, which details when automatic paperless filing extensions will be granted following recently enacted legislation (A.B. 1775) that generally revised the deadline to file corporate and partnership tax returns for taxable years beginning on or after January 1, 2016. Check out this chart on applicable extended due dates, by entity type, for taxable years beginning on or after January 1, 2016.
[Issued: November 30, 2016]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/california-ftb-issues-notice-2016-04-outlining-automatic-extension-due-dates-for-ty-2016-california-tax-returns.html?id=us:2em:3na:stm:awa:tax:120916