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State Tax Matters
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In this issue:

Income/Franchise: Arkansas: New Law Requires Multistate Partnerships to Apportion Rather than Allocate their Income ... 2

Income/Franchise: New Jersey Division of Taxation Releases Guidance on CBT "Addback" Adjustment for Other States' Taxes ... 2

Income/Franchise: A Closer Look at New York's Draft Proposed Regulations under Article 9-A Business Corporation Franchise Tax – Specific to Apportionment of Receipts from Credit Cards and Similar Activities and Receipts Received by Credit Card Processors ... 4

Income/Franchise: Tennessee DOR Explains Consolidated Filing Election for Net Worth Franchise Tax Purposes ... 5

Indirect/Sales/Use: Alabama: New Law Authorizes DOR to Impose Remote Seller Information Reporting and Notice Requirements ... 6

Indirect/Sales/Use: Colorado DOR Schedules Stakeholder Work Group on April 25th to Discuss Possible Revisions to Remote Seller Notice & Reporting Regulation ... 6

Indirect/Sales/Use: South Carolina DOR Summarizes Policy on Taxation of Communication Services, Including New and Emerging Technologies ... 7

Multistate Tax Alerts ... 8

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Income/Franchise:
Arkansas: New Law Requires Multistate Partnerships to Apportion Rather than Allocate their Income

H.B. 1562, signed by gov. 3/14/17. Effective for tax years beginning on and after January 1, 2018, new law requires partnerships having income from both within and outside of Arkansas to apportion their income to Arkansas at the entity level in the same manner currently used by corporations – i.e., via apportionment under the Uniform Division of Income for Tax Purposes Act, Arkansas Code § 26-51-701 et seq., which consists of property, payroll, and double-weighted sales factors. Under current law, partnerships having income from both within and outside of Arkansas must allocate their taxable income to Arkansas; such allocation of taxable income requires partnerships to separately identify the state(s) where items of income and expenses are properly attributable. The new law additionally permits partnerships having income from both within and outside of Arkansas to petition the Arkansas Department of Finance and Administration (Department) for, or the Department may similarly require, use of an alternative apportionment method if the prescribed standard statutory apportionment method does not fairly represent the partnership's business activity in Arkansas for either all or part of the partnership's business. Note that, even under this new law, each individual partner must continue to allocate its share of the partnership income to Arkansas as under current law; the partnership income is allocated to the state by each partner as determined and reported on the Arkansas partnership return.
URL: http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act482.pdf

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Income/Franchise:
New Jersey Division of Taxation Releases Guidance on CBT "Addback" Adjustment for Other States' Taxes

Technical Bulletin No. TB-80, N.J. Div. of Tax. (3/15/17). The New Jersey Division of Taxation (Division) has released a technical bulletin explaining the "addback" adjustment for other states' taxes under New Jersey's corporation business tax (CBT) given that state law requires a corporation's taxable income be determined without the exclusion, deduction, or credit of certain taxes. In doing so, the Division generally explains that based on the relevant CBT statute, regulation, and applicable case law, the following types of taxes generally should be added back:
URL: http://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb80.pdf

- Taxes measured based on profits or income;
- Taxes based on business presence or business activity that are not property taxes, excise taxes, payroll taxes, or sales taxes; and
- Taxes similar to the CBT.

Correspondingly, the following tax types generally should *not* be added back:

- Gross receipts taxes that are similar in nature to the New Jersey Petroleum Gross Receipts Tax whereby the tax is imposed based on receipts, but not on profits;
- Taxes imposed on capital stock that measure the value of the taxpayer's assets;
- Excise taxes;
- Sales taxes;
- Payroll taxes; and
- Property taxes.

The Division states that it will evaluate a given tax to determine if it is based on profits, income, business presence or business activity, and, therefore, must be added back to income. Similarly, the Division states that a tax that is related to business presence or business activity but that is in effect a property tax, excise tax, payroll tax, or sales tax will *not* be added back. Based on the applicable New Jersey statutes, regulations, and case law, "and an analysis of the

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specific application of these taxes," the bulletin additionally lists some examples of state taxes that must be added back under the CBT including, but not limited to, the following:

- California Franchise Tax (CA Rev & Tax Code § 23101);
- California LLC Fee (CA Rev & Tax Code § 17942);
- California LLC Tax (CA Rev & Tax Code § 17941);
- Connecticut Business Entity Tax (Conn. Gen. Stat. § 12-2846);
- District of Columbia Unincorporated Business Tax (D.C. Code § 47-1808.01);
- Hawaii Business Excise Tax (Hawaii Revised Statutes § 18-237-13);
- Los Angeles Business Tax (LAMC § 21.03);
- Massachusetts Corporation Excise Tax (Income Tax portion only, MA G.L. Ch. 63 § 39);
- Michigan Gross Receipts Tax (MCL § 208.1203);
- Mississippi Corporate Income and Franchise Tax (Income Tax portion only, MS Code § 27-7-5);
- New Hampshire Business Profits Tax (NH Rev Stat § 77-A:1);
- New York Maintenance Fee (New York Tax Law Article 9, § 181.2);
- New York City Unincorporated Business Tax (N.Y.C. Administrative Code § 11-503);
- Ohio Commercial Activities Tax (Ohio Code § 5751.02);
- Oregon Excise Tax (OR Rev Stat § 317.018);
- Philadelphia Business Income Receipts Tax (Phila. Code § 19-2601);
- Tennessee Excise Tax (Tenn. Code Ann. § 67-4-207);
- Texas Franchise Tax (TX Tax Code, Ch.171, Subsection A, § 171.002);
- Texas Margin Tax (TX Tax Code, Ch. 171, Subsection C, § 171.101); and
- Washington Business and Occupation Tax (WA Rev. Code § 82.04.010).

On the flip side, the bulletin lists some examples of state taxes that should not be added back under the CBT including, but not limited to, the following:

- Alabama Privilege Tax (Code of Ala. § 40-14A-21);
- Delaware Franchise Tax (8 Del. C. § 503);
- Georgia Net Worth Tax (O.C.G.A. § 48-13-70);
- Illinois Franchise Tax (805 ILCS 5/15.35);
- Kansas Franchise Tax (K.S.A. § 79-5401);
- Kentucky License Tax (KRS § 136.070) (Repealed January 1, 2006);
- Louisiana Franchise Tax (La. R.S. § 47:601);
- Michigan Business Personal Property Tax (MCLS § 211.8);
- Minnesota Care Tax (Minn. Stat. § 295.50) (Repealed as of Jan. 1, 2020);
- Mississippi Corporation Franchise Tax (Miss. Code Ann. § 27-13-1);
- Nevada Modified Business Tax (Nev. Rev. Stat. Ann. § 363B.010) (Repealed July 1, 2015);
- New York Tax on the Furnishing of Utility Services (NY CLS Tax § 186-a);
- New York Commercial Rent Tax (New York City Administrative Code § 11-701 et seq.);
- North Carolina Franchise Tax (N.C. Gen. Stat. § 105-122);
- North Carolina Utilities Tax (N.C. Gen. Stat. § 105-116) (Repealed July 1, 2014);
- Oklahoma Business Activity Tax (68 Okl. St. § 1215) (Repealed January 1, 2013);
- Pennsylvania Capital Stock-Franchise Tax (72 P.S. § 7601) (Repealed December 31, 2015);
- Pennsylvania Bank and Trust Company Shares Tax (72 P.S. § 7701);
- Pennsylvania Gross Receipts Tax (72 P.S. § 8101);
- Puerto Rico Excise Tax (PR-IRC § 2101);
- South Carolina Utilities Tax (S.C. Code Ann. § 12-20-100);
- Tennessee Franchise Tax (Tenn. Code Ann. § 67-4-2101);
- Washington State Litter Tax (RCW 82.19.010); and
- West Virginia Business and Occupation Tax (W. Va. Code § 11-13-1).

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Income/Franchise:
A Closer Look at New York's Draft Proposed Regulations under Article 9-A Business Corporation Franchise Tax – Specific to Apportionment of Receipts from Credit Cards and Similar Activities and Receipts Received by Credit Card Processors

On September 30, 2016, the New York Department of Taxation and Finance (Department) released a draft document repealing New York Business Corporation Franchise Tax Regulations Subparts 4-1, 4-2, 4-3, 4-4, 4-5, 4-7, 4-8, 4-9 and 4-10, and proposing draft regulations for New York Business Corporation Franchise Tax Regulations Subparts 4-1, 4-2 and 4-3. Below, Draft Proposed Regulation Sec. 4-2.10 (Receipts from Credit Cards and Similar Activities) and Sec. 4-2.11 (Receipts Received by Credit Card Processors) are reviewed.

Receipts from Credit Cards and Similar Activities

The sourcing of receipts from credit cards is addressed in New York Tax Law Sec. 210-A.5(c). Specifically, this statute requires that receipts from credit cards and similar activities (such as interest and fees and penalties in the nature of interest, service charges and fees from credit cards) are sourced to New York to the extent that the mailing address of the card holder is located in New York. In addition, receipts related to merchant discounts are sourced to New York if the merchant is located in New York. To the extent that the merchant is located within and without New York, merchant discounts are sourced to New York if the sales related with said merchant discount occurred in New York. The location of the merchant is generally presumed to be the merchant's address, as identified by such merchant's invoice to the taxpayer. New York Tax Law Sec. 210-A.5(c)(3). Both receipts from credit cards and merchant discounts are included in the denominator of the apportionment factor. These rules are replicated in Draft Proposed Reg. Sec. 4-2.10. For this purpose and the purpose of the draft proposed regulations discussed below addressing receipts received by credit card processors, the term "credit card includes credit, bank, travel and entertainment or pre-paid payment cards or products that that can be presented at a physical point-of-sale terminal, electronically, or by telephone." Draft Proposed Reg. Sec. 4-2.11(a)(1).

Receipts Received By Credit Card Processors

The sourcing of receipts from credit card authorization processing, and clearing and settlement processing received by credit card processors is addressed in New York Tax Law Sec. 210-A.5(c)(4). Specifically, this statute requires that receipts related to credit card authorization processing, clearing processing, and settlement processing be sourced to New York to the extent that the credit card processor's customer accesses the processor's network from within New York. Receipts received by credit card processors that are not otherwise addressed in New York Tax Law Sec. 210-A (*i.e.*, the Article 9-A apportionment statute) are sourced to New York "by multiplying the total amount of such other receipts by the average of (i) eight percent and (ii) the percent of its New York access points." New York Tax Law Sec. 210-A.5(c)(4). The percent of New York access points is determined by dividing the number of New York locations where the taxpayer's customers can access the credit card processor's network over the total number of such locations in the United States. *Id*.

Draft Proposed Reg. Sec. 4-2.11 provides additional guidance in this regard. First, the draft proposed regulation defines credit card processor as an "entity . . . that derives 50 percent or more of its gross receipts from any or all of the following: credit card authorization processing, clearing processing, settlement processing, and volume-based activities." Draft Proposed Reg. Sec. 4-2.11(a)(2). The draft proposed regulation also provides definitions for a number of other key terms: authorization processing, clearing processing, settlement processing, credit card processor's network, volume-based activities, access points, acquirer bank, and insurer bank.

Draft Proposed Reg. Sec. 4-2.11(b)(1) states that (except in the case of a third-party credit card processor) New York receipts from authorization processing, clearing processing, and settlement processing (each as defined in the draft proposed regulations) earned by a credit card processor generally would be calculated by multiplying all such processing receipts by the percent of the credit card processor's New York access points. An access point would be "any physical location at which a credit card processor's customers access or may access the credit card processor's network." Draft Proposed Reg. Sec. 4-2.11(a)(8).

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- A third-party credit card processor would be required to exercise due diligence to identify access points for its processing transactions on behalf of the issuer bank. If that information is not available, "the amount of receipts from those transactions earned from issuer banks with billing addresses, kept in the normal course of the credit card processor's operations, in New York State shall be included in New York receipts." Draft Proposed Reg. Sec. 4-2.11(b)(2).
- A percentage of all other receipts, including those from volume-based activities, defined under Draft Proposed Reg. Sec. 4-2.11(a)(7) as "services that are charged to customers measured on the dollar volume or number of credit card transactions," not specifically addressed in Tax Law Section 210-A, would be included in New York receipts by taking the total of such receipts and multiplying them by the average of (i) 8% and (ii) the percent of the credit card processor's New York access points. Draft Proposed Reg. Sec. 4-2.11(c).

Draft Proposed Reg. Sec. 4-2.11(d) would permit credit card processors to utilize an alternative approach to calculate New York receipts if receipts from activities outside the United States result in the taxpayer's New York receipts not being accurately reflected under the prescribed method.

- In such a scenario, the credit card processor would be permitted to calculate its New York receipts based on the New York percentage of total access points, which would be "calculated as access points physically located in New York State divided by the total number of access points used to generate the receipts being apportioned under [Draft Proposed Reg. Sec. 4-2.11]." Draft Proposed Reg. Sec. 4-2.11(d).
- The credit card processor would have the burden to prove that this alternative methodology is required to properly reflect its business income or business capital in New York. Id.

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Income/Franchise:
Tennessee DOR Explains Consolidated Filing Election for Net Worth Franchise Tax Purposes

FAQs: Franchise and Excise Tax, Tenn. Dept. of Rev. (updated 3/21/17). The Tennessee Department of Revenue explains that for Tennessee net worth franchise tax purposes, an affiliated group making the consolidated net worth election must list all affiliated group members on its registration application, and that the consolidated net worth election is *not* available to affiliated groups in which one or more affiliates have a different year end.
URL: https://revenue.support.tn.gov/hc/en-us/sections/200549025-Franchise-Excise-Tax

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Indirect/Sales/Use:
Alabama: New Law Authorizes DOR to Impose Remote Seller Information Reporting and Notice Requirements

S.B. 86, signed by gov. 3/22/17. Effective July 1, 2017, new law authorizes the Alabama Department of Revenue to "within constitutional limitations" generally require state sales and use tax information reporting and customer notification for certain remote sellers that do not collect sales, use, or simplified sellers use tax on their Alabama sales, including penalties for noncompliance.
URL: http://arc-sos.state.al.us/PAC/SOSACPDF.001/A0011784.PDF

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Indirect/Sales/Use:
Colorado DOR Schedules Stakeholder Work Group on April 25th to Discuss Possible Revisions to Remote Seller Notice & Reporting Regulation

Scheduled Work Group: Notice and Reporting Requirements for Retailers that Do Not Collect Sales Tax, Colo. Dept. of Rev. (3/17). The Colorado Department of Revenue (Department) has scheduled a stakeholder work group on April 25, 2017, to discuss possible revisions to Colorado Administrative Regulation 39-21-112.3.5, which was promulgated pursuant to state statutes imposing notice and reporting requirements on out-of-state retailers that generally do not collect Colorado sales tax and are making sales into Colorado. The Department states that it "will be reviewing this rule to determine if there are issues that need to be addressed before the Department begins enforcement of the law's notice and reporting requirements with respect to transactions on or after July 1, 2017" – specifically noting that it intends to examine whether the administrative rule should address "marketplace" sellers.
URL: https://www.colorado.gov/pacific/tax/tax-regulations

Providing some background on Colorado's remote seller notice and reporting legislation, which became effective on July 30, 2010, the Department explains how the law was then challenged in state and federal courts, and how injunctions against enforcement of the law were obtained in both state and federal courts. The Department notes how the case went to the US Supreme Court in 2015 on a jurisdictional issue where the Court held that federal courts have jurisdiction to hear challenges to the constitutionality of state laws such as the one imposed by Colorado; and how the Tenth Circuit Court of Appeals subsequently upheld the Colorado remote seller notice and reporting law – and that the federal litigation concluded in 2016 when the US Supreme Court chose *not* to hear the case [see previously issued Multistate Tax Alert for more details on this litigation and prior case coverage]. The Department then states that "with the federal injunction having been previously dissolved, the state court injunction, which was the last remaining bar to enforcement of the statute and the rule, was dissolved on February 28, 2017." The Department explains that as part of the underlying settlement between the litigants, it had agreed that any penalties for failure to follow Colorado's remote seller notice and reporting requirements would be waived with respect to transactions occurring prior to July 1, 2017. Accordingly, the Department now states that it will be reviewing Colorado Administrative Regulation 39-21-112.3.5, to determine whether any revisions are warranted before enforcement of Colorado's remote seller notice and reporting requirements begins for transactions occurring on or after July 1, 2017.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/us-supreme-court-denies-petition-for-certiorari-in-dma-v-brohl.html?id=us:2em:3na:stm:awa:tax:032417

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Indirect/Sales/Use:
South Carolina DOR Summarizes Policy on Taxation of Communication Services, Including New and Emerging Technologies

Revenue Ruling 17-2, S.C. Dept. of Rev. (3/10/17). Because "communication technology is expanding every day" and new and emerging technologies are being made available to consumers, the South Carolina Department of Revenue (Department) recently issued an update to its policy guidance concerning application of South Carolina sales and use tax to various types of communication services. This guidance summarizes the Department's longstanding opinions as well as some more recent related developments. In doing so, the Department explains that charges for the following communication services generally are subject to state sales and use tax:
URL: https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/RR17-2.pdf

- Telephone services (not specifically exempted under Code Section 12-36-2120(11)), including telephone services provided via the traditional circuit-committed protocols of the public switched telephone network (PSTN), a wireless transmission system, a voice over Internet protocol (VoIP), or any of other method;
- Teleconferencing Services;
- Paging Services;
- Automated Answering Services;
- Cable Television Services;
- Satellite Programming Services and Other Programming Transmission Services (includes, but is not limited to, emergency communication services and television, radio, music or other programming services);
- Fax Transmission Services;
- Voice Mail Messaging Services;
- E-Mail Services;
- Electronic Filing of Tax Returns when the return is electronically filed by a person who did not prepare the tax return;
- Database Access Transmission Services (online information services), such as legal research services, credit reporting/research services, charges to access an individual website;
- Streaming Services that provide Television Programming, Movies, Music, and Other Similar Content; and
- Cloud-Based Services for Processing and Routing Telephone Calls within a Customer's Telephone System.

The guidance additionally indicates that charges for the following communication services generally are *not* subject to state sales and use tax pursuant to Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3):

- Telephone services specifically exempted under Code Section 12-36-2120(11), such as toll charges between telephone exchanges and carrier access charges and customers access line charges established by the Federal Communications Commission or the South Carolina Public Service Commission;
- Telegraph Messages;
- Communication Services involving Automatic Teller Machines;
- Data Processing Services as defined under Code Section 12-36-910(C);
- Computer Database Information Services provided by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative services;
- Electronic Filing of Tax Returns when the return is electronically filed by a person who prepared the tax return;
- Internet Access; and

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- Non-Automated Answering Services

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Multistate Tax Alerts

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