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Articles:

Grow New Jersey: A modern day case study in job attraction and retention

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), is authored by Charles Ruby and Gina Giordano of Deloitte Tax LLP and focuses on the Grow New Jersey Assistance program (Grow NJ), and how this program demonstrates some of the ways a state may look to create and retain jobs in a competitive landscape.

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/grow-new-jerse-a-modern-day-case-study-in-job-attraction-and-retention.html?id=us:2em:3na:stm:awa:tax:041417>

Income/Franchise:

Arkansas: New Law Imposes Withholding Requirements on Pass-through Entities for Nonresident C Corporation Owners

H.B. 1559, signed by gov. 3/30/17. Effective for tax years beginning on and after January 1, 2018, new law amends Arkansas' corporate income tax withholding requirements for members or owners of pass-through entities (PTEs), requiring such PTEs to withhold income tax at the maximum rate for a C corporation that is a member of the PTE on its share of income of the PTE that is derived from or attributable to sources within Arkansas and distributed to each nonresident member. The new law also permits such C corporations to participate in a composite return filed by the PTEs, as well as provides that C corporations may claim any withholding to offset their Arkansas corporation income tax liability. Additionally, nonresident C corporations may be exempted from withholding under this new law if the C corporation signs an agreement to file Arkansas corporation income tax returns, pay the underlying tax timely, and be subject to collections actions in court. A corporation may also file an Arkansas corporation income tax return, and then claim any taxes withheld by such PTEs as payment toward its state corporation income tax liability.

URL: <http://www.arkleg.state.ar.us/assembly/2017/2017R/Acts/Act760.pdf>

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Income/Franchise:

New Jersey Tax Court Holds that Sourcing Income from S Corp's 338(h)(10) Deemed Asset Sale for Nonresident Individual Shareholders Follows CBT Principles

Docket No. 011704-2015; Docket No. 000056-2016; Docket No. 000057-2016, N.J. Tax Ct. (4/10/17). In a case involving whether the gain from the deemed sale of assets of a New Jersey S corporation under Internal Revenue Code Sec. 338(h)(10) is sourced to New Jersey for state corporation business tax (CBT) purposes and thus reportable as New Jersey source income on the nonresident shareholders' New Jersey nonresident gross income tax (*i.e.* personal income tax) returns, the New Jersey Tax Court (Court) held that the correct method of sourcing such income is with reference to New Jersey's CBT statutes and case law. In this regard, the Court explained that the holding of *McKesson Water Prods. Co. v Director, Div. of Taxation*, 408 N.J. Super. 213 (App. Div.), *certif. denied*, 200 N.J. 506 (2009) controls to allocate the income at issue to New Jersey as the S corporation's domiciliary state – thus affirming the gross income tax assessment against the nonresident individual shareholders for the prior years at issue. Note that the continuing precedential impact of this case possibly may be viewed as uncertain due to a statutory change in effect for later years.

URL: http://www.judiciary.state.nj.us/taxcourt/tax_published/011704-2015opn%20cor.pdf

Stay tuned for a forthcoming Multistate Tax Alert that further discusses this case and offers some taxpayer considerations.

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Income/Franchise:

New Mexico: New Law Imposes “Addback” Requirement on Certain Captive REIT Deductions

S.B. 391, signed by gov. 4/6/17. Effective June 16, 2017, and applicable to taxable years beginning on and after January 1, 2017, new law requires New Mexico corporate income taxpayers to add back the amount of any deduction claimed in calculating federal taxable income for all expenses and costs directly or indirectly paid, accrued or incurred to a captive real estate investment trust (REIT) in computing their state corporate income tax bases. The new law defines a captive REIT as a corporation, trust or association taxed as a real estate investment trust pursuant to Internal Revenue Code Sec. 857, the shares or beneficial interests of which are not regularly traded on an established securities market – provided that more than 50% of any class of beneficial interests or shares of the REIT are owned directly, indirectly or constructively by the taxpayer during all or a part of the taxpayer’s taxable year.

URL: <https://www.nmlegis.gov/Sessions/17%20Regular/final/SB0391.pdf>

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Indirect/Sales/Use:

North Dakota: New Law Would Impose Remote Seller Tax Collection Responsibilities Despite Lack of “Physical Presence”

S.B. 2298, signed by gov. 4/10/17. Effective on the date the US Supreme Court issues an opinion overturning *Quill* or “otherwise confirming a state may constitutionally impose its sales or use tax upon an out-of-state seller” under similar circumstances as provided in this legislation where a seller lacks an in-state physical presence, new law generally would require the collection and remittance of North Dakota sales and use tax for out-of-state sellers of tangible personal property or other taxable product for delivery into North Dakota if, in the previous or current calendar year:

URL: <http://www.legis.nd.gov/assembly/65-2017/documents/17-0968-04000.pdf>

1. The seller’s gross sales from the sale of tangible personal property and other taxable items delivered in North Dakota exceed \$100,000; or
2. The seller sold tangible personal property and other taxable items for delivery in North Dakota in 200 or more separate transactions.

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Indirect/Sales/Use:

Pennsylvania DOR Issues Updated Guidance on 2016 Legislation that Had Addressed Taxability of Support Services to Canned Software Sales

Legal Letter Ruling No. SUT-17-001, Penn. Dept. of Rev. (rev. 4/4/17). The Pennsylvania Department of Revenue (Department) has issued an updated legal letter ruling that discusses to what extent “support services to canned computer software” are subject to taxation, pursuant to legislation enacted in 2016 [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 Department explains that the term “support” in this context means providing advice or guidance concerning otherwise taxable digital or electronic tangible personal property; this includes identifying the source of problems affecting the usability of the property and/or attempting to place the property in or restore the property to a useable state (*e.g.*, help desk support or call center support). According to the Department, such support may be delivered verbally, online, or through automated means that reside on the customer’s device or by human means; and the support may be delivered by the property vendor or a third-party support provider that may or may not have remote access to the customer’s device. The Department explains that providing such support is taxable regardless of the billing method and that examples include, but are not limited to, the following:

URL: <http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Letter%20Rulings/SUT/sut-17-001.pdf>

URL: <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2015&sind=0&body=H&type=B&bn=1198>

- Vendors provide support via a remote desktop where they access and alter the software directly;
- Vendors provide telephone support where they troubleshoot/discuss the issue with the customer and subsequently provide a patch or module to fix the issue;
- Customers send a copy of the problematic software program to a vendor that then alters the software and then returns a useable version of the software to the customer; and
- Vendors provide telephone support in the form of a call-in, help-desk providing direction as to the implementation, use, correction, or manipulation of the software.

However, the Department now explains that taxable “support services” generally do *not* include computer software training and general consulting.

Note that an earlier version of this same legal letter ruling [see *State Tax Matters*, March 3, 2017 for more details on this previously released letter ruling] sparked debate among many tax practitioners due to its apparently broad interpretation of taxable support services to canned computer software; this earlier version was then subsequently removed from the Department’s website.

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170303_8.html

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Indirect/Sales/Use:

Pennsylvania DOR Announces that Large Refund Petitions May be Addressed through Field Audit Process

Sales & Use Tax Bulletin 2017-01, Penn. Dept. of Rev. (4/10/17). The Pennsylvania Department of Revenue (Department) recently announced that it is changing the procedure for handling large sales and use tax refund petitions, explaining that such large refund requests may be addressed through the field audit process “to improve overall tax compliance and to improve the efficiency of reviewing these requests.” The Department states that the

decision to conduct a field audit will be made at its discretion but that, in general, refund petitions requesting in excess of \$100,000, or multiple petitions in one year exceeding that threshold in the aggregate, "are more likely to be referred for a field audit." In doing so, the Department notes that a taxpayer's due process rights will be fully preserved through the field audit process; and that the audit will encompass at least the same periods within the three-year refund window, and may extend to additional periods if the taxpayer agrees to a waiver of the statute of limitations on assessments.

URL:
http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Tax%20Bulletins/SUT/st_bulletin_2017-01.pdf

The Department also explains that the Pennsylvania Board of Tax Appeals is introducing a new "Summary Appeal Schedule" to provide a high-level overview of petitions requesting in excess of \$100,000 for refund with the petition. According to the Department, this schedule may be filed to determine if the Department intends to refer the refund request for a field audit review prior to submission of all of the evidence supporting the claim. Also, if the taxpayer has requested a hearing on the petition form, the Department explains that a hearing will be scheduled unless the taxpayer decides to waive the hearing, and that the issue of an audit referral may be discussed at this hearing.

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Indirect/Sales/Use: Tennessee Chancery Court Suspends Enforcement of "Economic Presence" Rule Pending Final Judgment in Ongoing Litigation Over its Constitutionality

On April 10, 2017, a Tennessee chancery court ordered Tennessee to suspend enforcement of Tenn. Comp. R. & Regs. 1320-05-01-.129, "pending the entry of a final judgment" in ongoing litigation over its constitutionality. Under Tenn. Comp. R. & Regs. 1320-05-01-.129(2), effective January 1, 2017, out-of-state dealers with no physical presence in Tennessee that engage in regular and systematic solicitation of consumers in Tennessee and that make sales exceeding \$500,000 to consumers in Tennessee during the previous twelve-month period are generally deemed to have a "substantial nexus" with Tennessee.

Note that previous guidance issued by the Tennessee Department of Revenue (Department) had instructed out-of-state dealers with no physical presence in Tennessee but meeting these "economic presence" requirements under Tenn. Comp. R. & Regs. 1320-05-01-.129, to register with the Department for sales and use tax purposes by March 1, 2017, and begin collecting and remitting tax by July 1, 2017 [see *State Tax Matters*, February 3, 2017 for more details on this previously released guidance]. To this end, the Tennessee chancery court's order does provide that out-of-state dealers subject to Tenn. Comp. R. & Regs. 1320-05-01-.129 are not precluded from voluntarily complying with the rule pending a final judgment in this ongoing litigation, and that while this action is pending, the Department may proceed with registration by and collection from sellers that voluntarily comply with the rule's requirements.

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170203_8.html

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Multistate Tax Alerts

Throughout the week, we highlight selected developments involving state tax legislative, judicial, and administrative matters. The alerts provide a brief summary of specific multistate developments relevant to taxpayers, tax professionals, and other interested persons. Read the recent alerts below or visit the archive.

Archive: <http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive0.html?id=us:2em:3na:stm:awa:tax>

California Penalty Relief Offered for 2015 on Market Sourcing Regulation

On March 29, 2017, the California Franchise Tax Board (FTB) issued FTB Notice 2017-02 providing business entities and individual taxpayers relief from late payment penalties imposed as a result of an underpayment of tax due to complying with the new amendments to California Code of Regulations, Title 18, Section (Regulation) 25136-2 that were finalized on September 15, 2016. According to FTB Notice 2017-02, certain procedures must be followed, and the relief is limited only to tax liabilities shown on timely filed returns for taxable years beginning on or after January 1, 2015 and before January 1, 2016.

This Multistate Tax Alert provides background on the amendments made to Regulation 25136-2, summarizes the eligibility and procedural requirements to obtain penalty relief under FTB Notice 2017-02, and provides some taxpayer considerations.

[Issued April 10, 2017]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/california-penalty-relief-offered-for-2015-on-market-sourcing-regulation.html?id=us:2em:3na:stm:awa:tax:041417>

Economic Nexus Standard for Tennessee Business Tax; Returns Due April 18

Effective for tax years beginning on or after January 1, 2016, as part of the Revenue Modernization Act enacted in 2015, Tennessee has added a "bright-line" economic nexus standard for purposes of Tennessee's gross receipts-based tax, which is more commonly known as the Tennessee Business Tax (Business Tax). Accordingly, taxpayers having substantial economic nexus with Tennessee may now be subject to the Business Tax, which has an approaching due date of April 18, 2017, for 2016 calendar year taxpayers.

This Multistate Tax Alert summarizes the Business Tax and offers some taxpayer considerations regarding the impact of the economic nexus standard on out-of-state taxpayers.

[Issued April 7, 2017]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/economic-nexus-standard-for-tennessee-business-tax-returns-due-april-18.html?id=us:2em:3na:stm:awa:tax:041417>

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