



In this issue:

Articles: Perspectives: How Would Federal Tax Reform Affect the States? Fifty Directions of Tax Reform	1
Articles: Pollution Control Tax: State and Local Credits and Incentives	2
Administrative: Oklahoma: New Law Allows State Tax Commission to Establish Enforcement Division; Permits Contracts with Out-of-State Private Auditors or Audit Firms	2
Income/Franchise: Constitutional Challenge to New York’s Taxation of Statutory Residents Based on <i>Wynne</i> Moves Forward.....	2
Income/Franchise: Oregon: New Law Replaces the Term “Business Income” with “Apportionable Income”.....	4
Income/Franchise: Virginia: Enacted Budget Includes Non-Codified Provisions Related to Intercompany Intangible Expense “Addback” Statutes	4
Sales/Use/Indirect: New York: Advisory Explains that Access to Online Video-Generating Interface Constitutes Constructive Possession of Taxable Prewritten Computer Software.....	5
Multistate Tax Alerts	6

Articles:

Perspectives: How Would Federal Tax Reform Affect the States? Fifty Directions of Tax Reform

In this edition of Board Briefs, board members of State Tax Notes were asked to weigh in on how they believe federal tax reform will affect the states. Valerie C. Dickerson, a tax partner and leader of Deloitte’s Washington National Tax-

Multistate practice, provides her insight on state tax matters. This article was originally published in State Tax Notes, Board Briefs, April 3, 2017.

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/how-would-federal-tax-reform-affect-the-states.html?id=us:2em:3na:stm:awa:tax:051917](https://www2.deloitte.com/us/en/pages/tax/articles/how-would-federal-tax-reform-affect-the-states.html?id=us:2em:3na:stm:awa:tax:051917)

Articles:

Pollution Control Tax: State and Local Credits and Incentives

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 co-authored with Darilyn Stewart and Bruce Kessler of Deloitte Tax LLP and provides an overview of state programs providing tax credits and incentives that seek to offset the costs of implementing pollution control activities.

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/pollution-control-tax-state-and-local-credits-and-incentives.html?id=us:2em:3na:stm:awa:tax:051917](https://www2.deloitte.com/us/en/pages/tax/articles/pollution-control-tax-state-and-local-credits-and-incentives.html?id=us:2em:3na:stm:awa:tax:051917)

Administrative:

Oklahoma: New Law Allows State Tax Commission to Establish Enforcement Division; Permits Contracts with Out-of-State Private Auditors or Audit Firms

H.B. 1427, signed by gov. 5/10/17. Effective November 1, 2017, new law permits the Oklahoma State Tax Commission (Commission) to establish and maintain an "Out-of-State Tax Collections Enforcement Division" (Division) for the purpose of collecting taxes owed to Oklahoma. In doing so, the new law provides that the Commission may contract with out-of-state private auditors or audit firms and may require any person performing an audit to be first approved by the Commission. The new law allows the Commission to employ full-time, unclassified, out-of-state tax auditors or full-time-equivalent contracted auditors to staff the Division and who shall perform audit functions related to enhancing:

[URL: http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/hB/HB1427%20ENR.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20ENR/hB/HB1427%20ENR.PDF)

1. Sales and use tax collections related to sales or transactions involving Oklahoma residents and out-of-state vendors with Oklahoma nexus; and
2. Collections of any other unpaid taxes owed to Oklahoma by out-of-state individuals, firms and corporations.

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Income/Franchise:

Constitutional Challenge to New York's Taxation of Statutory Residents Based on *Wynne* Moves Forward

Chamberlain v. New York State Dept. of Tax. and Finance, N.Y. Sup. Ct., Albany County (3/3/17). A New York trial court judge recently affirmed that New York's taxation of statutory residents was constitutional. In this case, the

taxpayers filed suit against the New York State Department of Taxation and Finance utilizing many of the dormant Commerce Clause arguments supporting the US Supreme Court's 2015 decision in *Comptroller of the Treasury of Maryland v. Wynne* [see previously issued Multistate Tax Alert for more details on the *Wynne* case]. The taxpayers have since filed an appeal of this trial court decision with the New York Court of Appeals.

[URL: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-supreme-court-rules-maryland-individual-income-tax-scheme-unconstitutional.html?id=us:2em:3na:stm:awa:tax:051917](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-supreme-court-rules-maryland-individual-income-tax-scheme-unconstitutional.html?id=us:2em:3na:stm:awa:tax:051917)

The taxpayers in this case are a married couple that claimed residency in Connecticut and maintained an additional residence in New York City between 2009 and 2011. For those years, the couple filed joint Connecticut resident income tax returns and New York nonresident income tax returns, although both individuals acknowledged being physically present in New York for more than 183 days during each tax year at issue. As a result, under audit, the New York State Department of Taxation and Finance determined the taxpayers were "statutory residents" of New York State and New York City. The taxpayers' dispute in this case focuses on the tax liability owed to New York State in relation to intangible and investment income that could not be traced to any jurisdiction outside of New York (*i.e.*, the New York State tax liability was calculated with no credit for taxes paid to Connecticut on the intangible and investment income). The taxpayers claimed that New York's "statutory residency scheme" violates the US Constitution's dormant Commerce Clause, as supported by the US Supreme Court's decision in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

The trial court judge in this case ruled that *Tamagni v. Tax Appeals Tribunal*, 91 NY2d 530 (1998) (holding that New York's tax on the intangible income of statutory residents did not implicate the Commerce Clause) was still controlling law on this issue in New York, and then highlighted a number of factors that distinguish the present facts from *Wynne*. Most notably, the judge explained, the *Wynne* case dealt with a plaintiff that was being taxed by Maryland on income derived outside of Maryland, resulting in double taxation on this income; in contrast, the income in this current case was not derived outside of New York. Citing *Tamagni*, the trial court judge also noted that the double taxation on the taxpayers' intangible income at hand "does not fall on any identifiable interstate market" and "does not favor intrastate commerce over interstate commerce in a manner violative of the dormant Commerce Clause." Rather, the judge reasoned, the double taxation is the result of the taxpayers' status as New York statutory residents and the classification of the taxable income at issue as income from intangibles that cannot be tied to the taxpayers' activities in another state. Further, the judge commented that *Wynne* is not a departure from prior dormant Commerce Clause law and does not provide any "meaningful or new guidance" on the constitutionality of New York's statutory residence scheme.

Note, again, that the taxpayers have since filed an appeal of this trial court decision with the New York Court of Appeals. Please contact us with any questions.

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Income/Franchise:

Oregon: New Law Replaces the Term “Business Income” with “Apportionable Income”

H.B. 2275, signed by gov. 5/15/17. Effective on the 91st day after the date on which the 2017 session of the 79th Legislative Assembly adjourns sine die, and applicable to tax years beginning on or after January 1, 2018, new law repeals the current definition of “business income” and replaces the term with “apportionable income” for state corporate income tax purposes, generally to more closely align with similar Multistate Tax Compact revisions as recommended by the Multistate Tax Commission regarding the transactional test and the functional test. Under this new law, the term “apportionable income” will be defined as follows:

URL: <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2275/Enrolled>

- Income arising from transactions and activity in the regular course of the taxpayer’s trade or business;
- Income arising from the acquisition, management, employment, development or disposition of tangible and intangible property if the acquisition, management, employment, development or disposition is related to the operation of the taxpayer’s trade or business;
- Any other income that is apportionable under the US Constitution and not allocated under Oregon law; and
- Any income that would be allocable to Oregon under the US Constitution, but that is apportioned rather than allocated pursuant to Oregon law.

Please contact us with any related questions.

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Income/Franchise:

Virginia: Enacted Budget Includes Non-Codified Provisions Related to Intercompany Intangible Expense “Addback” Statutes

H.B. 1500, signed by gov. 4/28/17. Applicable retroactively for taxable years beginning on and after January 1, 2004, Virginia’s recently enacted budget bill includes non-codified provisions that limit the “subject to tax” statutory exception to Virginia’s intercompany intangible expense addback statute – regarding income that is subject to a tax based on or measured by net income or capital imposed by Virginia, another state, or a foreign government – to the portion of intercompany expense payments to the related member that corresponds to the portion of the related member’s income where it has sufficient nexus to be subject to taxes based on or measured by net income or capital in other states – i.e., on a post-apportionment basis. Also retroactively for taxable years beginning on and after January 1, 2004, the budget bill includes non-codified provisions that limit the unrelated party “safe harbor” statutory exception to Virginia’s intercompany intangible expense addback statute to the portion of such income derived from licensing agreements for which the rates and terms are comparable to the rates and terms of agreements that the related member has actually entered into with unrelated entities. Note that these same non-codified provisions were also included in state budget bills enacted in previous years, and thus they are essentially being continued with this most recent enactment.

URL: <https://budget.lis.virginia.gov/bill/2017/1/HB1500/Chapter/>

URL: <https://budget.lis.virginia.gov/item/2017/1/HB1500/Chapter/3/3-5.09/>

Other non-codified provisions contained in this year’s state budget bill, two of which were substantively enacted as codified statutes through legislation earlier this session [H.B. 2246; H.B. 2058; see *State Tax Matters*, Issue 2017-9 for more details on this previously enacted legislation], include:

URL: <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=171&typ=bil&val=hb2246>

URL: <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+HB2058ER+pdf>

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170303_9.html

- Establishment of a tax amnesty program at some point during July 1, 2017 through June 30, 2018, for 60 days to 75 days, which generally will be open to qualifying taxpayers that are required but have failed to file a return or pay most taxes administered by the Virginia Department of Taxation (in exchange for participation, qualifying taxpayers potentially may receive a waiver of all penalties assessed or assessable and one-half of the interest assessed or assessable; the program will include a 20% non-participation penalty); and
- Providing that a dealer with in-state inventory has “physical presence” with Virginia and sufficient activity within Virginia requiring it to register for the collection of state sales and use taxes on sales to customers within Virginia.

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Sales/Use/Indirect: New York: Advisory Explains that Access to Online Video-Generating Interface Constitutes Constructive Possession of Taxable Prewritten Computer Software

TSB-A-17(4)S, N.Y. Dept. of Tax. & Fin. (3/1/17). A recent sales/use tax advisory opinion involving a company’s “video-generating services” explains that, under the presented facts, the company is providing its customers with taxable prewritten computer software that is subject to state and local sales taxes when sold to customers located in New York. The company offers an online product that allows its customers to have a video automatically created using uploaded “image content” that is set to music; the videos are created via the use of a web-based interface. While this interface does not itself create any videos, it gives customers the ability to control the video-generating software by selecting the content of a video, the order in which this content appears, and various other aspects of a video, including what music and logos are used, and the video’s “style.” In addition, the interface allows customers to create text that can be incorporated into a video. The advisory opinion reasons that, under these facts, the location of the code embodying the software is irrelevant, because the software can be used just as effectively by the customer even though the customer never receives the code on a tangible medium or by download. Also, under the facts, there is no indication that any aspect of the company’s product, including the web interface that customers use, was designed or developed to the specifications of a specific customer. Rather, it appears that regardless of who uses the company’s product, the same software is used to produce videos for all customers. Accordingly, the advisory opinion concludes that all of this software constitutes taxable prewritten computer software. Further, while the company’s customers may not directly interact with the video generating software located on its server, the advisory explains that they have access to an online interface that gives them control over that software and what it does. As such, the customers are deemed to have constructive possession of the company’s video generating software in that they are given the “right to use, or control or direct the use” of it – and that merely because “all videos will be unique in some way due to the software’s algorithms is irrelevant.”

URL: https://www.tax.ny.gov/pdf/advisory_opinions/sales/a17_4s.pdf

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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>

Texas Administrative Court Disallows Taxpayer Amendment to COGS Reporting Method

Recently, the Texas State Office of Administrative Hearings released a hearing decision disallowing a taxpayer's amendment to its franchise tax returns to change its cost of goods (COGS) methodology from the expense to the capitalization method.

This Multistate Tax Alert summarizes the decision and offers some taxpayer considerations.

[Issued May 12, 2017]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/texas-administrative-court-disallows-taxpayer-amendment-to-cogs-reporting-method.html?id=us:2em:3na:stm:awa:tax:051917>

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