State Tax Matters
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Income/Franchise:
Delaware: New Law Revises Tax Return Due Dates

H.B. 66, signed by gov. 5/18/17. Effective for all tax years beginning after December 31, 2016, new law generally revises the due dates for Delaware's tax returns to conform with the federal income tax return due dates as follows:
URL: https://legis.delaware.gov/json/BillDetail/GetWordDocument?fileAttachmentId=52367

- Pass-Through entity returns (*i.e.*, returns for pass-through entities, including S corporations, partnerships, and limited liability companies classified as partnerships for income tax purposes) are due on the date on which such pass-through entity's federal tax return is due;
- C corporations:

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- Tentative returns, covering estimated income tax liability, are due on or before the 15th day of the fourth month of the current income year (April 15 for calendar year taxpayers); and
- Final returns are due on the date on which the taxpayer's federal tax return is due.

Please contact us with any questions.

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Income/Franchise:
Montana: New Law Revises NOL Carryforward Period and Imposes Annual Carryback Limitation Amount

H.B. 550, signed by gov. 5/22/17. Applicable to tax years beginning after December 31, 2017, new law revises net operating loss (NOL) provisions related to Montana's corporate income tax, permitting NOLs to be carried back three years and carried forward ten years. Under current law, NOLs are permitted to be carried back three years and carried forward only seven years. Also applicable for tax years beginning after December 31, 2017, the new law limits the annual NOL carryback amount to $500,000 – currently, no such limitation exists.
URL: http://leg.mt.gov/bills/2017/billpdf/HB0550.pdf

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Income/Franchise:
New Jersey Tax Court Holds that Subsidiary's Payments Qualify for "Unreasonable" Exception under CBT's Intercompany Expense Addback Statute

Docket No. 000403-2012, N.J. Tax Ct. (5/24/17). In a case involving New Jersey's intercompany expense "addback" statute under state corporation business tax (CBT) law provisions, a recently published New Jersey Tax Court (Court) decision granted summary judgment in favor of the taxpayer, holding that a subsidiary was entitled to a deduction for termed "royalty" payments made to its parent. In doing so, the Court concluded that:
URL: http://www.judiciary.state.nj.us/attorneys/assets/opinions/tax/00403-12opn.pdf

- The plain language and substance of the agreement between the related members at issue show that payments were made by the subsidiary for obtaining the license to use and distribute the parent's prewritten software, original and updates thereto, a proprietary product – thus qualifying the subsidiary's payments at issue as an "intangible expense/cost" for purposes of the CBT intercompany expense addback statute; and

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- The subsidiary's payments at issue are excepted from the CBT intercompany expense addback statute pursuant to the "unreasonable" allowance under N.J.S.A. 54:10A-4.4(c)(1), because the undisputed facts show that the payments were substantively equivalent to payments made by either the parent or the subsidiary to unrelated third parties under transactions involving the same subject and object (*i.e.*, sale of prewritten computer software license and service contracts).

In essence, the Court explained that the intercompany payments at issue qualified for the "unreasonable" exception to the CBT intercompany expense addback statute because they were "substantively equivalent to an unrelated party transaction." Please contact us with any questions.

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Income/Franchise:
A Closer Look at New York's Draft Proposed Regulations under Article 9-A Business Corporation Franchise Tax Under Subpart 3-9 – Computation of the Prior Net Operating Loss Conversion (PNOLC) Subtraction

On May 5, 2017, the New York Department of Taxation and Finance (Department) released a draft document renumbering New York Business Corporation Franchise Tax Regulations Subpart 3-9 as 3-14, and adding a new Subpart 3-9. Below, Draft Proposed Regulation Sec. 3-9.5 (Corporations not allowed a prior net operating loss conversion (PNOLC) subtraction), Sec. 3-9.6 (Computation of the PNOLC subtraction pool), and Sec. 3-9.7 (Computation of the PNOLC subtraction) are reviewed.

Overview

Under New York Tax Law Sec. 210.1(a)(viii), net operating losses (NOLs) generated before January 1, 2015 are deducted from taxable income in the form of a prior net operating loss conversion (PNOLC) subtraction beginning in 2015. As part of this framework, taxpayers compute their unabsorbed net operating loss (UNOL). The UNOL generally is the unabsorbed portion of NOL as calculated under Article 9-A or Article 32, as in effect on December 31, 2014, that was not deductible in previous tax years and was eligible for carryforward on the last day of the base year. Next, a UNOL is converted into a PNOLC subtraction pool. Taxpayers are permitted to deduct a PNOLC subtraction based on the size of this subtraction pool and certain other factors.[1]

Corporations Not Allowed a PNOLC Subtraction

Under the Draft Proposed Regulation 3-9.5, certain corporations are not entitled to a PNOLC subtraction. The statute does not provide specific guidance on this issue. These corporations include:

- Corporations without a UNOL;
- Corporations with a base year[2] business allocation percentage of zero percent;
- Corporations with a base year tax rate of zero percent (*e.g.*, a corporation that is a qualified New York manufacturer subject to the 0% rate);
- Corporations not subject to tax under New York Tax Law Articles 9-A or 32 (as a separate company or as a member of a combined group) during the base year;
- Corporations that were regulated investment companies during the base year;

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[1] Draft Prop. Reg. Sec. 3-9.4.
[2] Base year is defined as "the last taxable year beginning on or after January first, two thousand fourteen and before January first, two thousand fifteen." New York Tax Law Sec. 210.1(a)(viii)(B)(1)(I); *see also* Draft Prop. Reg. Sec. 3-9.1(a).

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- Corporations that were New York S corporations, as defined under New York Tax Law on Dec. 31, 2014, during the base year.[3]

Computation of the PNOLC Subtraction Pool

For a corporation not part of a combined group during its base year, the PNOLC subtraction pool is calculated by completing the following steps:

- Determine the tax value of the taxpayer's UNOL by multiplying the UNOL by the base year business allocation percentage and the taxpayer's base year tax rate (7.1% for most taxpayers); and
- Divide the tax value of the UNOL by 6.5%.[4]

Computation of the PNOLC Subtraction

Under the draft proposed regulations, a taxpayer would be required to compute and compare amounts described below to arrive at its PNOLC subtraction.

- For taxpayers using the 50% allotment method, the PNOLC subtraction is limited to the smallest of:
    - The available amount;
    - The maximum amount; and
    - 50% of the PNOLC subtraction pool.[5]
- For taxpayers using the 100% or 10% allotment methods, the PNOLC subtraction is limited to the smaller of
    - The available amount; and
    - The maximum amount.

For a corporation that is not part of a combined group in its first taxable year beginning on or after January 1, 2015 (the first 2015 year), the PNOLC subtraction available for use is the amount of its PNOLC subtraction allotment. For tax periods beginning after the first 2015 year, its PNOLC subtraction available for use is its PNOLC subtraction allotment plus any unused portion of its PNOLC subtraction from prior years. The PNOLC subtraction amounts described in this paragraph are referenced above as the "available amount."[6]

A taxpayer's PNOLC subtraction allotment is the percentage, either 10%, 50%, or 100% (limited to small business taxpayers), of a taxpayer's PNOLC subtraction pool that may be claimed in a taxable year.[7] To the extent that a taxpayer cannot utilize all of its PNOLC subtraction allotment, such unused portion will be carried forward as a PNOLC subtraction carry forward.[8]

The maximum amount of the PNOLC subtraction is computed by multiplying "apportioned business income before the PNOLC subtraction and the net operating loss deduction for the taxable year" by "the business income tax rate for the taxable year" and subtracting "the greater of the capital base tax or the fixed dollar minimum tax."[9] This result is divided "by the taxpayer's business income tax rate for the taxable year."[10] This amount is referenced above as the "maximum amount."

With regard to the 50% PNOLC subtraction allotment, the draft proposed regulations state that an election must be made "on an original, timely filed return for the first 2015 taxable year, determined with regard to extensions of time

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[3] Draft Prop. Reg. Sec. 3-9.5.
[4] New York Tax Law Sec. 210.1(a)(viii)(B)(2); Draft Prop. Reg. Sec. 3-9.6(a). Note that the Draft Proposed Regulations omit any reference to a special rate for manufacturers that is present in the statute. Under the Draft Proposed Regulations, all taxpayers divide their UNOL by 6.5%.
[5] Draft Prop. Reg. Sec. 3-9.7(d). The PNOLC subtraction for a corporation utilizing the 50% allotment method is allowed only in tax years beginning before January 1, 2017. *Id.*
[6] Draft Prop. Reg. Sec. 3-9.7(a).
[7] Draft Prop. Reg. Sec. 3-9.7(b).
[8] Draft Prop. Reg. Sec. 3-9.7(c).
[9] *Id.*
[10] *Id.*

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for filing."[11] If such an election is made, the taxpayer is entitled to a 50% PNOLC subtraction allotment for the first two taxable years after the base year, and no PNOLC subtraction allotment for the third taxable year and all following years. The election is revocable on a timely filed amended return for each year that the election was claimed.[12]

If making the 50% allotment method election, the PNOLC subtraction carry forward "cannot be carried forward to any tax year beginning on or after January 1, 2017."[13] However, an example makes clear that if a taxpayer with the 50% election has two short taxable years in 2015, the taxpayer will be able to utilize any unused PNOLC subtraction carryforward in the tax period ending December 31, 2016.[14]

Corporations that do not make the 50% allotment method election (and are not small business taxpayers) are entitled to a 10% PNOLC subtraction allotment "in each of its first ten taxable years after the base year."[15] Corporations that do not make the 50% allotment method election may claim a PNOLC subtraction for no longer than 20 taxable years or the taxable year beginning on or after January 1, 2035 but before January 1, 2036, whichever comes first.[16]

As with its other draft proposed regulations, the Department has stated that these draft proposed regulations are not final and should not be relied upon. The Department is seeking comments before August 3, 2017. Please contact us with any questions.

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Indirect/Sales/Use:
Minnesota: New Law Imposes Collection and Remittance Responsibilities on Marketplace Providers; Includes Affiliate Nexus Provisions

H.F. 1, signed by gov. 5/30/17. For state sales tax collection and remittance purposes, new law includes an expanded definition of a "retailer maintaining a place of business in this state" to generally add in having a representative such as a "marketplace provider" operating in Minnesota under the retailer's authority for the purpose of facilitating or processing sales for the retailer's goods or services. The new law also expands upon the definition of a retailer's affiliate, incorporating certain "affiliate nexus"-type provisions. Under the new law, a "marketplace provider" is defined as a person that facilitates a retail sale by a retailer by:
URL: https://www.revisor.mn.gov/laws/?year=2017&type=1&doctype=Chapter&id=1

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[11] Draft Prop. Reg. Sec. 3-9.7(b)(2). Note that the draft proposed regulation contains wording different from the statute, which only requires the election to be made on a taxpayer's "first return for the tax year beginning on or after January first, two thousand fifteen and before January first, two thousand sixteen by the due date for such return (determined with regard to extensions)." New York Tax Law Sec. 210.1(a)(viii)(B)(2)(IV).
[12] Draft Prop. Reg. Sec. 3-9.7(b)(2)(ii).
[13] Draft Prop. Reg. Sec. 3-9.7(e).
[14] Draft Prop. Reg. Sec. 3-9.9, Example 3.
[15] Draft Prop. Reg. Sec. 3-9.7(b)(3).
[16] Draft Prop. Reg. Sec. 3-9.7(d).

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- Listing or advertising for sale by the retailer in any forum, taxable tangible personal property, services, or digital goods; and
- Either directly or indirectly through agreements or arrangements with third parties collecting payment from the customer and transmitting that payment to the retailer regardless of whether the marketplace provider receives compensation or other consideration in exchange for its services.

Such marketplace providers must collect and remit state sales and use taxes for all facilitated sales for a retailer, and are subject to audit on the retail sales they facilitate, unless either:

- The retailer provides a copy of the retailer's registration to collect Minnesota sales and use tax to the marketplace provider before the marketplace provider facilitates a sale; or
- Upon inquiry by the marketplace provider or its agent, the Minnesota Department of Revenue discloses that the retailer is registered to collect Minnesota sales and use taxes.

These various new state sales and use tax provisions become effective upon the earlier of:

- A decision by the US Supreme Court modifying its decision in *Quill Corp. 136.12 v. North Dakota*, so that a state may require retailers without a physical presence in the state to collect and remit sales tax; or
- July 1, 2019.

However, the legislation also provides that if a federal law is enacted authorizing a state to impose a requirement to collect and remit sales tax on retailers without a physical presence in the state, the Minnesota Department of Revenue must enforce these new provisions "to the extent allowed under federal law."

Stay tuned for a forthcoming Multistate Tax Alert that further discusses this recently enacted legislation, and offers some related taxpayer considerations.

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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

Montana Adopts Market-Based Sourcing for Receipts from Sales of Non-TPP
On May 3, 2017, Montana Governor Steve Bullock signed House Bill 511 (H.B. 511). H.B. 511 revises Montana's adopted version of the Multistate Tax Compact as recommended by the Multistate Tax Commission, and generally includes the following modifications to Montana income tax law:

- Implements market-based sourcing for sourcing receipts from sales other than the sale of tangible personal property for apportionment purposes;
- Imposes a receipts factor "throwout" rule; and
- Provides new definitions for "apportionable income" and "receipts."

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This Multistate Tax Alert summarizes these law changes that are effective for tax years beginning on or after January 1, 2018, as well as offers some taxpayer considerations.
[Issued May 30, 2017]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/montana-adopts-market-based-sourcing-for-receipts-from-sales-of-non-tpp.html?id=us:2em:3na:stm:awa:tax:060217

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