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Amnesty:

Ohio: New Law Includes Amnesty Program with Potential 100% Penalty Waiver and 50% Interest Waiver

H.B. 49, signed by gov. 6/30/17. New law provides for a tax amnesty program to be administered from January 1, 2018 through February 15, 2018, for certain qualifying delinquent taxes administered by the Ohio Department of Taxation – including Ohio's financial institution, sales, use, and commercial activity taxes – that generally were due and payable as of May 1, 2017. Under this program, tax amnesty will be granted to qualifying taxpayers for such eligible taxes, potentially permitting 100% waiver of the underlying penalties and 50% waiver of the underlying interest.

URL: <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-HB-49>

See forthcoming Multistate Tax Alert for more details on this new law, as well as related taxpayer considerations.

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Income/Franchise:

California: New Law Includes Seven-Month Filing Extension for Some Partnership Returns

A.B. 119, signed by gov. 6/27/17. Pursuant to legislation enacted in 2016 (A.B. 1775) that generally revised the deadline to file California partnership tax returns for taxable years beginning on or after January 1, 2016 [see previously issued Multistate Tax Alert for more details on these provisions], and “the challenges of complying with the accelerated filing due date, coupled with the inherent complexities of preparing partnership returns,” new law provides that the California Franchise Tax Board (FTB) generally must presume reasonable cause and not willful neglect in the case of any partnership that meets both of the following for the 2016 taxable year:

URL: http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB119

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:070717>

- The partnership return for taxable year 2016 is filed by the extended due date under former law, which is October 15, 2017, for a calendar year partnership, or by the 15th day of the 10th month following the close of the taxable year of the partnership in the case of fiscal year filers; and
- The partnership requests relief, in the form and manner specified by the FTB, from the imposition of either or both the delinquent filing penalty under Cal. Rev. & Tax. Code Section 19131, or the failure of a partnership to comply with the filing requirements penalty under Cal. Rev. & Tax. Code Section 19172.

Additionally, applicable to returns required to be filed for taxable years beginning on or after January 1, 2017, new law authorizes the FTB to grant an automatic extension of time for filing California partnership returns for a maximum of seven months rather than the current maximum of six months.

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Income/Franchise:

Delaware: New Law Includes Increased Corporate Franchise Taxes

H.B. 175, signed by gov. 7/3/17. New law generally increases Delaware's maximum corporate franchise tax from \$180,000 to \$200,000, and creates a second top-tier tax of \$250,000 applicable to a "Large Corporate Filer" (*i.e.*, a public company with greater than \$750 million in either consolidated revenue or consolidated assets and no less than \$250 million in both consolidated revenue and consolidated assets, which otherwise would pay the \$200,000 maximum tax) for tax years beginning on or after January 1, 2017. The new law also increases the tax rate for corporations with greater than 10,000 authorized shares (from \$75 to \$85 per each 10,000 shares or part thereof), greater than \$1 million of assumed no-par capital (from \$75 to \$85 per \$1 million or part thereof), or greater than \$1 million of assumed par value capital (from \$350 to \$400 per \$1 million or part thereof), as well as increases the minimum tax for taxpayers using the assumed par value method (from \$350 to \$400) for tax years beginning on or after January 1, 2018.

URL: <https://legis.delaware.gov/BillDetail?legislationId=25780>

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Income/Franchise:

New York City: New Law Extends Current General Corporation Tax Rates Through 2020

Ch. 61 [A 40001], signed by gov. 6/29/17. Effective immediately, new law extends the current New York City general corporation tax rates imposed under New York City Administrative Code §11-604(1)(E) – which previously had been due to expire on January 1, 2018 – for another three years. Accordingly, such tax rates now also apply for taxable years beginning before January 1, 2021.

URL: http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A40001&term=2017&Summary=Y&Actions=Y&Text=Y

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Income/Franchise: New York City: Appellate Court Affirms that Telecom is Subject to Unincorporated Business Tax; Fails to Qualify as Exempt Utility

No. 154499/14 4165 [2017 NY Slip Op 05194], N.Y. App. Div. (6/27/17). The New York Supreme Court, Appellate Division, has affirmed that a telecommunications/wireless provider was not exempt from New York City unincorporated business income tax (UBT) as a "utility" for the prior tax years at issue because it was not sufficiently supervised by the New York Public Service Commission (PSC). In doing so, the Court cited supporting case law and explained that the facts in this case showed that the taxpayer is a competitive entity that "does not enjoy monopoly status," and that its "light regulation" by the PSC does not rise to the level of "supervision" necessary to classify it as a UBT-exempt utility. Please contact us with any questions.

[URL: http://www.courts.state.ny.us/reporter/3dseries/2017/2017_05194.htm](http://www.courts.state.ny.us/reporter/3dseries/2017/2017_05194.htm)

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Income/Franchise: Oregon: New Law Implements Market-Based Sourcing on Sales of Non-TPP; Updates State Conformity to IRC

S.B. 28, signed by gov. 7/3/17. Applicable to tax years beginning on or after January 1, 2018, new law replaces Oregon's current cost-of-performance apportionment methodology for sales of items other than tangible personal property with market-based sourcing for state corporate income tax purposes. See recently released Multistate Tax Alert for more details on this recently enacted legislation.

[URL: https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB28/Enrolled](https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB28/Enrolled)

S.B. 701, signed by gov. 6/29/17. Effective on the 91st day after the date on which the 2017 session of the 79th Legislative Assembly adjourns sine die, new law generally updates Oregon's corporate and personal income tax statutory references to the Internal Revenue Code as it existed on December 31, 2016, applicable "to transactions or activities occurring on or after January 1, 2017, in tax years beginning on or after January 1, 2017." The department generally will waive interest and penalties related to any deficiencies resulting from this law change for tax years beginning before January 1, 2017.

[URL: https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB701/Enrolled](https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB701/Enrolled)

Note that even with this new law, Oregon continues to have "rolling conformity" with respect to the definition of "taxable income."

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Indirect/Sales/Use: Colorado DOR Releases Amended Remote Seller Notice & Reporting Regulation, Including Online Marketplace Provisions – Enforcement Began July 1

Emergency Amended "Notice and Reporting Requirements for Non-Collecting Retailers," Rule 39-21-112(3.5), Colo. Dept. of Rev. (6/30/17). The Colorado Department of Revenue (Department) has issued emergency revisions to Colorado Administrative Rule 39-21-112.3.5, which initially was promulgated pursuant to state statutes imposing notice and reporting requirements on some out-of-state retailers that generally do not collect Colorado sales tax and are making sales into Colorado. Earlier this year, the Department had stated that it would review 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 would consider whether the administrative rule should address online "marketplace" sellers. Regarding online marketplaces, the emergency rule now states the following:

[URL: https://www.colorado.gov/pacific/sites/default/files/39-21-112%283.5%29%20emergency%20final.pdf](https://www.colorado.gov/pacific/sites/default/files/39-21-112%283.5%29%20emergency%20final.pdf)

"The use of online marketplaces to make sales does not relieve a Non-Collecting Retailer from the obligation to provide a Transactional Notice with each Colorado Reportable Purchase. However, a marketplace may provide the Transactional Notice to Colorado Purchasers on behalf of the Non-Collecting Retailer."

Note that Colorado's remote seller notice and reporting legislation, which technically became effective on July 30, 2010, was subsequently challenged in state and federal courts and resulted in injunctions against enforcement of the law. The case ultimately 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. The Tenth Circuit Court of Appeals then subsequently upheld the Colorado remote seller notice and reporting law, and 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]. As part of the underlying settlement between the litigants [see previously issued Multistate Tax Alert for more details on this settlement], the Department 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 has now promulgated emergency revisions to Colorado Administrative Rule 39-21-112.3.5, for purposes of enforcing Colorado's remote seller notice and reporting requirements 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:070717](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:070717)

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/direct-marketing-association-reaches-settlement-with-colorado.html?id=us:2em:3na:stm:awa:tax:070717](https://www2.deloitte.com/us/en/pages/tax/articles/direct-marketing-association-reaches-settlement-with-colorado.html?id=us:2em:3na:stm:awa:tax:070717)

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Indirect/Sales/Use:

Indiana: DOR Holds that Online Banking Products Provided to Customers of Financial Institutions Constitute Nontaxable Services

Revenue Ruling No. 2015-09ST, Ind. Dept. of Rev. (4/13/17). The Indiana Department of Revenue (Department) recently held that a company providing its financial institution customers with the ability to allow their banking account holders to view and manage their personal bank accounts online was in fact providing nontaxable services rather than taxable prewritten computer software or telecom services. In doing so, the Department explained that the company sufficiently showed that the “true object” of the transactions at issue was the provision of services – given that the company did not grant the financial institutions with any rights to its online banking, online bill payment, and mobile banking products and that the software functionality was limited and merely incidental to the overall services it provided. Additionally, such services did not fall within Indiana’s definition of taxable “telecommunication services” because such term does *not* include data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information. Please contact us with any questions.

URL: <http://www.in.gov/legislative/iac/20170628-IR-045170295NRA.xml.pdf>

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Indirect/Sales/Use:

Massachusetts: DOR Revokes Directive Attempting to Adopt “Bright Line” Economic Nexus Rule for Some Remote Sellers; Proposed Regulations “Coming Soon”

Directive No. 17-2 [Revocation of DD 17-1 In Anticipation of a Proposed Regulation], Mass. Dept. of Rev. (6/28/17). “Effective immediately,” the Massachusetts Department of Revenue (Department) has revoked its April 3, 2017 directive [Directive No. 17-1; see *State Tax Matters*, Issue 2017-14, for more details on Directive No. 17-1], which was scheduled to take effect on July 1, 2017 and had attempted to adopt a “bright line” economic nexus rule for some remote sellers. Addressing circumstances under which an Internet vendor with a principal place of business located outside Massachusetts would be required to register, collect and remit Massachusetts sales or use tax pursuant to Mass. Gen. Laws chapters 64H and 64I, Directive No. 17-1 previously had adopted a bright line rule as follows:

URL: <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/directives/directives-by-years/2017-directives/dd-17-2.html>

URL: <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/directives/directives-by-years/2017-directives/dd-17-1.html>

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170407_7.html

- For the six-month period, July 1, 2017 to December 31, 2017, if during the preceding 12 months, July 1, 2016 to June 30, 2017, the Internet vendor had in excess of \$500,000 in Massachusetts sales *and* made sales for delivery into Massachusetts in 100 or more transactions; and

- For each calendar year beginning with 2018 if during the preceding calendar year the Internet vendor had in excess of \$500,000 in Massachusetts sales *and* made sales for delivery into Massachusetts in 100 or more transactions.

In a new directive, the Department now states that it anticipates proposing administrative regulations which, if adopted after public notice, comment, and hearing as provided under Mass. Gen. Laws chap. 30A, would require “large Internet vendors to collect Massachusetts sales and use tax on a prospective basis under standards similar to those described in Directive 17-1.” The Department additionally states that this regulatory proposal “will be based upon legal rationale similar to that stated in Directive 17-1,” and that Directive 17-1 is being revoked in anticipation of the rulemaking process under Mass. Gen. Laws chap. 30A.

Note that on June 28, 2017, in a case filed by trade groups representing Internet and catalog vendors challenging the validity of Directive 17-1, a Massachusetts superior court held that Directive 17-1 was invalid and unenforceable because it was adopted in violation of the Administrative Procedure Act, Mass. Gen. Laws chap. 30A, §§ 1-25.

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Indirect/Sales/Use:

Ohio: New Law Expands “Substantial Nexus” Presumption to Include a \$500,000 Gross Receipts Threshold

H.B. 49, signed by gov. 6/30/17. Recently enacted legislation provides that, beginning January 1, 2018, “substantial nexus” with Ohio is presumed to exist for Ohio sales and use tax purposes if the seller:

URL: <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-HB-49>

- Uses in-state software to sell or lease taxable tangible personal property or services to consumers, provided the seller has gross receipts in excess of \$500,000 in the current or preceding calendar year from the sale of tangible personal property for storage, use, or consumption in Ohio or from providing services the benefit of which is realized in Ohio; or
- Provides or enters into an agreement with another person to provide a content distribution network in Ohio to accelerate or enhance the delivery of the seller’s website to consumers, provided the seller has gross receipts in excess of \$500,000 in the current or preceding calendar year from the sale of tangible personal property for storage, use, or consumption in Ohio or from providing services the benefit of which is realized in Ohio.

See forthcoming Multistate Tax Alert for more details on this new law, as well as related taxpayer considerations.

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Indirect/Sales/Use:

Texas Comptroller Issues Proposed Amendments to Administrative Rule 3.308 Computers--Hardware, Software, Services, and Sales

Proposed Amended 34 TAC Section 3.308, Tex. Cmptrlr. (6/30/17). The Texas Comptroller of Public Accounts (Comptroller) has issued proposed revisions to an administrative rule concerning computers, hardware, software and related sales and services. The amendments include new definitions for the terms “computer program” and “computer program maintenance,” where maintenance generally is limited to those activities that keep a computer program in original working order, such as providing error correction and technical support. The proposed definitions explain that adding new functionality to an existing computer program creates a new computer program and is not considered computer program maintenance; reflect that technical support may include remote assistance (*e.g.*, telephone and online); and memorialize previous Comptroller guidance that contract programming only occurs when the person performing the programming services did not sell, and does not own, any intellectual rights to the computer program being created, repaired, maintained, or restored. The proposed amended rule also reflects that the purchase price of a computer program sold or used in Texas may not be allocated between Texas and another state based on the purchaser making copies of the program for use in another state, installing the program on hardware located in another state, or accessing the program in another state. It further provides that when a purchaser acquires multiple licenses and does not install the computer program or take possession of it in Texas, use tax is due only on the individual licenses subsequently used in Texas. Finally, the proposed amendments implement legislation enacted in 2015, which created a resale exemption for computer programs sold by Internet hosting providers under certain circumstances.

URL: <http://www.sos.texas.gov/texreg/pdf/backview/0630/0630prop.pdf>

The Comptroller is requesting written comments on this proposed rule within 30 days from publication of its proposal; please contact us with any questions.

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Indirect/Sales/Use:

Washington: Governor Expected to Sign Bill with Expanded Economic Nexus Provisions, as well as Information Reporting and Notice Requirements on Some Remote Sellers, Including Marketplace Facilitators

H.B. 2163, passed by House and Senate 6/30/17. Governor Jay Inslee is expected to sign legislation that extends “economic nexus” for state business and occupation (B&O) taxes to persons engaged in retail sales so long as the retailer has more than \$267,000 in receipts from Washington or at least 25% of the retailer’s total property, payroll or total receipts are in Washington during the current or immediately preceding calendar year.

URL: <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/2163.PL.pdf#page=1>

This legislation additionally mandates that certain out-of-state remote sellers, marketplace facilitators and referrers meeting specified “economic nexus” statutory criteria remit Washington sales or use tax on their sales to in-state customers beginning January 1, 2018, or else choose to comply with new information reporting and consumer notice requirements – including substantial penalties for noncompliance. For such purposes, the legislation generally defines a “marketplace facilitator” as a person that contracts with sellers to facilitate, for consideration, regardless of whether

it is deducted as fees from a transaction, the sale of the seller's products through a catalog, or a physical or electronic marketplace, and engages:

- Directly or indirectly, through one or more affiliated persons in: transmitting or otherwise communicating an offer and acceptance between the buyer and seller; owning or operating the infrastructure (electronic or physical) that brings buyers and sellers together; providing virtual currency; or software development or research and development related to the electronic or physical marketplace; and
- In any of the following activities with respect to sellers or producers: payment processing services; fulfillment or storage services; listing for sale for consideration; setting prices; branding sales as those of the marketplace facilitator; order taking; advertising or promotion; or providing customer service and assistance with returns and exchanges.

A "referrer" generally is defined as a person who contracts or otherwise agrees with a seller to list or advertise for sale items in any medium, receives a commission, fee, or other consideration from a seller for listing or advertising, transfers a potential purchaser to a seller or an affiliated person to complete the sale, and does not collect receipts from the purchasers for the transaction. A referrer generally does *not* include a newspaper or a newspaper publisher *nor* does it include a person that provides Internet advertising services and does not ever provide either the marketplace seller's shipping terms or advertise whether a marketplace seller charges sales tax.

See forthcoming Multistate Tax Alert for more details on this legislation, as well as related taxpayer considerations.

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Transfer:

California Supreme Court Holds Documentary Transfer Tax May Apply to Transfers of Legal Entity Interests

Case No. S222329, Cal. (6/29/17). The California Supreme Court recently affirmed that California's "Documentary Transfer Tax" (DTT) may be imposed under Cal. Rev. & Tax. Code Section 11911 when a transfer of an interest in a legal entity results in a change in ownership of real property within the meaning of Cal. Rev. & Tax. Code Section 64(c) or (d), so long as there is a written instrument reflecting a sale of the property for consideration. Contrary to the taxpayer's contentions in this case, the California Supreme Court essentially held that "a written instrument conveying an interest in a legal entity that owns real property may be taxable, even if the instrument does not directly reference the real property and is not recorded."

[URL: http://www.courts.ca.gov/opinions/documents/S222329.PDF](http://www.courts.ca.gov/opinions/documents/S222329.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>

No new alerts were issued this period. Be sure to refer to the archives to ensure that you are up to date on the most recent releases.

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36 USC 220506