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## Articles:
## Enterprise zones: A comparison of EZ programs in Illinois, Indiana, and Wisconsin

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 Linda Bonelli and John Casey of Deloitte Tax LLP, and provides an overview of the respective enterprise zone (EZ) programs in Illinois, Indiana, and Wisconsin, as well as highlights some of the more notable differences.
**URL:** https://www2.deloitte.com/us/en/pages/tax/articles/enterprise-zones-a-comparison-of-ez-programs-in-illinois-indiana-and-wisconsin.html?id=us:2em:3na:stm:awa:tax:081817

## Amnesty/Voluntary Disclosure:
## MTC National Nexus Program Adds 2 More Participating States to "Online Marketplace Seller Voluntary Disclosure Initiative"

*Online Marketplace Seller Voluntary Disclosure Initiative*, Multistate Tax Comm., Nexus Program (8/17). The Multistate Tax Commission (MTC) National Nexus Program has added two more states (Florida and Tennessee) to the list of participating states in its special limited-time voluntary disclosure initiative that began on August 17, 2017, and will run through October 17, 2017. This program generally is being made available to online sellers that have nexus with a participating state as a result of having inventory located in a fulfillment center or warehouse in that state operated by a defined "marketplace provider/facilitator" or from other nexus-creating activities of a marketplace provider/facilitator in the state. Under this program, qualifying participants generally must prospectively collect and remit applicable sales and use taxes, as well as file and pay any appropriate corporate income and franchise taxes, in exchange for waiver of back tax liabilities, penalties, and interest in that state.
**URL:** http://www.mtc.gov/Nexus-Program/Online-Marketplace-Seller-Initiative

Besides Florida and Tennessee, other states that appear to be participating in this program include: Alabama, Arkansas, Colorado, Connecticut, Idaho, Iowa, Kansas, Kentucky, Louisiana, Nebraska, New Jersey, Oklahoma, South Dakota, Texas, Utah, Vermont, and Wisconsin. Most states participating in this special time-limited voluntary disclosure initiative have agreed, for eligible taxpayers meeting specified criteria, to waive sales/use and income/franchise back tax liability, including penalties and interest, for prior tax periods, *without regard to any lookback period*, provided the taxpayer registers as a seller or retailer to collect, report and remit sales/use tax and commences to file sales/use tax returns and remit sales/use tax as of the effective date set forth in the voluntary disclosure agreement; and if the taxpayer is subject to income/franchise tax, the taxpayer commences filing income/franchise tax returns and paying tax due, commencing with the tax year that includes the effective date of the voluntary disclosure agreement.

See *State Tax Matters*, Issue 2017-32, for more details on this program and its eligibility criteria, and please contact us with any questions.
**URL:** http://newsletters.usdbriefs.com/2017/Tax/STM/170811_2.html

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## Amnesty / Voluntary Disclosure:
## Rhode Island Division of Taxation Announces that it Will Accept Applications for Recently Enacted Amnesty Program Beginning December 1

*Summary of Legislative Changes*, R.I. Div. of Tax. (8/8/17). Pursuant to recently enacted legislation [H.B. 5175; see *State Tax Matters*, Issue 2017-32, for more details on this new law] that requires the Rhode Island Division of Taxation (Division) to establish a tax amnesty program that must be conducted for a 75-day period ending on February 15, 2018, and which generally will be open to eligible taxpayers owing any tax (including state corporate income and sales/use taxes) imposed by the Division, the Division has announced that it will begin accepting applications for this program on December 1, 2017. The Division further explains that this amnesty program will apply to any taxable period ending on or before December 31, 2016, and that accepted eligible participants generally will receive a waiver of all related penalties and a reduction of the applicable interest rate "by 25 percent." To illustrate the calculation of this reduced interest, the Division provides the following example: the interest rate of 18 percent in effect for calendar year 2016 would be reduced by 4.5 percentage points, to 13.5 percent. Additionally, the Division explains that this tax amnesty will be open to any taxpayer who pays the tax and interest due upon filing the amnesty tax return, or who enters into a *bona fide* installment payment agreement for reasons of financial hardship (provided that the installment payment agreement is for a short term).
**URL:** http://www.tax.ri.gov/reports/Summary%20of%20Legislative%20Changes%20--%2008-08-17.pdf
**URL:** http://webserver.rilin.state.ri.us/BillText/BillText17/HouseText17/H5175Aaa.pdf
**URL:** http://newsletters.usdbriefs.com/2017/Tax/STM/170811_4.html

This issued guidance also explains other provisions contained in H.B. 5175, including Rhode Island's conformity of its corporate income tax estimated tax payment requirements to federal income tax law for taxable years beginning after December 31, 2017, and new Rhode Island sales and use tax registration and/or notice and reporting requirements for non-collecting retailers, retail sale facilitators, and referrers.

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## Income / Franchise:
## Arkansas Administrative Ruling Holds that Proceeds from Sales of Excess Tax Credits Constitute Apportionable Business Income

*Administrative Dockets No. 17-396*, Ark. Dept. of Fin. & Admin., Office of Hearings & Appeals (8/7/17). The Arkansas Department of Finance and Administration's Office of Hearings and Appeals (OHA) held that a taxpayer's proceeds from its sales of excess tax credits to other companies constituted apportionable business income for state corporate income tax purposes under the functional test, because the credits were integral parts of the taxpayer's business and the proceeds had materially contributed to its production of business income. The OHA reasoned that selling credits was not a new phenomenon for the taxpayer, which operated as a products and parts distributor, and that the same office within its organization that had managed the sales of these credits also managed the underlying programs that

had generated and obtained the credits. In this respect, such streamlined management served as an indicator of how "interwoven" the selling of the taxpayer's credits were and in fact constituted a "seamless part" of that office's daily activity. The facts also showed that the taxpayer had actively managed the credits since 2011, and had sold excess credits since the first year it was eligible to do so, which demonstrated the requisite control and/or direction on the use of such property. The taxpayer had unsuccessfully argued that under a narrow interpretation of the functional test, the facts failed to show integral acquisition, integral management, and integral disposition with respect to the distributor's sales of excess tax credits to other companies.
**URL:** https://www.ark.org/dfa-act896/index.php/api/document/download/17-396.pdf

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## Income/Franchise:
## California FTB Issues Draft Proposed New Pass-Through Entity Withholding Regulation

*DRAFT Proposed Regulation Section 18662-7 – Withholding on Domestic Pass-Through Entities*, Cal. FTB (8/17). For purposes of facilitating discussion at the California Franchise Tax Board (FTB)'s upcoming interested parties meeting (IPM) scheduled for September 8, 2017, the FTB has issued a draft of proposed language for a new rule, California Regulation Section 18662-7, that would address domestic pass-through entity withholding requirements. As currently drafted, the FTB's proposal would require pass-through entities to withhold tax on behalf of a nonresident owner based on that owner's distributive share of the pass-through entity's California source income, rather than withhold on distributions paid. The withholding rate that applies depends on whether the nonresident owner is an individual, corporation, S corporation, or an upper-tier pass-through entity other than an S corporation as defined under the proposed regulation.
**URL:** https://www.ftb.ca.gov/law/regs/18662-7/09082017-Draft-Language.pdf

Handouts for this upcoming IPM include this draft language, an accompanying explanation of the draft language, and related diagrams. The FTB has also indicated that written comments may be submitted at the IPM, or otherwise may be provided to the FTB by October 6, 2017 – stating that "all written and oral comments will be considered without attribution."

See forthcoming Multistate Tax Alert for more details on this proposal, as well as some related taxpayer considerations. In the meantime, for more information or questions, please reach out to any of the following individuals listed below.

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## Income/Franchise:
## Minnesota Tax Court Holds that Taxpayer May Apply NOL Carryovers from an Acquired Entity to Full Extent Permitted under IRC § 382

*Case No. 8919-R*, Minn. Tax Ct. (8/11/17). The Minnesota Tax Court (Court) recently held in favor of the taxpayer and granted its motion for summary judgment, holding that state law (specifically, Minn. Stat. § 290.095, subd. 3(d)) permits the taxpayer to apply net operating loss (NOL) carryovers from an acquired corporation against its net income to the full extent permitted under Internal Revenue Code (IRC) § 382, "before apportionment" for state franchise tax purposes – thereby rejecting the Minnesota Department of Revenue (Department)'s "alternative interpretation" that also subjected such NOL carryover amounts to apportionment. In doing so, the Court explained that the Department's approach "produced a radically sharper restriction upon the use of acquired NOLs than that required or authorized" by Minn. Stat. § 290.095, subd. 3(d), which ran contrary to the legislative intent of this statute "to protect taxpayers against the loss of favorable tax attributes."
**URL:** https://mn.gov/tax-court-stat/published%20orders/2017/Sinclair%20Broadcast%20Group%20v%20COR%2008-11-17.pdf

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## Income/Franchise:
## North Carolina: New Law Includes Changes to Intercompany Expense "Addback" Statute; Added Franchise Tax Base Deduction; and Definition of Business Income

*S.B. 628*, signed by gov. 8/11/17. Applicable for taxable years beginning on or after January 1, 2017, new law makes some revisions to computing North Carolina's related member interest expense "addback" for state corporate income tax purposes, including a provision stating that for purposes of determining whether a nominal debt instrument creates allowable deductible interest, the North Carolina Department of Revenue (Department) "will not apply the covered debt instrument rules contained in the regulations promulgated" under IRC Section 385. Applicable for taxable years beginning on or after January 1, 2020, and applicable to the calculation of state franchise tax reported on the 2019 and later state corporate income tax returns, the new law also allows some taxpayers a deduction from their North Carolina tangible property tax base for any indebtedness specifically incurred, and existing solely for, and as the result of the purchase of any real estate and any permanent improvements made on the real estate. Note that such state franchise tax liability is generally equal to the greatest of i) the taxpayer's apportioned net worth; ii) 55% of the appraised value of the taxpayer's North Carolina real and tangible property as determined for ad valorem taxation; or iii) the taxpayer's total actual investment in tangible property in North Carolina.
**URL:** http://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S628v7.pdf

Applicable for taxable years beginning on or after January 1, 2017, this new law also defines "apportionable income" as all income that is apportionable under the US Constitution, including income that arises from either of the following:

- Transactions and activities in the regular course of the taxpayer's trade or business; or
- Tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business.

This new law additionally makes some technical corrections and clarifications to legislation enacted earlier this year [S.B. 257; see previously issued Multistate Tax Alert for more details on this new law] involving reduced business tax rates, as well as provides for consequences of a taxpayer's "inaction"/failure to respond to a Department request for additional information involving the taxpayer's request for review of a proposed denial of a tax refund or a proposed tax assessment.
**URL:** http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2017&BillID=sb257&submitButton=Go
**URL:** https://www2.deloitte.com/us/en/pages/tax/articles/north-carolina-tax-legislation-enacted.html?id=us:2em:3na:stm:awa:tax:081817

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## Income/Franchise:
## Texas Court of Appeals Upholds Subcontractor Exclusion While Reversing & Remanding on Taxpayer's COGS Methodology

*Case No. 03-16-00250-CV*, Tex. Ct. App. (8/11/17). A Texas Court of Appeals (Court) recently upheld a trial court decision permitting a taxpayer primarily engaged in the business of surveying, manufacturing, upgrading, and repairing drilling rigs to exclude subcontractor payments from its revenue for Texas franchise tax purposes. However, the Court reversed and remanded on the issue of allowable Texas cost of goods sold (COGS) items based on the taxpayer's use of federal COGS as its starting point for its Texas franchise tax COGS deduction. Instead, the taxpayer was required to use a cost-by-cost analysis to determine whether a cost was eligible for inclusion in the Texas COGS deduction.
**URL:** http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=85ff5c0a-5a6f-4366-8663-71cb6b96557f&coa=coa03&DT=Opinion&MediaID=5b2f991d-9fbc-4b31-a093-1742981b6fe8

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

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## Indirect/Sales/Use:
## Michigan Court of Appeals Holds that Certain Additional Minutes Purchased on Prepaid Wireless Arrangements are Not Taxable

*Case No. 333094*, Mich. Ct. App. (8/8/17). The Michigan Court of Appeals (Court) recently reversed in part a Michigan Tax Tribunal ruling, holding that under the current statutory language of MCL 205.52(2)(b), certain "PINless top-up minute" sales are *not* subject to state sales tax because they do not involve the sale of a telephone calling card or authorization number for telephone use, nor do they involve the reauthorization of a telephone calling card or authorization number. The case generally involved sales of wireless calling arrangements for prepaid cellphones, including "PINless top-up minutes" and electronic personal identification numbers (EPINs) – both sold via an entirely

electronic system where no traditional phone cards are necessary. Generally, PINless top-up minutes allow an individual to automatically add minutes to a prepaid cellphone via wireless download upon completion of payment, whereas an EPIN customer refills minutes on a prepaid cellphone only after entering a personal identification number (PIN) into the actual cellphone. To purchase PINless top-up minutes, a customer provides a cellphone number to the seller, who in turn enters that number and the amount of the purchase into a credit-card-type terminal. After the seller presses "enter," the terminal prints out a receipt reflecting the transaction amount, including a reference number on the receipt. The additional minutes purchased are then wirelessly downloaded to the customer's cellphone and are available immediately; the receipt is given to the customer, who may need the reference number in the event there is a problem with the service. The Court agreed with the Michigan Tax Tribunal that the EPIN transactions constitute taxable sales of prepaid authorization numbers for telephone use under MCL 205.52(2)(b), because the EPIN represents a prepaid account used by the owner to access the purchased telephone services associated with the EPIN. However, the Court explained that because no sale of a prepaid authorization number occurs when a customer purchases PINless top-up minutes, such sales are *not* taxable under MCL 205.52(2)(b) – "stated differently, a purchaser of a PINless top-up purchases additional prepaid telephone services without any concomitant purchase of an authorization number necessary to access the purchased service." The Court additionally noted that if the Michigan Legislature wants to tax the sale of such PINless services, "then it must amend the statute to do so." Please contact us with any questions.
**URL:** http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20170808_C333094_26_333094.OPN.PDF

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## Indirect / Sales / Use:
## New York: Memo Explains Recent Law Changes on Transactions Involving TPP Resold Between Certain Related Entities

*TSB-M-17(4)S*, N.Y. Dept. of Tax. & Fin. (8/14/17). A recently issued state sales and use tax memorandum explains legislation enacted earlier this year [see previously issued Multistate Tax Alert for more details on this Budget legislation] that attempts to close perceived "tax loopholes" for transactions between related entities by revising the definition of a "retail sale" to generally include transfers of tangible personal property to certain entities when the property is resold to a related person or entity. More specifically, this memo addresses how sales tax applies to transactions between certain related entities, and the now more narrowed exclusion from state use tax for purchases made outside New York by nonresident businesses. Numerical examples are included in this new guidance. Please contact us with any questions.
**URL:** https://www.tax.ny.gov/pdf/memos/sales/m17_4s.pdf
**URL:** https://www2.deloitte.com/us/en/pages/tax/articles/new-york-2017-2018-state-budget-bill-enacted.html?id=us:2em:3na:stm:awa:tax:081817

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## Indirect/Sales/Use:
## Washington DOR Reissues Emergency Amended B&O Tax Rule on Financial Institution Apportionment to Conform with MTC Changes

*Emergency Amended WAC 458-20-19404*, Wash. Dept. of Rev. (eff. 8/22/17). The Washington Department of Revenue (Department) has reissued its emergency amended administrative rule addressing how financial institutions must apportion gross income for state business and occupation (B&O) tax purposes when they engage in business both within and outside of Washington. These emergency amendments are issued pursuant to state law authorizing the Department to adopt financial institution apportionment rules that are consistent with the model adopted by the Multistate Tax Commission (MTC). Accordingly, the Department explains, its administrative rule has been amended on an emergency basis to remain consistent with the MTC's change in its model method of apportionment for financial institutions, which became effective for tax years starting on or after January 1, 2016.
**URL:** http://dor.wa.gov/Docs/Rules/draft/20-19404cr3efrmdraftAug2017.pdf

Note that a similar proposal for a permanent version of these rule amendments is pending, with written comments on the proposal due by September 13, 2017 – which is also the date of the related rulemaking hearing. Please contact us with any questions.

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## Transfer:
## California Supreme Court Denies Rehearing in Recent Case Involving Taxation of a Transfer of Legal Entity Interests

*Case No. S222329*, Cal. (petition for rehearing denied 8/9/17). The California Supreme Court (Court) has denied the taxpayer's request for rehearing in a case in which the Court recently affirmed that California's "Documentary Transfer Tax" 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 Court essentially had 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." See previously issued Multistate Tax Alert for more details on this earlier decision, as well as related taxpayer considerations.
**URL:** http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2091836&doc_no=S222329
**URL:** https://www2.deloitte.com/us/en/pages/tax/articles/ca-supreme-court-documentary-transfer-tax-may-apply-to-transfers-of-legal-entity-interests.html?id=us:2em:3na:stm:awa:tax:081817

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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

**AB 398 Expands California's Partial Sales and Use Tax Exemption**
On July 25, 2017, California Governor Jerry Brown signed Assembly Bill (AB) 398. While the centerpiece of the legislation was to extend California's cap-and-trade emissions control program through 2030, it also expands California's partial sales and use tax exemption (unchanged at 3.9375% resulting in taxation at a rate of 3.3125% plus applicable district taxes) currently available for manufacturing and research and development to include, with some limitations, electric power generation and agricultural businesses, effective January 1, 2018.

Additionally, AB 398 clarifies that tangible personal property with a useful life of one year or more that is expensed for California income/franchise tax purposes is included in the scope of eligible property. Companies that were denied refunds or the partial exemption under audit due to the prior requirement that qualified property be capitalized must notify the California Department of Tax and Fee Administration on or before June 30, 2018.

AB 398 also extends the sunset date of the partial sales and use tax exemption for all qualified taxpayers through June 30, 2030 (previously set to expire in 2022.)

This Multistate Tax Alert summarizes the elements of AB 398 affecting the partial sales and use tax exemption, as well as provides some taxpayer considerations.
[Issued August 16, 2017]
**URL:** https://www2.deloitte.com/us/en/pages/tax/articles/ab-398-expands-californias-partial-sales-and-use-tax-exemption.html?id=us:2em:3na:stm:awa:tax:081817