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Income/Franchise:
Colorado: Amended Regulations Address Combined and Consolidated Filing, Apportionment

Amended Regulations 39-22-303(11)(c); 39-22-305, Colo. Dept. of Rev. (eff. 9/14/17). The Colorado Department of Revenue has issued administrative rule amendments intended to clarify how an affiliated group required to file a Colorado combined corporate income tax report or choosing to file a Colorado consolidated corporate income tax return must apportion and allocate their income if the commercial activities of the affiliated group require the use of

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more than one apportionment methodology – specifically how to combine multiple apportionment methodologies. The amendments include a presumption stating that a commercial activity is conclusively *de minimis* if the sum of the gross sales of that commercial activity that requires the use of a different apportionment methodology amounts to less than 1% of the taxpayer's total gross sales; in such cases, the taxpayer must apportion the income from the *de minimis* activity in the same ratio that it apportions its gross sales pursuant to the sales factor for the remainder of the commercial activity. The amendments additionally state that a commercial activity that requires the use of a different apportionment methodology may be *de minimis* if the gross sales of the commercial activity amounts to less than 5% of the taxpayer's total gross sales. Another rule amendment attempts to clarify the process for both making and withdrawing a state consolidated return election.
URL: http://www.sos.state.co.us/CCR/RegisterPdfContents.do?publicationDay=08/25/2017

Please contact us with any questions.

— Greg McClure (Denver)
Managing Director
Deloitte Tax LLP
grmcclure@deloitte.com

Lance Williams (Denver)
Managing Director
Deloitte Tax LLP
lancwilliams@deloitte.com

Shona Ponda (New York)
Senior Manager
Deloitte Tax LLP
sponda@deloitte.com

Income/Franchise:
Massachusetts DOR Issues Technical Information Release on Policy Change Regarding Treaty-Exempt Income

Technical Information Release, TIR 17-7: Non-US Corporation with US Income Exempt from US Tax Pursuant to a Bilateral US Income Tax Treaty, Mass. Dept. of Rev. (8/25/17). The Massachusetts Department of Revenue (Department) has issued a technical information release (TIR 17-7) announcing a change in its policy regarding the calculation of the non-income measure by a non-US corporation subject to tax in Massachusetts that has one or more items of income that is exempt from federal income tax pursuant to the provisions of a bilateral US income tax treaty ("treaty-exempt income") – explaining that while treaty-exempt income previously has been excluded from the computation of such corporation's apportionment percentage for the income measure of Massachusetts tax, such treaty-exempt income is also now excluded from the computation of the corporation's separate company apportionment percentage for the non-income measure of Massachusetts tax.
URL: http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2017-releases/tir-17-7.html

TIR 17-7 is intended as a revision and restatement of TIR No. 10-16, amending sections IV and V with respect to the calculation of the non-income measure of the state corporate excise tax by a non-US corporation consistent with 830 CMR 63.38.1 as amended in 2014, which provides that any receipts, property or payroll related to items excluded from a corporation's federal gross income are excluded from the computation of the corporation's apportionment percentage for Massachusetts corporation excise tax purposes.

In TIR 17-7, the Department states it will apply these announced policy changes "going forward and to all open taxable years within the statute of limitations for assessment or abatement." The Department additionally notes that TIR No. 10-16 was issued to explain a 2010 statutory change made to the Massachusetts combined reporting statute, G.L. c. 63, § 32B, applying in the instance where a "water's edge" combined group includes a non-US corporation that has one or more items of treaty-exempt income. The 2010 statutory change, like the combined reporting statute itself, was effective for taxable years beginning on or after January 1, 2009.

Please contact us with any questions or comments.

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— Bob Carleo (Boston)
Managing Director
Deloitte Tax LLP
rcarleo@deloitte.com

Alexis Morrison-Howe (Boston)
Senior Manager
Deloitte Tax LLP
alhowe@deloitte.com

Income/Franchise:
Oregon Tax Court Explains that Only Direct Costs are Relevant in Determining Where Greater Proportion of Costs of Performance was Incurred

TC-MD 150352C, Or. Tax Ct. (8/24/17). In a state corporate income tax case involving the apportionment of tuition income generated from the taxpayer's provided online courses, the Magistrate Division of the Oregon Tax Court (Magistrate) held that for purposes of determining where the greater proportion of the taxpayer's costs of performance was incurred only the underlying faculty costs constituted the "incremental costs" or "direct costs" to be used in determining the sourcing location and calculating the sales factor numerator. While the Magistrate agreed that for purposes of Or. Rev. Stat. Sec. 314.665(4), the "income-producing activity" of providing such courses from the taxpayer's "online campus" was composed of faculty, curriculum development, and select "eCampus activities," it explained that under Or. Admin. Rule Sec. 150-314-0435(4), the only relevant costs of performance are the "direct costs" incurred "to perform the income producing activity that gives rise to the particular item of income." The taxpayer had unsuccessfully argued that various other underlying costs associated with the online course tuition income should be considered in making the sales factor sourcing determination.
URL:
https://web.courts.oregon.gov/Tax/taxdocs.nsf/($All)/7834C8514C169DE48825818600572110/$File/150352CApolloEducationFinalDE.pdf

Note that legislation recently enacted in Oregon [S.B. 28; see previously issued Multistate Tax Alert for more details on this legislation] replaces the state's current cost-of-performance apportionment methodology for sales of items other than tangible personal property with market-based sourcing, effective for tax years beginning on or after January 1, 2018.
URL: https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB28/Enrolled
URL: https://www2.deloitte.com/us/en/pages/tax/articles/oregon-governor-signs-market-sourcing-legislation.html?id=us:2em:3na:stm:awa:tax:090117

Please contact us with any questions.

— Scott Schiefelbein (Portland)
Managing Director
Deloitte Tax LLP
sschiefelbein@deloitte.com

Shona Ponda (New York)
Senior Manager
Deloitte Tax LLP
sponda@deloitte.com

Indirect/Sales/Use:
Indiana Attorney General Responds to Suit Filed by Trade Groups Regarding Enforcement of New Remote Seller Economic Nexus Law

On August 28, 2017, the Indiana Attorney General submitted a response to a suit filed on June 30, 2017 by a pair of trade groups representing Internet and catalog vendors in an Indiana superior court, which sought action for declaratory judgment and challenged the constitutionality of newly enacted legislation [H.B. 1129; see *State Tax Matters*, Issue 2017-18 for more details on this new law] – asking the court to declare such new law as valid and adding certain third-party retailers to this suit. Effective July 1, 2017, this new law generally requires the collection of Indiana gross retail tax for sellers of tangible personal property, electronically transferred products, or services on such sales into Indiana if, in the previous or current calendar year, i) the seller's sales into Indiana exceed $100,000, or ii) the seller had 200 or more separate transactions into Indiana.
URL: https://iga.in.gov/legislative/2017/bills/house/1129
URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170505_7.html

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Note that similar to legislation that was enacted in South Dakota in 2016 [see previously issued *Multistate Tax Alert* for more details on this previously enacted South Dakota legislation] and which is currently pending review before the South Dakota Supreme Court, the new Indiana law authorizes the Indiana Department of Revenue (Department) to bring action to obtain a declaratory judgment providing that such obligation for tax remission by an out-of-state seller lacking an in-state "physical presence" is valid under state and federal law – which also operates as an injunction during the pendency of the action generally prohibiting the Department from enforcing this gross retail tax collection obligation on remote sellers that do not affirmatively consent or otherwise remit gross retail tax on a voluntary basis.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-south-dakota-enacts-sb-106-physical-presence-no-longer-required-for-sales-tax-collection.html?id=us:2em:3na:stm:awa:tax:090117

According to the initial filed complaint, the plaintiffs in this case are seeking for the Indiana superior court to:

- Enter a declaration that H.B. 1129 is unconstitutional and unenforceable on its face;
- Enter judgment for the plaintiffs;
- Enjoin enforcement of H.B. 1129;
- Award the plaintiffs their attorneys' fees and costs; and
- Grant such further relief as the court deems just and proper.

Please contact us with any questions.

— Robyn Staros (Chicago)
Senior Manager
Deloitte Tax LLP
rstaros@deloitte.com

Amanda Suasnabar (Indianapolis)
Managing Director
Deloitte Tax LLP
asuasnabar@deloitte.com

Shona Ponda (New York)
Senior Manager
Deloitte Tax LLP
sponda@deloitte.com

Dwayne Van Wieren (Los Angeles)
Partner
Deloitte Tax LLP
dvanwieren@deloitte.com

Indirect/Sales/Use:
New Jersey: Limited-Time Voluntary Disclosure Program for Out-of-State Sellers Having Click-Through Nexus Runs through November 21

Notice: New Jersey Offers Voluntary Disclosure Program to Out-of-State Sellers with Customer Referral Agreements, N.J. Div. of Tax. (8/17). The New Jersey Division of Taxation (Division) is offering a voluntary disclosure program to help certain out-of-state businesses comply with state sales and use tax law provisions that went into effect in 2014. This 2014 legislation applies to certain out-of-state sellers (retailers, service providers and other businesses) that reach agreements with businesses located in New Jersey for referrals of New Jersey customers; such sellers may not have a physical presence in New Jersey, but state law may consider them to be soliciting in New Jersey because of their referral agreements – thus requiring them to register in New Jersey and collect and remit New Jersey sales and use tax if they meet all criteria in the 2014 law. Under this voluntary disclosure program that began on August 21, 2017 and ends on November 21 2017, businesses have the ability to enter into an agreement with the Division and comply with the state sales and use tax law registration and reporting requirements based on the following terms:
URL: http://www.state.nj.us/treasury/taxation/pdf/VDAoutstatesellers.pdf

- The taxpayer must file any required returns for the two quarters between January 1, 2017, and June 30, 2017; all prior periods will be considered closed;
- The Division will waive all penalties;
- New Jersey will assess statutory interest (prime rate plus 3% as applicable to each period at issue);
- Within 45 days of the execution of an agreement with the Division, taxpayers will register with the New Jersey Division of Revenue and Enterprise Services using New Jersey Business Code "O/S SELLER 5000;" they will electronically file quarterly state sales and use tax returns (ST-50), report all sales subject to New Jersey sales tax, and remit payment of the tax due;
- The taxpayer will pay statutory interest within 30 days of filing the state sales and use tax returns; and

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- Participants in the initiative must not have been contacted by the Division regarding state sales and use tax compliance.

Please contact us with any related questions.

— Norm Lobins (Parsippany)
Managing Director
Deloitte Tax LLP
nlobins@deloitte.com

Mike Bryan (Philadelphia)
Managing Director
Deloitte Tax LLP
mibryan@deloitte.com

Stephanie Csan (Parsippany)
Managing Director
Deloitte Tax LLP
scsan@deloitte.com

Indirect/Sales/Use:
Rhode Island Division of Taxation Explains New Information Reporting & Notice Requirements on Some Remote Sellers, Including Marketplace Facilitators

Non-collecting retailers, referrers, and retail sales facilitators, R.I. Div. of Tax. (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 imposes new Rhode Island sales and use tax registration and/or notice and reporting requirements for some non-collecting retailers, retail sale facilitators, and referrers, the Rhode Island Division of Taxation (Division) has released additional details and related forms to help implement this new law. The Division explains that defined “non-collecting retailers” must – beginning August 17, 2017 – register with the Division for a permit to make sales at retail and collect and remit state sales and use tax on all taxable sales into Rhode Island, or else implement certain notice requirements. Defined “referrers” must – beginning August 17, 2017 – notify retailers that their sales may be subject to Rhode Island sales and use tax, while defined “retail sale facilitators” may have certain filing requirements beginning January 15, 2018. In summarizing these various new compliance requirements via table format, the Division also notes the following two points:
URL: http://www.tax.ri.gov/Non-collecting%20retailers/index.php
URL: http://webserver.rilin.state.ri.us/BillText/BillText17/HouseText17/H5175Aaa.pdf
URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170811_9.html

- A “convenient way” to collect and remit Rhode Island sales and use tax is through a Certified Service Provider (CSP) under the auspices of the Streamlined Sales and Use Tax Agreement (SSUTA).
- A “quick and easy way” to register for a sales and use tax account in all Streamlined member states, including Rhode Island, is through the Streamlined Sales Tax Registration System (SSTRS) – stating that once registered in this way, “you will automatically be registered in Rhode Island and can begin collecting and remitting tax; you will not receive a separate notification of your Rhode Island registration.”

Please contact us with any questions or comments.

— Jack Lutz (Hartford)
Managing Director
Deloitte Tax LLP
jacklutz@deloitte.com

Inna Volfson (Boston)
Senior Manager
Deloitte Tax LLP
ivolfson@deloitte.com

Shona Ponda (New York)
Senior Manager
Deloitte Tax LLP
sponda@deloitte.com

Dwayne Van Wieren (Los Angeles)
Partner
Deloitte Tax LLP
dvanwieren@deloitte.com

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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

Seattle High-Income Resident Income Tax Enacted

On July 10, 2017, the Seattle City Council unanimously approved Council Bill 119002, a city ordinance imposing an income tax on high-income Seattle residents. Seattle Mayor, Ed Murray, signed the ordinance into law on July 14, 2017, which includes the following provisions:

- Levies a 2.25% tax on individual and trust total income in excess of $250,000 ($500,000 for married individuals filing jointly).
- Provides a credit for income taxes paid to another state or local government.
- Persons who do not have a domicile in the city or persons who maintain a permanent place of abode in the city but spend 183 days (or partial days) of the tax year in the city or less, are not subject to the Seattle income tax.
- The tax will apply to Seattle resident individual and trust income received after January 1, 2018. The ordinance provides that payments are due on April 15 of the year following the tax year, and there are no provisions requiring withholding or estimated payments.
- Imposes a penalty of $250 for failure to file a tax return by the due date and a penalty of 1% of the remaining tax balance per month, or fraction of a month, for failure to pay all owed taxes by the due date.

This Multistate Tax Alert provides an overview of Council Bill 119002, as well as pending legal challenges.
[Issued August 24, 2017]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/seattle-high-income-resident-income-tax-enacted.html?id=us:2em:3na:stm:awa:tax:090117

Texas Appellate Court Upholds Subcontractor Exclusion While Reversing and Remanding on COGS Methodology

On August 11, 2017, the Texas Third Court of Appeals, Austin upheld an earlier decision by the 201st Travis County District Court, which found that Gulf Copper & Manufacturing Corporation was entitled to exclude certain subcontractor payments from its revenue under former Texas Tax Code § 171.1011(g)(3). However, the Court of Appeals reversed and remanded on the issue of allowable Texas cost of goods sold (COGS) items based on Gulf Copper's use of federal COGS as the starting point for its Texas franchise tax COGS deduction. Instead, the Court of Appeals found Gulf Copper was required to use a cost-by-cost analysis to determine whether a cost was eligible for inclusion in the Texas COGS deduction.

This Multistate Tax Alert summarizes the decisions of both the District Court and Court of Appeals, as well as offers some taxpayer considerations.
[Issued August 28, 2017]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/tx-appellate-court-upholds-subcontractor-exclusion-while-reversing-and-remanding-on-cogs-methodology.html?id=us:2em:3na:stm:awa:tax:090117

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