



In this issue:

Articles: Examining the Potential Tax Implications of Streaming Video Distribution.....	2
Income/Franchise: Alabama: Appellate Court Affirms that Certain Separate Company NOL Carryforwards Can Be Claimed on Consolidated Return	2
Income/Franchise: Delaware: New Law Includes Retroactive Tax Law Changes for Series Captive Insurance Companies.....	2
Income/Franchise: Illinois Tax Tribunal Holds that Insurance Premium Financing Subs Must File as Part of Combined Return for Financial Organizations.....	3
Income/Franchise: Mississippi: New Law Allows Department of Revenue to Contract with Third-Party Auditors on a Contingent Fee Basis	4
Income/Franchise: Montana: Proposed Regulations Reflect Recent Law Changes that Expand Waiver of Composite Return or Withholding for Domestic 2nd-Tier Pass-Through Entities	4
Income/Franchise: Once Again, Pennsylvania Trial Court Finds Net Operating Loss Cap is Unconstitutional	4
Income/Franchise: Tennessee DOR Issues Chart and Examples Depicting Apportionment Calculations Under Various Elections.....	5
Income/Franchise: Virginia Circuit Court Denies Alternative Apportionment Request; Upholds Validity of Standard Cost-of-Performance Method to Apportion Income from Subscription-Based Services	5
Indirect/Sales/Use: Massachusetts DOR Finalizes New Regulation Adopting “Bright Line” Nexus for Some Remote Sellers.....	6
Indirect/Sales/Use: Ohio: Proposed Amended Rule Addresses Bad Debts, Assignment of Accounts Receivables, & Financing Companies	7
Multistate Tax Alerts	7

Articles:

Examining the Potential Tax Implications of Streaming Video Distribution

Competitive pressures have prompted media and entertainment companies to sprint toward the next innovation, including new over-the-top (OTT) offerings that are often packaged, distributed, and sold in non-traditional ways. Content consumption is no longer a one-to-one transaction between a film studio or a network and a single customer. In fact, the very nature of what constitutes a transaction has shifted, which can impact the taxability of a transaction. Check out this recent article, co-authored by Stephanie Csan of Deloitte Tax LLP's multistate indirect tax practice, to learn more about the tax considerations for streaming video distribution.

URL: <https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/streaming-tax-over-the-top-tv-services.html?id=us:2em:3na:stm:awa:tax:091517>

Income/Franchise:

Alabama: Appellate Court Affirms that Certain Separate Company NOL Carryforwards Can Be Claimed on Consolidated Return

Case No. 2160412, Ala. Civ. App. (9/8/17). In a case involving whether a taxpayer's Alabama affiliated group could deduct certain net operating losses (NOLs) generated by members of the group prior to making an election to file an Alabama consolidated return, the Alabama Court of Civil Appeals (Court) recently affirmed that because the taxpayer and its subsidiaries were members of an "Alabama affiliated group" from 1999 forward under state law, the affiliated group could deduct the separate company NOLs incurred by the taxpayer in 1999 and thereafter – thus allowing the taxpayer to carry forward its separate company NOLs incurred in 1999 through 2002 and 2004 to offset the consolidated group's taxable income on its 2007 Alabama consolidated income tax return. In this respect, the Court agreed with the lower court holding that an "Alabama affiliated group" could exist under state law as of 1999 (*i.e.*, the year Alabama's consolidated filing regime was first implemented), even though the group did not actually file an Alabama consolidated return in those years. The Alabama Department of Revenue had unsuccessfully argued that Alabama's version of the federal separate return limitation year (SRLY) rule prohibited the taxpayer from sharing any NOLs incurred before the group's actual initial Alabama consolidated filing election, and that the entities at issue could not be considered an "Alabama affiliated group" until the 2007 state consolidated return was filed.

URL: <https://acis.alabama.gov/displaydocs.cfm?no=824439&event=50AOKHOOT>

Please contact us with any questions.

— Chris Snider (Miami)
Managing Director
Deloitte Tax LLP
csnider@deloitte.com

Brian Sullivan (Atlanta)
Managing Director
Deloitte Tax LLP
briansullivan@deloitte.com

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

Income/Franchise:

Delaware: New Law Includes Retroactive Tax Law Changes for Series Captive Insurance Companies

H.B. 86, signed by gov. 8/30/17. Effective immediately and applicable retroactively to June 24, 2015, new law attempts to correct an unintended consequence of legislation enacted in 2015 – which had provided for a definition of a "series captive insurance company" for Delaware gross premium insurance tax purposes and generally imposed an annual minimum aggregate tax of \$3500 for each series captive insurance company – by "preventing double taxation

of premium ceded to a series captive insurance company or protected cell.” This new law also precludes premium taxation of series limited liability companies, exclusive of any series thereof, when premium is written only in the series of such series limited liability companies.

[URL: http://legis.delaware.gov/BillDetail?legislationId=25497](http://legis.delaware.gov/BillDetail?legislationId=25497)

Please contact us with any questions.

— Kenn Stoops (Philadelphia)
Managing Director
Deloitte Tax LLP
kstoops@deloitte.com

Stacy Ip-Mo (Philadelphia)
Senior Manager
Deloitte Tax LLP
sipmo@deloitte.com

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

Income/Franchise:

Illinois Tax Tribunal Holds that Insurance Premium Financing Subs Must File as Part of Combined Return for Financial Organizations

No. 15 TT 175, Ill. Indep. Tax Trib. (9/07/17). The Illinois Tax Tribunal (Tribunal) recently granted summary judgment for the Illinois Department of Revenue (Department), holding that a company and its subsidiaries that filed three separate Illinois unitary combined corporate income tax returns (i.e., one return reported the unitary business group income for general corporations, one return reported the unitary business group income for insurance companies, and one return reported the unitary business group income for financial organizations) could *not* amend its returns to add certain companies that provided loans to businesses to finance their property and casualty insurance premium obligations on the combined return for general corporations. In doing so, the Tribunal agreed that each of the entities at issue constituted an insurance premium financing company, as defined in the Illinois Premium Finance Regulation Act, and that each qualified as a “financial organization” for purposes of Illinois income tax law because it met the definition of a sales finance company whose business income should be reported on tax returns for financial organizations under the reasoning that the purchase of insurance constitutes the purchase of a service. The taxpayer had unsuccessfully argued that such entities must be re-characterized as general corporate organizations rather than financial organizations, because they did *not* constitute financial organizations and/or sales finance companies – its contention premised on the position that the purchase of insurance is neither the purchase of tangible personal property nor a service.

[URL: https://www.illinois.gov/taxtribunal/decisions/Documents/Decisions-Rulings/15TT175.pdf](https://www.illinois.gov/taxtribunal/decisions/Documents/Decisions-Rulings/15TT175.pdf)

Note that recently enacted budget legislation [see previously issued Multistate Tax Alert for more details on this new law] repeals Illinois’ unitary business group “non-combination rule” for tax years ending on or after December 31, 2017 – that is, a unitary business group includes members that are required to use different apportionment formulas under 35 ILCS 5/204 for tax years ending on or after December 31, 2017. Accordingly, Illinois’ “non-combination rule” is now only in effect for taxable years ending before December 31, 2017. Please contact us with any questions.

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/illinois-2017-2018-state-budget-bill-enacted.html?id=us:2em:3na:stm:awa:tax:091517](https://www2.deloitte.com/us/en/pages/tax/articles/illinois-2017-2018-state-budget-bill-enacted.html?id=us:2em:3na:stm:awa:tax:091517)

— Brian Walsh (Chicago)
Managing Director
Deloitte Tax LLP
briawalsh@deloitte.com

Pat Ferrini (Chicago)
Tax Senior Manager
Deloitte Tax LLP
pferrini@deloitte.com

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

Income/Franchise:

Mississippi: New Law Allows Department of Revenue to Contract with Third-Party Auditors on a Contingent Fee Basis

S.B. 2973, signed by gov. 4/18/17. Effective July 1, 2017, new law permits the Mississippi Department of Revenue to enter into service contracts with third-parties that may be paid on a contingent fee basis, where such contracts would be for the analysis of taxes, interest, or penalties or the reduction of refunds claimed, and paid to the third-parties based on the actual amount of taxes, interest and/or penalties collected and/or the amount by which claimed refunds are reduced.

URL: <http://billstatus.ls.state.ms.us/2017/pdf/history/SB/SB2973.xml>

Please contact us with any questions.

— Amber Rutherford (Nashville)
Senior Manager
Deloitte Tax LLP
amberrutherford@deloitte.com

Todd Senkiewicz (Atlanta)
Managing Director
Deloitte Tax LLP
tsenkiewicz@deloitte.com

Income/Franchise:

Montana: Proposed Regulations Reflect Recent Law Changes that Expand Waiver of Composite Return or Withholding for Domestic 2nd-Tier Pass-Through Entities

Proposed Amended Mont. Admin. R. 42.9.106, .203, .301, .401, .501, Mont. Dept. of Rev. (9/08/17). The Montana Department of Revenue has issued proposed amended administrative rules that reflect, among other items, legislation enacted earlier this year [S.B. 252, see *State Tax Matters*, Issue 2017-19, for more details on these law changes] that generally modifies Montana's more restrictive pass-through entity withholding requirements that became in effective in 2016, by providing an additional waiver for certain pass-through entities applicable to tax years beginning after December 31, 2016. The administrative rule proposal reflects new law that generally expands the previous withholding waiver by expanding the definition of "domestic second-tier pass-through entity" to include a pass-through entity whose interest is entirely held, either directly or indirectly, by domestic C corporations or a direct or indirect combination of Montana resident individuals and domestic C corporations. Please contact us with any questions.

URL: <http://sos.mt.gov/portals/142/ARM/2017/MAR/MAR17-17.pdf?dt=1505169195272>

URL: <http://leg.mt.gov/bills/2017/billpdf/SB0252.pdf>

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170512_2.html

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

Laura Fisbeck (Denver)
Manager
Deloitte Tax LLP
lfisbeck@deloitte.com

Income/Franchise:

Once Again, Pennsylvania Trial Court Finds Net Operating Loss Cap is Unconstitutional

Case No. 73 F.R. 2011, Pa. Commw. Ct. (9/12/17). A recent Pennsylvania commonwealth court decision overruled the state's exceptions to the court's previous panel decision in the same matter [*73 F.R. 2011*, Pa. Commw. Ct. (6/15/16)], which held that the statutory cap on Pennsylvania's corporate net income tax net operating loss (NOL) carryover deduction, as applied to the taxpayer at issue, violates the Uniformity Clause of the Pennsylvania Constitution. Note that this holding is similar to a previous Pennsylvania commonwealth court decision from 2015 [see

previously issued Multistate Tax Alert for more details on the case from 2015], which is currently pending before the Pennsylvania Supreme Court.

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-pennsylvania-nol-cap-found-unconstitutional.html?id=us:2em:3na:stm:awa:tax:091517](https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-pennsylvania-nol-cap-found-unconstitutional.html?id=us:2em:3na:stm:awa:tax:091517)

Please contact us with any questions.

— Kenn Stoops (Philadelphia)
Managing Director
Deloitte Tax LLP
kstoops@deloitte.com

Stacy Ip-Mo (Philadelphia)
Senior Manager
Deloitte Tax LLP
sipmo@deloitte.com

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

Income/Franchise: Tennessee DOR Issues Chart and Examples Depicting Apportionment Calculations Under Various Elections

Franchise and Excise Tax FAQ: Is there more than one formula for apportioning franchise and excise tax?, Tenn. Dept. of Rev. (9/07/17). The Tennessee Department of Revenue explains that there is more than one formula for apportioning Tennessee franchise and excise tax, and that the apportionment formula will differ depending on the type of taxpayer and elections made. A provided chart with separate examples shows i) the standard apportionment calculation that is applied to both the franchise and excise tax base when no elections have been made; ii) the apportionment calculation for the franchise tax base when consolidated net worth (CNW) applies and an affiliate (not the taxpayer) has elected the single sales factor (SSF); iii) the franchise and excise tax apportionment calculations for a manufacturer that is a member of a CNW affiliated group and the manufacturer has made the SSF election; and iv) the franchise and excise apportionment calculations for a manufacturer that has made the SSF election but is not a member of an affiliated group electing CNW.

[URL: https://revenue.support.tn.gov/hc/en-us/articles/115002947783-Is-there-more-than-one-formula-for-apportioning-franchise-and-excise-tax-](https://revenue.support.tn.gov/hc/en-us/articles/115002947783-Is-there-more-than-one-formula-for-apportioning-franchise-and-excise-tax-)

Please contact us with any questions.

— Amber Rutherford (Nashville)
Senior Manager
Deloitte Tax LLP
amberrutherford@deloitte.com

Todd Senkiewicz (Atlanta)
Managing Director
Deloitte Tax LLP
tsenkiewicz@deloitte.com

Income/Franchise: Virginia Circuit Court Denies Alternative Apportionment Request; Upholds Validity of Standard Cost-of-Performance Method to Apportion Income from Subscription-Based Services

Case No. CL16-1525, Va. Cir. Ct. (9/1/17). In a case involving a corporate taxpayer's income from sales of subscription-based services that were sourced to Virginia under Virginia's standard "costs of performance" statute for purposes of calculating its sales factor under the state corporate income tax, a Virginia circuit court held that the taxpayer failed to adequately show that this standard apportionment method was unconstitutional or inequitable, or that its proposed alternative "destination-based" sourcing method more accurately reflected its in-state earned income. In doing so, the court explained that a challenge to the constitutionality of the standard statutory apportionment method requires a showing by clear and cogent evidence, and a challenge to the equity of that method

requires a showing by the preponderance of the evidence. Additionally, whether a taxpayer's proposed alternative apportionment method is better calculated to assign its income requires proof by a preponderance of the evidence. Because the taxpayer in this case had failed to meet these respective burdens of proof, the court entered judgment in favor of the Virginia Department of Taxation.

Please contact us with any questions.

— Dave Vistica (Washington, DC)
Managing Director
Deloitte Tax LLP
dvistica@deloitte.com

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

Indirect/Sales/Use: Massachusetts DOR Finalizes New Regulation Adopting "Bright Line" Nexus for Some Remote Sellers

New Regulation 830 CMR 64H.1.7, Mass. Dept. of Rev. (eff. 9/22/17). The Massachusetts Department of Revenue (Department) has finalized a new administrative regulation that will adopt "bright line" economic nexus for some remote sellers, "taking into consideration the relevant provisions of the US constitution and federal law." The regulation addresses 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, and includes definitions for various relevant terms such as Internet vendors, online marketplace facilitators, and cookies. More specifically, the new rule implements a bright line economic nexus rule for out-of-state Internet vendors as follows:

URL: <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/regulations/64h-00-sales-and-use-tax/830-cmr-64h-1-7.html>

- For the period beginning October 1, 2017 through December 31, 2017, if during the preceding twelve months, October 1, 2016 to September 30, 2017, it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions; and
- For each calendar year beginning with 2018, if during the preceding calendar year it had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.

The new rule also states that "unlike the mail order vendor at issue in *Quill*," Internet vendors with a large volume of in-state sales "invariably have one or more of the following contacts with the state that function to facilitate or enhance such in-state sales and constitute the requisite in-state physical presence":

- Property interests in and/or the use of in-state software (*e.g.*, "apps") and ancillary data (*e.g.*, "cookies") which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers, and may enable the vendor's use of such physical devices;
- Contracts and/or other relationships with content distribution networks resulting in the use of in-state servers and other computer hardware and/or the receipt of server or hardware-related in-state services; and/or
- Contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-state services, including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics and consumer access to customer service.

Additionally, the rule provides that such types of contacts "will generally establish state sales or use tax jurisdiction in the case of a non-Internet vendor when the US constitutional requirements are met." As an example, the rule states that a non-Internet vendor may be subject to state sales or use tax jurisdiction based upon the in-state ownership or use of computer software or hardware, or the receipt of in-state services provided by a marketplace facilitator or delivery company.

Note that this recently finalized administrative rule follows the Department's previous issuance and subsequent revocation of a directive [Directive No. 17-1, see *State Tax Matters*, Issue 2017-14, for more details on Directive No. 17-1; and Directive No. 17-2 [Revocation of DD 17-1 In Anticipation of a Proposed Regulation], see *State Tax Matters*, Issue 2017-27, for more details on Directive No. 17-2], which had been scheduled to take effect on July 1, 2017, and similarly had attempted to adopt a bright line economic nexus rule for some remote sellers. Note also 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.

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

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

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170707_9.html

Please contact us with any related questions.

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

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

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

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

Indirect/Sales/Use:

Ohio: Proposed Amended Rule Addresses Bad Debts, Assignment of Accounts Receivables, & Financing Companies

Proposed Amended Ohio Admin. Code §5703-9-44, Ohio. Dept. of Tax. (9/1/17). The Ohio Department of Taxation (Department) has issued proposed amendments to its administrative rule concerning Ohio's "bad debt" sales and use tax deduction, which apparently are intended to "address a court decision." The proposal includes added language stating the following:

URL: <http://www.tax.ohio.gov/portals/0/legal/rules/5703-9-44.pdf>

"In situations where the vendor has assigned the account receivables to a third party or where the vendor was uses a third party to facilitate the financing of the taxable sale, to qualify for the bad debt deduction, the claimant must be the vendor and the bad debt deduction must appear on the books and records of the vendor."

The Department is requesting any comments on this proposal by September 22, 2017.

— Brian Hickey (Cincinnati)
Managing Director
Deloitte Tax LLP
bhickey@deloitte.com

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

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>

Hurricane Harvey Impact Upon Federal and Certain State Fleet/Fuel Taxes and Fuel Procurement

In response to fuel shortages caused by Hurricane Harvey, the United States Environmental Protection Agency, the Internal Revenue Service and the State of Texas have issued fuel waivers related to the sale and use of dyed diesel fuel in highway vehicles. The waivers are intended to minimize disruption of diesel fuel supply in the provision of emergency response and disaster recovery services in areas affected by Hurricane Harvey. Under qualifying circumstances, entities will temporarily avoid federal and state penalties associated with using dyed diesel fuel in on-road vehicles. Additionally, certain state agencies have issued temporary waivers related to interstate motor carrier registration and tax reporting and remittance requirements under the International Fuel Tax Agreement.

This Multistate Tax Alert summarizes the temporary federal and Texas fuel waivers, as well as the impact upon certain fleet and fuel tax registration requirements.

[Issued September 8, 2017]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/hurricane-harvey-impact-upon-federal-and-certain-state-fleet-fuel-taxes-and-fuel-procurement.html?id=us:2em:3na:stm:awa:tax:091517>

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. In the United States, Deloitte refers to one or more of the US member firms of DTTL, their related entities that operate using the “Deloitte” name in the United States and their respective affiliates. Certain services may not be available to attest clients under the rules and regulations of public accounting. Please see www.deloitte.com/about to learn more about our global network of member firms.

Copyright © 2017 Deloitte Development LLC. All rights reserved.
36 USC 220506