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Articles:
The State Tax Function and Emerging Technologies: Now is the Time

Information technology is changing business. In this article, Andrew Gold of Deloitte Tax LLP discusses three disruptive technologies and how state tax executives can derive significant benefits from them.

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/the-state-tax-function-and-emerging-technologies.html?id=us:2em:3na:stm:awa:tax:102717>

Administrative:

California Office of Tax Appeals Proposes Draft Emergency Regulations on Administration and Procedures of Appeals and Petitions for Rehearing

Proposed Draft Emergency CCR Title 18, Division 4 [Draft emergency regulations for FIT appeals before OTA], Cal. FTB (10/23/17). The California Office of Tax Appeals (OTA) has issued draft emergency regulations regarding appeals and petitions for rehearing submitted with or subject to the jurisdiction of the OTA, which was created pursuant to legislation enacted earlier this year [A.B. 102; see previously issued Multistate Tax Alert for more details on this legislation] that revamped the California State Board of Equalization (BOE) by forming two new tax agencies known as the "California Department of Tax and Fee Administration" (CDTFA) and the OTA to take over many of the BOE's key functions. The OTA was established by the new law on July 1, 2017 and, beginning January 1, 2018, will be conducting appeals on taxes and fees that were previously conducted by the BOE, such as appeals on franchise and personal income tax, sales and use tax, and other special taxes and fees. The new law requires the OTA to adopt regulations to govern its appeals processes and procedures prior to January 1, 2018. These proposed emergency regulations deal specifically with appeals from actions of the Franchise Tax Board and business tax appeals such as those involving the sales and use tax and other special taxes and fees. The OTA will hold an informal stakeholder meeting on November 6, 2017 to "solicit input regarding the draft emergency regulations," with written comments also accepted by November 7, 2017. The OTA has stated that it will then subsequently "finalize and formally commence" the emergency regulations rulemaking process under the California Administrative Procedure Act. Please contact us with any questions or comments.

URL: <https://ota.ca.gov/wp-content/uploads/sites/54/2017/10/Notice-of-Informal-Stakeholder-Meeting-re-OTA-Draft-Emergency-Regulation...pdf>

URL: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB102

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/california-governor-signs-legislation-creating-new-office-of-tax-appeals-and-new-department-of-tax-and-fee-administration.html?id=us:2em:3na:stm:awa:tax:102717>

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Income/Franchise:

California FTB Now Permitting Oral Presentations in Petitioning for Use of Alternative Apportionment

FTB Notice 2017-05, Cal. FTB (10/19/17). The California Franchise Tax Board (FTB) recently issued a notice explaining that it will permit taxpayers and their representatives to request permission to make oral presentations to FTB staff in connection with California Revenue and Taxation Code (CRTC) section 25137 petitions – that is, petitions for use of alternative apportionment as a variance from the application of the standard apportionment provisions for California franchise and income tax purposes. According to the notice, neither taxpayers nor their representatives historically were permitted to orally present their request for a variance before FTB staff, and such petitions for a variance previously were based entirely on the written materials submitted on the taxpayer's behalf. However, "hereinafter, a

petitioning taxpayer, or the taxpayer's representative, may, in addition to filing the written materials with the CRTC section 25137 petition, also directly present its request for a variance orally."

URL: <https://www.ftb.ca.gov/law/notices/2017/05.pdf>

Procedurally, the notice states that if a taxpayer seeks to make such an oral presentation, or have its representative make such an oral presentation, the taxpayer (or its representative) must state as much in its CRTC section 25137 petition filed with the FTB, or must notify the assigned FTB staff member as early in the proceedings as possible. Please contact us with any questions.

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Income/Franchise:

Maryland Tax Court Holds that Out-of-State Loaning Subsidiary Has Nexus Based on Relationship with In-State Parent; Sustains Comptroller's "Blended Apportionment Factor"

Case No. 12-IN-00-1187, Md. Tax Ct. (2/1/17). Citing *Comptroller v. SYL, Inc.* and subsequent Maryland case law, the Maryland Tax Court (Court) held that, under the provided facts, an out-of-state retail store company was subject to Maryland corporate income tax on intercompany interest income it earned from loans to its controlling parent that did business in Maryland, because the company failed to operate as a separate entity independent from its parent. In doing so, the Court explained that the out-of-state retail store company could not have functioned as a corporate entity without the support services, ranging from its physical housing to payroll, accounting, cash management, tax services, funding of legal services, capital requirements, financing, executive staffing, and purchasing, which were supplied by its corporate parent – thus, the retail store company lacked true economic substance separate from its parent. The Court additionally explained that the intercompany interest income at issue has a direct and substantial connection to Maryland because the income was paid on loans made to the retail store company's Maryland parent that are serviced in Maryland. Having determined that the out-of-state retail store company had sufficient minimum contacts with Maryland requiring it to file returns and pay Maryland income taxes, the Court additionally held that the Maryland Comptroller fairly apportioned income to the company's Maryland related income-producing activities based on the parent's filed Maryland income tax returns, reasoning that the Comptroller's "blended apportionment factor" was not unreasonable under the facts and did not distort the retail store company's income. The Court did, however, explain that the retail store company had some reasonable cause and acted in good faith in not remitting Maryland income tax on its intercompany interest income – and thus granted the taxpayer 100% penalty and 50% interest relief on the underlying taxes due.

URL: <http://taxcourt.maryland.gov/PDF/Decisions/Michigan-Host-Inc-v-Comptroller.pdf>

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Income/Franchise: Ohio Department of Taxation Opens Registration for Centralized Filing of Business Municipal Taxes

Release, Ohio Dept. of Tax. (10/19/17). Pursuant to new law [H.B. 49; see previously issued Multistate Tax Alert for more details on this new law] that, effective January 1, 2018, permits some electing businesses to file a single annual or estimated municipal tax return through the Ohio Business Gateway where the business may report and pay tax to all of the Ohio municipalities where tax is due, the Ohio Department of Taxation (Department) recently opened registration for such businesses to “opt-in” for centralized filing and state administration of the municipal net profit tax for the 2018 tax year. According to the Department, businesses that opt-in “will have the advantage of filing one municipal net profit tax return that encompasses every municipality in which they are required by law to report.” The Department states that it will process all the centrally filed returns and distribute tax payments to the appropriate municipalities, and that it will also be responsible for all administrative functions, including appeals and audits. Please contact us with any questions.

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

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/ohio-fiscal-year-2018-2019-budget-bill-enacted.html?id=us:2em:3na:stm:awa:tax:102717>

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Indirect/Sales/Use: Ohio Issues and Updates Bulletins Pursuant to New Law that Includes a \$500,000 Gross Receipts Nexus Threshold

Sales Tax Information Release ST 2017-02, Ohio Dept. of Tax. (10/17). The Ohio Department of Taxation has issued an administrative release discussing new law [H.B. 49; see previously issued Multistate Tax Alert for more details on this new law] that, beginning January 1, 2018, provides that “substantial nexus” with Ohio is presumed to exist for Ohio sales and use tax purposes if the seller:

URL: http://www.tax.ohio.gov/Portals/0/sales_and_use/nexususetaxst2017-02-2017.pdf

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

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/ohio-fiscal-year-2018-2019-budget-bill-enacted.html?id=us:2em:3na:stm:awa:tax:102717>

- 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.

The release provides examples illustrating situations of both "in-state software nexus" and "network nexus" with Ohio, including related underlying definitions. The release additionally explains that an out-of-state seller that consequently falls within Ohio's taxing jurisdiction, and makes taxable sales, will be required to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in Ohio, and file returns and remit the appropriate tax.

Note that another administrative release (Sales Tax Information Release ST 2001-01) has been updated to reflect how these recent law changes impact certain Ohio sales and use tax nexus "safe harbors" involving software licenses and website servers.

[URL: http://www.tax.ohio.gov/Portals/0/sales_and_use/2017-01nexususetax10-2017.pdf](http://www.tax.ohio.gov/Portals/0/sales_and_use/2017-01nexususetax10-2017.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](http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive0.html?id=us:2em:3na:stm:awa:tax)

California A.B. 131 Enacted: Procedures for Office of Tax Appeals and Department of Tax and Fee Administration Clarified

Assembly Bill (A.B.) 131 was recently enacted, clarifying certain provisions of the previously-adopted A.B. 102. A.B. 102, which was enacted on June 27, 2017, had reduced the functions of the Board of Equalization (BOE) to the core responsibilities granted to it under the California Constitution and created two new tax agencies – the California Department of Tax and Fee Administration (CDTFA) and the Office of Tax Appeals (OTA) – which would take over many of the responsibilities previously handled by the BOE. A.B. 131 clarifies various ambiguities and uncertainties that were triggered by the enactment of A.B. 102 with respect to the duties, responsibilities, and rules that apply to the BOE, CDTFA, and OTA.

This Multistate Tax Alert summarizes the more notable provisions of A.B. 131, and provides some taxpayer considerations.

[Issued October 18, 2017]

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/california-ab-131-enacted-procedures-for-office-of-tax-appeals-and-department-of-tax-and-fee-administration-clarified.html?id=us:2em:3na:stm:awa:tax:102717](https://www2.deloitte.com/us/en/pages/tax/articles/california-ab-131-enacted-procedures-for-office-of-tax-appeals-and-department-of-tax-and-fee-administration-clarified.html?id=us:2em:3na:stm:awa:tax:102717)

Pennsylvania Supreme Court Affirms that Fixed-Dollar Cap on Net Loss Deduction is Unconstitutional, But Holds that Percentage Cap is Valid

On October 18, 2017, the Supreme Court of Pennsylvania (Supreme Court) issued a majority opinion in *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth of Pennsylvania* in which it determined that the dollar cap limitation of Pennsylvania's net loss deduction provisions violated the Uniformity Clause of the Pennsylvania Constitution. The Supreme Court remedied the constitutional violation by severing the dollar-based cap from the net loss statute, thus leaving the percentage of taxable income cap in place. The decision reverses the order of the Commonwealth Court of Pennsylvania, which had directed the Pennsylvania Department of Revenue to issue a refund to the taxpayer.

This Multistate Tax Alert summarizes the background of the case, the lower court and Supreme Court decisions, and provides taxpayer considerations.

[Issued October 23, 2017]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/pa-supreme-court-affirms-that-fixed-dollar-cap-on-net-loss-deduction-is-unconstitutional-but-holds-that-percentage-cap-is-valid.html?id=us:2em:3na:stm:awa:tax:102717>

Virginia Supreme Court addresses "Subject-to-Tax" Addback Exception

Recently, the Virginia Supreme Court ruled in a 4-3 decision in *Kohl's Department Stores, Inc. v. Virginia Department of Taxation* in which it considered the subject-to-tax exception of Virginia's related party intangible expense add back statute. In sum, the majority held that the subject-to-tax exception applies only to the extent that the royalty payments were actually taxed by another state (*i.e.*, on a post – apportionment basis); and that the subject-to-tax exception applies as long as royalties are actually taxed regardless of which entity paid the tax (*i.e.*, even if paid by an affiliate, as part of a combined filing or statutory add back).

This Multistate Tax Alert summarizes the factual background of the case, the lower court and Virginia Supreme Court decisions, and provides taxpayer considerations.

[Issued October 20, 2017]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/virginia-supreme-court-addresses-subject-to-tax-addback-exception.html?id=us:2em:3na:stm:awa:tax:102717>

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