State Tax Matters
The power of knowing.
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In this issue:

Income/Franchise:
California FTB Chief Counsel Ruling Addresses Whether Sales from Certain Business Divestures Can be Excluded from Sales Factor

Chief Counsel Ruling 2017-03, Cal. FTB (10/18/17). The California Franchise Tax Board recently released a chief counsel ruling which concluded that a global parent company's divestment of US subsidiaries was substantial and occasional pursuant to California Code of Regulations section 25137(c)(1)(A), where the taxpayer's normal course of business did not involve selling subsidiaries and the divestitures occurred infrequently.
URL: https://www.ftb.ca.gov/law/ccr/2017/03.pdf

See forthcoming Multistate Tax Alert for more details on this recent ruling, and please contact us with any related questions.

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Income/Franchise:
California FTB Issues Proposed Regulations on How Credits are Allocated Among Members of Combined Reporting Group when Defective Election Occurs

Proposed CCR Title 18, Division 3, Regs. Sections 23663-1 through 23663-5, Cal. FTB (11/24/17). The California Franchise Tax Board (FTB) has issued proposed regulations with the intent of giving taxpayers "certainty" and "flexibility" on how credits are allocated among affiliated members of a combined reporting group when a defective election occurs, including allowing taxpayers to have one year to correct certain errors in such defective elections. California Revenue and Taxation Code section 23663 generally permits the assignment of credits among affiliated members of the same combined reporting group, and the FTB explains that in some situations, taxpayers have made defective elections to assign credits under this statutory provision. The FTB notes that because the assignment election is irrevocable, some taxpayers "are therefore left with uncertainty regarding the allocation of credits which are the subject of a defective election, as well as having no clear recourse to correct a defective election." Accordingly, the FTB states that these proposed regulations are intended to provide guidance on how to determine when a defective election to assign credits occurs, how to allocate defectively assigned credits, as well as give taxpayers some flexibility in determining the allocation of credits in certain instances where there is agreement between the parties involved in the defective election.
URL: https://www.ftb.ca.gov/law/regs/23663/Draft-Language.pdf

The FTB additionally states that it has *not* scheduled a public hearing on this proposed regulatory action; however, it will hold a hearing "if it receives a written request for a public hearing from any interested person, or his or her

authorized representative, no later than 15 days before the close of the written comment period" – which is by close of business on January 11, 2018. Please contact us with any questions or comments.

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Income/Franchise:
Connecticut: New Law Postpones Start of Claimant Period for Combined Reporting-Related ASC 740 Deduction

S.B. 1503, signed by gov. 11/21/17. Effective immediately, new law postpones the start of the period over which the ASC 740 deduction that was originally part of legislation enacted in 2015 – which adopted a mandatory unitary combined reporting regime effective January 1, 2016 [see previously issued Multistate Tax Alert for more details on the 2015 legislation] – may be claimed from a 2018 start year to a 2021 start year. Note that other legislation enacted earlier this year [S.B. 1502; see *State Tax Matters*, Issue 2017-44, for more details on this legislation] revised the period over which this ASC 740 deduction may be claimed from the original seven-year period to a thirty-year period. Accordingly, under this now revised ASC 740 deduction, for the thirty-year period beginning with the unitary group's first income year that begins in 2021, a unitary group shall be entitled to a deduction from unitary group net income equal to one-thirtieth of the amount necessary to offset the increase in the net deferred tax liability or decrease in the net deferred tax asset, or the aggregate change thereof if the net income of the unitary group changes from a net deferred tax asset to a net deferred tax liability, as computed in accordance with generally accepted accounting principles, that would result from Connecticut's imposition of unitary reporting requirements. Please contact us with any questions.
URL: https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2017&bill_num=1503
URL: http://www2.deloitte.com/us/en/pages/tax/articles/sweeping-connecticut-tax-reforms-enacted.html?id=us:2em:3na:stm:awa:tax:120117
URL: https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2017&bill_num=1502
URL: http://newsletters.usdbriefs.com/2017/Tax/STM/171103_2.html

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Income/Franchise:
Illinois DOR Explains Blended Income Tax Rates for 2017 Illinois Income Tax Returns Under Recently Enacted Budget

Informational Bulletin FY 2018-14, Ill. Dept. of Rev. (11/17). The Illinois Department of Revenue (Department) has issued an information bulletin pursuant to state budget legislation enacted earlier this year [see previously issued Multistate Tax Alert for more details on this new law] that permanently increases the personal income tax rate to 4.95%, and the corporate income tax rate to 7%, effective July 1, 2017. Because these personal and corporate income tax rate increases are effective July 1, 2017, the Department explains that for those taxpayers filing a 2017 Illinois income tax return as a fiscal-year, short-year, or 52/53 week filer, and whose tax year ends on or after July 1, 2017, two tax rates would apply to the tax year. The amount earned prior to July 1, 2017, is taxed at 3.75% (for individuals, trusts, and estates) or 5.25% (for corporations), while the amount earned on or after July 1, 2017, is taxed at 4.95% (for individuals, trusts, and estates) or 7% (for corporations). These two tax amounts then must be added together to figure the total tax liability. The bulletin additionally explains that for taxable years beginning prior to July 1, 2017 and ending after June 30, 2017, taxpayers may select one of two methods to calculate the amount of income tax due – that is, such taxpayers may elect to prorate income between these two tax rate periods under the blended rate method, or use specific accounting to determine income earned in the two tax rate periods. The bulletin states that taxpayers must choose which method they will use to divide their income on or before the extended due date of the tax return and that once this decision is made, it is irrevocable. The bulletin includes underlying rate schedules for those taxpayers choosing to use the blended rate method. Please contact us with any questions.
URL: http://www.revenue.state.il.us/Publications/Bulletins/2018/FY-2018-14.pdf
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:120117

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Income/Franchise:
Michigan: Department of Treasury Discusses Appellate Court Decision Narrowing Scope of Unitary Ownership Test; Benefits of Filing Amended Returns by December 31

Treasury Update, Mich. Dept. of Treas. (11/17). In its recently issued newsletter, the Michigan Department of Treasury (Department) comments on the Michigan Court of Appeals' 2016 decision, explaining that the case "eliminated constructive ownership and ownership through attribution as a means to satisfy the unitary business group (UBG) control test, potentially affecting the filing status of entities under both the Michigan Business Tax (MBT) and the Corporate Income Tax (CIT)." Accordingly, the Department explains, affected entities were directed via a subsequently issued administrative notice to file amended UBG or original stand-alone returns for those tax periods within the statute of limitations period, correcting their filing status. The Department additionally states that although no penalties will be imposed upon these corrected filings, interest must be paid on any deficient tax liability. However, the Department states that it has agreed to waive the associated interest for taxpayers who file such corrected returns on or before December 31, 2017 – and therefore "taxpayers are encouraged to take advantage of this window of opportunity before it's too late."
URL: http://www.michigan.gov/documents/treasury/Treasury_Update_November_2017_606900_7.pdf

See previously issued Multistate Tax Alert that briefly summarizes the Michigan Court of Appeal's 2016 decision in this case and provides some taxpayer considerations, including commentary on the Department's related "Notice to Taxpayers" that was issued on February 28, 2017.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/mbt-appellate-court-decision-narrowing-scope-of-unitary-ownership-test-now-final.html?id=us:2em:3na:stm:awa:tax:120117

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Income/Franchise: Pennsylvania Supreme Court Reverses Lower Court; Holds that Three-Year SOL on Refund Period Began Upon Payment of Tax Due

Case No. 2 MAP 2016, Pa. (11/22/17). The Pennsylvania Supreme Court (Court) has reversed the Pennsylvania Commonwealth Court's 2016 ruling, which had held that the three-year corporate income tax refund period specified in Section 3003.1(a) of the Tax Reform Code of 1971 (Tax Code), 72 P.S. §10003.1(a), began to run on the date that the corporate taxpayer filed its annual tax report. Reversing the lower court, the Court instead held that such tax refund period began to run upon "the actual payment of the tax" on its due date – which is the act of transferring money or credits by the taxpayer to the Pennsylvania Department of Revenue (Department), and the Department's acceptance of the money or credits in full satisfaction of the tax liability. The case at hand involved a corporate taxpayer that had paid the underlying state corporate income tax on the date that it was due, but did *not* file its annual report until several months later. The Court considered whether the three-year refund period commenced on the date the tax was paid, rather than the subsequent date that the annual report was filed. In holding for the former date, the Court explained that the "actual payment of tax" in this case occurred on April 15, 2008 – that is, the date tax was due and payable, and when the Department accepted the taxpayer's estimated tax payments and credits as payment for its 2007 tax year liability. The Court additionally explained that the filing of the annual report – when it takes place *after* the tax due date as had occurred in this case – is *not* the triggering event for determining whether a refund petition is timely filed. The Court therefore concluded that the taxpayer's refund petition in this case was not timely filed because the three-year tax refund period began to run on April 15, 2008, and expired prior to the taxpayer's September 16, 2011 refund petition filing date. Please contact us with any questions.
URL: http://www.pacourts.us/assets/opinions/Supreme/out/Majority%20Opinion%20%20ReversedReinstatedRemanded%20%201033288 4827766755.pdf

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Income/Franchise: Washington Trial Court Strikes Down Recently Enacted Seattle High-Income Resident Income Tax

Case No. 17-2-18848-4 SEA, Wash. Super. Ct., Kings County (11/22/17). A Washington trial court recently held that a City of Seattle ordinance adopted in July [Council Bill 119002; see previously issued Multistate Tax Alert for more details on this new law] imposing a local income tax on certain high-income Seattle residents for individual and trust income received after January 1, 2018, was *not* authorized under state law and the City of Seattle failed to show otherwise.
URL: https://assets.documentcloud.org/documents/4277768/17-2-18848-4-Order-on-Cross-Motions-for-SJ.pdf
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:120117

Seattle Mayor Tim Burgess and City Attorney Pete Holmes subsequently issued a joint statement about the local tax and recent trial court ruling, explaining that they are "hopeful" that the tax will be upheld on appeal. Please contact us with any questions.
URL: http://mayorburgess.seattle.gov/2017/11/mayor-burgess-and-city-attorney-holmes-statement-on-income-tax-ruling/#sthash.xLkyyizd.dpbs

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Indirect/Sales/Use: Colorado DOR Issues Amended Remote Seller Notice & Reporting Regulation

Amended "Notice and Reporting Requirements for Non-Collecting Retailers," Rule 39-21-112(3.5), Colo. Dept. of Rev. (eff. 1/1/18). The Colorado Department of Revenue (Department) has issued permanent 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. The Department subsequently issued emergency revisions to Colorado Administrative Rule 39-21-112.3.5 [see *State Tax Matters*, Issue 2017-27, for more details on this emergency amended rule], for purposes of enforcing Colorado's remote seller notice and reporting requirements for transactions occurring on or after July 1, 2017, which contain provisions addressing online marketplaces. Similar to the emergency revisions to Colorado Administrative Rule 39-21-112.3.5, the Department's permanent amended rule states the following regarding online marketplaces:
URL: http://www.sos.state.co.us/CCR/RegisterPdfContents.do?publicationDay=11/25/2017
URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170707_7.html

> "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."

Please contact us with any related questions.

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Indirect/Sales/Use: New York: Appellate Court Holds that Purchased Competitor Pricing Reports are Information Services that Qualify for Exclusion

No. 2017 NY Slip Op 08225, N.Y. App. Div. (11/22/17). The New York Supreme Court, Appellate Division (Court), held that a taxpayer's purchases of sales pricing information involving its competitors did *not* constitute the purchase of taxable information services because such audit reports qualified for the exclusion under N.Y. Tax Law Section 1105 (c)(1), as personal and individual in nature and not substantially incorporated into reports of others. In doing so, the

Court explained that while there was no question that the pricing information collected on the taxpayer's behalf was information available to the public, it agreed with the taxpayer that, under the circumstances involved in this case, such information was *not* derived from a singular, widely accessible common source or database "as that test has previously been applied and commonly understood in determining the applicability of the tax exclusion at issue." In this case, based on its own unique and confidential pricing strategy, the taxpayer provided the vendor with its collection criteria for the underlying pricing audits to be performed, including the specific stores that it wanted the vendor to audit; the specific pricing information that it wanted the vendor to collect; and the frequency with which it wanted these audits to be conducted.
URL: http://www.courts.state.ny.us/reporter/3dseries/2017/2017_08225.htm

To the extent that the pricing information for each of the taxpayer's competitors regularly fluctuated to their own unique pricing strategies, the Court explained, there was no singular preexisting common source or data repository that the vendor could access to timely obtain the specific pricing information requested by the taxpayer. The Court also noted that once the raw data or specified pricing information was collected, pursuant to the vendor's collection methodology, it was maintained as a separate and distinct work component or database for the vendor's sole use in preparing its written report for the taxpayer. This information, the Court reasoned, was therefore not maintained in a general database that was viewable or for use by any of the vendor's other clients and there was no evidence that any such information ever was shared with its other clients. The Court additionally noted that the contract between the taxpayer and the vendor contained a confidentiality provision that expressly prohibited the vendor from providing any such information to third parties. The Court thus concluded that "at all relevant times throughout the process" the information furnished to the taxpayer was uniquely tailored to the taxpayer's specifications and was related exclusively to implementation of its confidential pricing strategy. Please contact us with any questions.

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Indirect/Sales/Use: Virginia Department of Taxation Ruling Holds that Online Marketplace Operator is Not a Dealer for Sales Tax Collection and Remittance Purposes

Ruling of Commissioner, P.D. 17-178, Vir. Dept. of Tax. (10/4/17). The Virginia Department of Taxation (Department) recently issued a ruling involving the application of Virginia retail sales and use tax to the provision of online restaurant order placement services, holding that the operator of an online marketplace that enables customers to purchase meals and food from unrelated third-party restaurants did *not* constitute a Virginia dealer required to collect Virginia retail sales tax on sales of food via its online web platform. The Department explained that while the operator processes payments received from the customers that purchase food from the restaurants, only commissions and credit card fees are retained by the operator; the balance of the payment proceeds are transferred to the restaurants. Accordingly, in the instant case, the Department held that the operator is providing payment processing services to the restaurants in addition to online ordering services. However, the Department reasoned, the operator is *not* engaged in making retail sales of food and thus is *not* a dealer for Virginia retail sales and use tax purposes. Because the operator collects the retail sales tax on behalf of the restaurants, the Department noted that it should maintain adequate records and documentation to demonstrate that the sales taxes are properly calculated and the sales tax amounts collected are transferred in full to the restaurants. In the event the individual restaurants are audited by the Department, such documentation may be required to verify that the proper amounts of sales tax from sales generated through the operator's ordering service have been properly reported and remitted to the Department. Please contact us with any questions.
URL: https://tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/17-178

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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

Cook County Repeals Sweetened Beverage Tax – Effective December 1, 2017
On October 11, 2017, the Illinois Cook County Board of Commissioners repealed the Sweetened Beverage Tax Ordinance, effective December 1, 2017. The Sweetened Beverage Tax, which was first levied effective July 1, 2017, must continue to be paid, collected and enforced through November 30, 2017.

This Multistate Tax Alert provides some background on the Sweetened Beverage Tax, its repeal and certain retailer and distributor considerations.
[Issued November 28, 2017]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/cook-county-repeals-sweetened-beverage-tax-effective-december-1-2017.html?id=us:2em:3na:stm:awa:tax:120117