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Administrative/Amnesty: California OTA Issues Amended Proposed Emergency Regulations on Administration and Procedures of Appeals and Petitions for Rehearing

Amended Proposed Draft Emergency CCR Title 18, Division 4, Regs. Sections 30100, 30101, 30102, et al., Cal OTA (12/26/17). The California Office of Tax Appeals (OTA) has issued amended proposed 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 in 2017 [A.B. 102; see previously issued Multistate Tax Alert for more details on this 2017 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, is 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. These proposals deal specifically with appeals from actions of the Franchise Tax Board (FTB) and business tax appeals such as those involving the sales and use tax and other special taxes and fees.

URL: <https://ota.ca.gov/wp-content/uploads/sites/54/2017/12/OTA-FINAL-DRAFT-Emergency-Regulations.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:010518>

The amended proposed emergency regulations provide that the precedential opinions of the BOE which were adopted prior to January 1, 2018, in accordance with applicable law and regulations, may be cited as precedential authority to OTA "unless a panel removes, in whole or in part, the precedential status of the opinion as part of a written opinion that the panel issues" under these regulatory provisions. The proposal also states that where the OTA removes the precedential status of an opinion of the BOE, it must publish on its website a specific notation that the previously precedential BOE opinion is no longer precedential, along with the date of the OTA opinion removing the precedential status. The amended proposed emergency regulations also provide that the "OTA may withdraw, in whole or in part, the precedential status of an opinion previously designated as precedential in a later appeal before [the] OTA by explaining in the decision issued in that later appeal why the precedential status has been removed."

On December 26, 2017, the FTB published a Notice of Proposed Emergency Regulatory Action pursuant to California law requiring the FTB to provide notice at least five working days prior to submission of the proposed regulation to the California Office of Administrative Law (OAL). It is expected that the FTB will submit the proposed regulation to the OAL for approval thereafter. Please contact us with any questions or comments.

URL: <https://ota.ca.gov/wp-content/uploads/sites/54/2017/12/Notice-and-Finding-of-Emergency.pdf>

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Administrative/Amnesty: Indiana Department of Revenue Explains Success of its New Protest Review System

New DOR Appeals Process, Ind. Dept. of Rev. (12/27/17). The Indiana Department of Revenue (Department) has issued some guidance regarding changes that have taken place since January 2017 concerning the Department's "new protest review system" that has "cut wait times for customers and increased efficiency at the Tax Court." The Department explains that its overall goal is to "resolve protests within 110 days" and that its new tax appeals process includes four options when filing a protest:

URL: <http://www.in.gov/dor/3877.htm>

- Settlement;
- Audit review;
- Administrative appeal with a hearing; or
- Administrative appeal without a hearing.

The Department additionally explains that Indiana's Tax Court "has also seen a positive impact since the implementation of the new process" as the Court's docket traditionally had been dominated by Department-related cases – with more than 100 such cases on the docket at the beginning of 2017, but only 18 such cases by September 2017. The Department notes that it continues to receive feedback from tax practitioners on their thoughts for areas of additional improvement concerning Indiana's tax appeals process, and that this feedback "is essential to continue to optimize this process." Please contact us with any questions.

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Administrative/Amnesty: Michigan: New Law Permits Alternate Method of Dispute Settlement/Resolution for Certain Tax Liabilities

H.B. 4976, signed by gov. 12/19/17. Effective immediately, new law provides for an alternate settlement process between the Michigan Department of Treasury (Department) and taxpayers to resolve certain disputes that may arise over the amount of taxes owed prior to the Department making a determination following an informal conference. After sufficient notice has been received by taxpayers from the Department, the current protest process allows taxpayers to request an informal conference. Under this new law, after such a request had been made, the taxpayer and the Department may seek to settle any or all issues in dispute by submitting a written settlement offer to the other party, who may then accept, reject, or counter the offer. After additional stages in this process, if the parties continue to reject each other's offers, the informal conference process generally would proceed. If the parties reach an agreement in this new resolution process on any or all issues in dispute, they must execute a written settlement agreement, and the Department's final assessment issued under these new provisions would *not* be subject to appeal or challenge or reviewable in any court. With respect to any issues in dispute *not* included in the written settlement agreement, the informal conference process generally would proceed unless otherwise withdrawn by the taxpayer. Please contact us with any questions.

URL: <http://www.legislature.mi.gov/documents/2017-2018/billenrolled/House/pdf/2017-HNB-4976.pdf>

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Administrative/Amnesty: Texas Comptroller Announces that Recently Enacted Tax Amnesty Program will Run from May 1 to June 29; Provides for Potential Waiver of Penalties and Interest

News Release, Tex. Cmptrlr. (12/21/17). Pursuant to legislation enacted in 2017 [S.B. 1; see *State Tax Matters*, Issue 2017-34 for more details on this new law] that requires the Texas Comptroller of Public Accounts (Comptroller) to establish a limited-duration tax amnesty program, the Comptroller has announced that such program will run from May 1, 2018 to June 29, 2018, and permit qualified taxpayers “to make their accounts compliant with state tax law without incurring penalties and interest on tax due.” The Comptroller explains that such tax amnesty will apply to periods prior to January 1, 2018, and only include certain tax liabilities (including state franchise and sales/use taxes) that have not been previously reported to the Comptroller. The Comptroller notes that this amnesty program will not apply to periods currently under audit review, IFTA taxes, PUC Gross Receipts assessments, Local Motor Vehicle Tax and Unclaimed Property payments.

URL: <https://comptroller.texas.gov/about/media-center/news/2017/171221-tax-amnesty.php>

URL: <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00001F.pdf#navpanes=0>

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/170825_3.html

Note that another recently issued Comptroller release announces that for 2017 franchise tax reports with valid extensions to November 15, the Comptroller’s office generally is granting an automatic extension to January 31, 2018 (previously, January 5, 2018) to businesses located in the counties designated for individual assistance by the Federal Major Disaster Declaration – which matches the similar extension granted by the IRS for filing reports. Please contact us with any questions.

URL: <https://comptroller.texas.gov/taxes/resources/disaster-relief.php>

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Income/Franchise: California: FTB’s Updated New Policy Prohibits Certain Ex Parte Communications Involving Alternative Apportionment Petition Hearings

Resolution Regarding Ex Parte Communications and Consideration of Petitions Made Pursuant to Section 25137 of the Revenue and Taxation Code, Cal. FTB (12/7/17). The California Franchise Tax Board (FTB) has issued an updated version of its original resolution that had explained its new policy prohibiting “ex parte communications” between the taxpayer and FTB board members and staff while the taxpayer’s petition for alternative apportionment under California Revenue and Taxation Code section 25137 is pending before the FTB. The original resolution provided that, beginning on January 1, 2018, while such a petition is pending, “there shall be no communication, direct or indirect, regarding any substantive issue related to the petition, to or from any Board member or his/her staff/representatives, to or from the petitioner or an employee/representative of the petitioner, or Franchise Tax Board staff.” The updated resolution adds the following phrase to clarify that such communication is prohibited “without notice and opportunity for all

parties to participate in the communication.” The resolution explains that such a petition is considered pending from the date of the filing of the petition with the FTB pursuant to California Revenue and Taxation Code section 25137. Please contact us with any related questions.

[URL: https://www.ftb.ca.gov/law/meetings/12072017/Resolution.pdf](https://www.ftb.ca.gov/law/meetings/12072017/Resolution.pdf)

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Income/Franchise:

Massachusetts: DOR Issues Proposed Regulations on Corporate Excise Tax Nexus; Return Dues Dates for S Corps in a Combined Group

Proposed Amended 830 CMR 63.39.1: Corporate Nexus; Proposed New 830 CMR 62C.11.1: Return Due Dates for S Corporations Included in a Combined Group, Mass. Dept. of Rev. (12/19/17). The Massachusetts Department of Revenue has issued proposed amendments to an administrative regulation that generally describes the circumstances under which certain business corporations will be subject to Massachusetts' corporate excise tax under M.G.L. c. 63 – including separate provisions for general business corporations, financial institutions, and insurance companies. Another proposed new rule provides that an S corporation that is a member of a combined group generally will be required to file its state corporate excise return on or before the fifteenth day of the fourth month following the close of each taxable year (*i.e.*, aligning it with the state filing date for C corporations), thereby addressing resulting nuances of state legislation enacted in 2017 that generally conforms the due dates for Massachusetts partnership and business corporation tax returns to the federal due dates beginning with state tax returns due on or after January 1, 2018. A public hearing on these rule proposals will be held on January 23, 2018, and written comments in advance of the hearing are encouraged. Please contact us with any questions or comments.

[URL: https://www.mass.gov/service-details/notice-of-public-hearing](https://www.mass.gov/service-details/notice-of-public-hearing)

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Income/Franchise:

Ohio: New Law Imposes Preferential Tax Rate on Certain Wages and Guaranteed Payments Paid by PEOs to Certain Owners of Pass-Through Entities

S.B. 8, signed by gov. 12/22/17. Applicable retroactively to taxable years beginning after 2013, new law provides that wages and guaranteed payments paid by a professional employer organization (PEO) to the owner of a pass-through entity that has contracted with the organization generally may be considered business income, thus permitting the owner of the pass-through entity to apply the preferential 3% flat tax rate with respect to this income so long as the owner holds at least a 20% interest in the pass-through entity. Please contact us with any questions.

URL: <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA132-SB-8>

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Income/Franchise:

Texas Supreme Court Affirms Rejection of Taxpayer's Use of Multistate Tax Compact Evenly-Weighted, Three-factor Apportionment Election for Texas Franchise Tax Purposes

Case No. 15-0669, Tex. (12/22/17). The Texas Supreme Court (Court) has affirmed the Texas Court of Appeals' 2015 ruling [see previously issued Multistate Tax Alert for more details on the 2015 decision] and therefore the underlying trial court's summary judgment, which had prevented a taxpayer from using the Multistate Tax Compact evenly weighted, three-factor apportionment formula to apportion its taxable margin to Texas for state franchise tax purposes – thus requiring the taxpayer to apportion its taxable margin via use of the standard single-sales factor formula. In doing so, the Court agreed that the Multistate Tax Compact election and its three-factor apportionment formula did *not* apply because the state franchise tax is not an income tax within the Multistate Tax Compact's meaning. Please contact us with any questions.

URL: <http://www.txcourts.gov/media/1439456/150669.pdf>

URL: <http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-texas-court-disallows-use-of-mtc-evenly-weighted-three-factor-formula.html?id=us:2em:3na:stm:awa:tax:010518>

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Indirect/Sales/Use:

California Department of Tax and Fee Administration Discusses Expanded Partial Sales and Use Tax Exemption

Special Notice: Amendments to the Manufacturing and R&D Partial Exemption, Cal. (12/17). The California Department of Tax and Fee Administration (CDTFA) has issued a notice explaining legislation enacted in 2017 [AB 398; see previously issued Multistate Tax Alert for more details on this 2017 law change] that expanded California's partial sales and use tax exemption available for manufacturing and research and development equipment to include, with some limitations, electric power generation and agricultural businesses, effective January 1, 2018. More specifically, the

CDTFA notice explains that, among others, the 2017 legislation made the following amendments to California's partial sales and use tax exemption available for manufacturing and research and development equipment:

[URL: https://www.cdtfa.ca.gov/formspubs/I518.pdf](https://www.cdtfa.ca.gov/formspubs/I518.pdf)

[URL: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB398](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB398)

[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:010518](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:010518)

1. Expands the partial exemption to "qualified tangible personal property" purchased for use by a qualified person to be used primarily in the generation or production, or storage and distribution, of electric power;
2. Beginning January 1, 2018, expands the definition of "qualified tangible personal property" to include special purpose buildings and foundations used as an integral part of the generation or production or storage and distribution of electric power;
3. Beginning January 1, 2018, expands the definition of a "qualified person" to include businesses primarily engaged in operating electric power generation facilities, as described in the North American Industry Classification System, 2012 edition, (NAICS) codes 22111 to 221118, inclusive, or primarily engaged in electric power distribution as described in NAICS code 221122;
4. Beginning January 1, 2018, removes the exclusion from the definition of a "qualified person" for certain persons engaged in agricultural business activities that were previously excluded as an apportioning trade or business under Cal. Rev. & Tax Code section 25128;
5. Amends the definition of "useful life" to state that tangible personal property that is deducted on the California state franchise or income tax return under Cal. Rev. & Tax Code sections 17201 and 17255 or section 24356, is deemed to have a useful life of one or more years; and
6. Extends the sunset date from July 1, 2022, to July 1, 2030.

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Indirect/Sales/Use:

Minnesota DOR Discusses New Law Imposing Collection and Remittance Responsibilities on Marketplace Providers; Remote Sellers

Marketplace Providers and Online Retailers, Minn. Dept. of Rev. (12/17). The Minnesota Department of Revenue (Department) explains legislation enacted in 2017 [H.F. 1; see previously issued Multistate Tax Alert for more details on the 2017 legislation] that for state sales tax collection and remittance purposes includes an expanded definition of a "retailer maintaining a place of business in this state" to generally add in having a representative such as a defined "marketplace provider" operating in Minnesota under the retailer's authority for the purpose of facilitating or processing sales for the retailer's goods or services. This legislation generally requires an out-of-state retailer or their marketplace provider to begin collecting and remitting state sales/use tax when the marketplace provider has a physical presence in Minnesota, unless sellers on the marketplace site are already collecting the tax. This 2017 legislation becomes effective upon the earliest of the following:

[URL: http://www.revenue.state.mn.us/businesses/sut/Pages/Marketplace-Providers-Online-Retailers.aspx](http://www.revenue.state.mn.us/businesses/sut/Pages/Marketplace-Providers-Online-Retailers.aspx)

[URL: https://www.revisor.mn.gov/laws/?year=2017&type=1&doctype=Chapter&id=1](https://www.revisor.mn.gov/laws/?year=2017&type=1&doctype=Chapter&id=1)

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/minnesota-tax-bill-enacted.html?id=us:2em:3na:stm:awa:tax:010518](https://www2.deloitte.com/us/en/pages/tax/articles/minnesota-tax-bill-enacted.html?id=us:2em:3na:stm:awa:tax:010518)

- July 1, 2019;
- The United States Supreme Court modifying its decision in *Quill Corp. v. North Dakota*; or
- Any federal law that authorizes states to require out of state vendors to collect and report sales tax.

The Department additionally explains that businesses (such as online retailers) currently using a marketplace providers' fulfillment center within Minnesota may have established a physical presence in Minnesota and that when such physical presence is established, the business must be registered to collect and remit state sales tax. More specifically, if the business uses a marketplace provider that has a physical presence in Minnesota and the business's inventory is located in Minnesota, the Department states that "it is currently responsible for collecting and remitting the proper Minnesota sales taxes." If such a business that has established nexus with Minnesota is not currently registered, the Department notes that it may qualify for Minnesota's voluntary disclosure program. Please contact us with any questions.

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Indirect/Sales/Use:

Ohio: Trade Association Files Suit Challenging Validity and Enforcement of New Remote Seller Economic Nexus Law, as Interpreted by Department of Taxation

On December 29, 2017, a trade association representing remote sellers/catalog vendors filed suit in an Ohio trial court seeking an action for declaratory judgment and challenging the validity, enforceability, and constitutionality of the Ohio Department of Taxation's (Department) interpretation of certain remote seller nexus provisions contained in legislation enacted in 2017 [H.B. 49; see previously issued Multistate Tax Alert for more details on this new law], which 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: <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:010518>

- 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 suit challenges the validity of subsequently issued Department guidance interpreting this new law [Sales Tax Information Release ST 2017-02; see *State Tax Matters*, Issue 2017-43 for more details on this administrative release], which incorporates examples illustrating situations of both "in-state software nexus" and "network nexus" with Ohio, including related underlying definitions. Please contact us with any questions.

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

URL: http://newsletters.usdbriefs.com/2017/Tax/STM/171027_6.html

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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>

Pennsylvania Bulletin 2017-02: Federal 100 Percent Expensing Deduction Disallowed

On December 22, 2017, the Pennsylvania Department of Revenue issued Corporation Tax Bulletin 2017-02, which explains the Pennsylvania Corporate Net Income Tax (CNIT) treatment of the 100 percent depreciation claimed as a deduction for federal income tax pursuant to the recently enacted federal tax reform legislation. According to Bulletin 2017-02, Pennsylvania law requires the federal 100 percent deduction to be added back to taxable income for CNIT purposes and provides no additional mechanism for cost recovery until the qualified property is sold or otherwise disposed. This appears to be a reversal of the Department's prior policy, which had allowed full recovery of 100 percent depreciation for CNIT purposes in the same year the deduction was claimed for federal income tax purposes.

This Multistate Tax Alert summarizes Bulletin 2017-02, discusses background of the CNIT treatment of so called "bonus depreciation" deductions pursuant to IRC §168(k), and provides some related taxpayer considerations.

[Issued January 2, 2018]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/pa-dor-bulletin.html?id=us:2em:3na:stm:awa:tax:010518>

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36 USC 220506