State Tax Matters
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February 23, 2018

In this issue:

Income/Franchise:
MTC's Section 18 Alternative Apportionment Regulatory Project Moves Forward with Two Proposed Model Rules

Public Hearing Notice, Multistate Tax Comm. (2/18). Under the Multistate Tax Commission's (MTC's) ongoing "Section 18 Regulatory Project" and pursuant to Multistate Tax Compact (Compact) Art. VII.(2)(a) and MTC Bylaw 7(c), the MTC held a public hearing on February 20 on proposed draft amendments to Section 18 of its Model General Allocation and Apportionment Regulations, which were advanced by the MTC Executive Committee on January 8 – namely:
URL: http://www.mtc.gov/Uniformity/Project-Teams/Public-Hearing-2-2018

1. Proposed Model Regulation IV.18.(c) Receipts Factor; and
   URL: http://www.mtc.gov/getattachment/The-Commission/Committees/Executive-Committee/Executive-Committee-Agenda-1-2018/Proposed-Regulation-IV-18-(c)-Gross-Receipts-apportionemnt-final12_8_17.pdf.aspx
2. Proposed Model Regulation IV.18.(d) Receipts Factor – Bank Holding Companies and Subsidiaries.
   URL: http://www.mtc.gov/getattachment/The-Commission/Committees/Executive-Committee/Executive-Committee-Agenda-1-2018/Proposed-Regulation-IV-18-(d)-Bank-Holding-Co-and-Subsidiaries.pdf.aspx

The proposals included special rules for determining a taxpayer's receipts factor if its receipts are zero or minimal (an entity's apportionment factor would be considered *de minimis* under the proposal if the denominator is less than 3.33 percent of the entity's apportionable gross receipts or if the factor is insignificant in producing income), or if the taxpayer is considered a bank holding company and/or one of its subsidiaries that are *not* currently covered by state financial institution apportionment rules. The proposals also included special rules for assigning certain types of income – such as dividends, capital gains, investment income, and interest income – to a particular state(s).

Note that the Section 18 Regulatory Project generally has been considering issues that arose as a result of amendments made in 2014 and 2015 to Article IV of the Compact – more specifically, issues relating to alternative apportionment in an attempt to address possible distortion that may be caused by the exclusion of functional receipts from the receipts factor; exceptions to the definition of receipts which now generally excludes receipts from securities and hedging transactions; consideration of factoring receipts; situations where application of general population data may result in distortion; the necessity of a *de minimis* rule; and other special industry rules. Please contact us with any questions.

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Income/Franchise:
California FTB Issues 15-Day Notice of Proposed Rule Changes on the Apportionment and Allocation of Partnership Income for Corporate and Individual Tax Purposes

Proposed Regulation Sections 25137-1 and 17951-4 – Apportionment and Allocation of Partnership Income, Cal. FTB (2/15/18). The California Franchise Tax Board (FTB) has released a "15-Day Notice" on its proposed amended regulations that establish appropriate guidelines for determining the apportionment and allocation rules for individual and corporate taxpayers with ownership interests in tiered partnership structures, including those that sell a partnership interest, and how income derived in that context should be sourced. The proposed amendments address tiered ownership structures, indicating that the various rules embedded in the regulation also apply to partnerships conducting business within and without California that are owned, or partially owned, by other partnerships that also conduct business within and without California. Addressing sales between a unitary partnership and other members of

the combined reporting group, the proposal explicitly states that sales between a unitary partnership and other members of the taxpayer's combined reporting group should *not* be reflected in the combined reporting group's sales factor. Other proposed changes include specifying that a taxpayer's partnership interest for purposes of computing a taxpayer's apportionment factors shall be (according to the underlying proposal's 'Initial Statement of Reasons') "determined by the taxpayer's interest in the partnership," which is "determined by the portion of total interest in profits of the partnership assigned to the partner for the taxable year." The most recent substantive revisions to this proposal clarify the provisions applicable for determining a nonresident partner's California source income from a partnership that conducts business both within and outside of California, pursuant to comments made at the regulatory hearing held on December 18, 2017. The FTB is now asking that any written comments concerning this 15-Day Notice and revised proposal be submitted no later than March 5, 2018. Please contact us with any questions.
URL: https://www.ftb.ca.gov/law/regs/25137/122017-15-Day-Notice-Draft-Text.pdf

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Income/Franchise:
New York Governor Releases Proposed "30-Day Amendments" to FY 2019 Executive Budget Legislation; Addresses Recently Enacted Federal Tax Reforms

FY 2019 Executive Budget Legislation – 30-Day Amendments, N.Y. Office of the Governor (2/15/18). Governor Andrew Cuomo's office has released proposed "30-day amendments" to New York's pending FY 2019 Executive Budget legislation, which includes some proposed state tax responses to the recently enacted federal tax reforms. In addition to creating a new optional "employer compensation expense tax" and two state charitable funds, the proposed 30-day amendments include provisions which, applicable for tax years beginning on or after January 1, 2017, would:
URL: https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19bills.html

- Require addback of the new federal deemed repatriation deduction under IRC Sec. 965(c) for Article 9-A tax purposes, since the full IRC Sec. 965(a) inclusion would be treated as exempt CFC income;
- Expand the definition of "exempt controlled foreign corporation (CFC) income" to include the federal "transition tax" income received from a corporate taxpayer that is not included within the same Article 9-A state combined return (thereby, among other things, eliminating the issue of whether the CFC is unitary with its US shareholder, which would be required in the absence of this proposed amendment);
- Carve out the penalty for underpayment of estimated tax related to the addback to income of interest deductions attributable to exempt CFC income (or the alternative 40% safe harbor reduction in CFC income); and
- Limit a corporation's entire net income exclusion for "dividends" under IRC Sec. 78 "to the extent that such dividends are not included in the computation of the deduction allowed" under IRC Sec. 250.

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Income/Franchise:
North Carolina DOR Discusses How Recently Enacted Federal Tax Reforms May Affect Some State Income Taxation

Notice: Impact of the Tax Cuts and Jobs Act and the Bipartisan Budget Act of 2018 on North Carolina's Corporate and Individual Income Tax Returns, N.C. Dept. of Rev. (2/16/18). The North Carolina Department of Revenue (Department) has issued a notice discussing how the recently enacted federal tax reform provisions may impact North Carolina individual income and corporate income tax returns – noting that North Carolina's corporate income tax law uses federal taxable income as the starting point in determining state taxable income, and that, currently, North Carolina generally conforms to the Internal Revenue Code as in effect as of January 1, 2017. The notice explains that North Carolina's General Assembly is scheduled to convene on May 16, 2018, and that "even if the General Assembly enacts legislation to update the Code reference to February 9, 2018 or later, it may elect to continue to decouple from some federal provisions," which would require North Carolina taxpayers to make decoupling adjustments accordingly. To this end, the notice recommends that any person required to file a North Carolina income tax return who has not yet filed the return and whose 2017 federal taxable income or federal adjusted gross income is impacted by the recent amendments to federal law "should check the Department's website for updates that will be posted as they become available."
URL: https://files.nc.gov/ncdor/documents/files/impact_of_17_and_18_fed_leg.pdf

The Department additionally states that taxpayers who file a 2017 North Carolina tax return prior to any action of the General Assembly and whose 2017 federal taxable income or federal adjusted gross income reported on the original return is impacted by changes to federal law may be required to file an amended North Carolina tax return. In such cases, "if the amended return reflects additional tax due, the taxpayer will avoid a late-payment penalty if the additional tax reflected on the amended return is paid when the amended return is filed;" however, "interest will be due on the additional tax from the original due date of the return until the additional tax is paid." The Department also explains that corporations choosing to wait to file their 2017 North Carolina income tax return will need to file Form CD-419 to receive an automatic six-month extension of time to file. Please contact us with any questions.

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Income/Franchise:
Judge Denies Injunction Sought by Ohio Cities Challenging New Centralized Filing of Business Municipal Taxes; Opting Calendar-Year Ohio Taxpayers Must Register by March 1

On February 21, 2018, an Ohio court of common pleas judge denied a preliminary injunction sought by various Ohio municipalities against the new state-administered centralized filing regime; these Ohio municipalities had requested a declaratory judgment that the centralized filing regime constituted an unconstitutional infringement upon the powers of local self-government. In doing so, the judge held that the recently enacted provisions for the state-administered centralized filing regime were in fact constitutional, and it therefore dissolved the underlying temporary restraining order it had issued on December 21, 2017 – stating, "this is a final appealable order and there is no just cause for delay."

Pursuant to legislation enacted in 2017 [H.B. 49; see previously issued Multistate Tax Alert for more details on this new law], some electing businesses may file a single annual and estimated municipal tax returns through the Ohio Business Gateway (OBG) or via modernized e-file (MeF) filing through the businesses' tax providers. Calendar year businesses that want to file their 2018 municipal net profit tax with the State must register through the OBG by March 1; once registered, they can file quarterly estimated returns and payments through the centralized filing option [see *State Tax Matters*, Issue 2018-7, for more procedural details on the new centralized filing option]. 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:022318
URL: http://newsletters.usdbriefs.com/2018/Tax/STM/180216_6.html

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Income/Franchise:
Ohio Department of Taxation Reissues Release on Nexus Standards and Filing "Safe Harbors" for Pass-Through Entities

Income Tax Information Release IT 2001-02 Nexus Standards & Filing Safe Harbors for Pass-Through Entities, Ohio Dept. of Tax. (2/15/18). The Ohio Department of Taxation (Department) has reissued an information release that describes its standards for determining whether a pass-through entity is subject to Ohio's pass-through entity composite income and/or withholding tax, and more specifically, its standards for determining if a pass-through entity has nexus with Ohio. In doing so, the Department explains that a pass-through entity doing business in Ohio, whether or not the entity is physically located in Ohio, generally is required to file a return and pay tax to Ohio if at least one of the pass-through entity's investors either is a nonresident of Ohio or is, itself, a pass-through entity or a trust. The release further explains that, under statute, a pass-through entity generally has nexus with Ohio when:
URL: https://www.tax.ohio.gov/Portals/0/ohio_individual/individual/information_releases/2001-02PTENexusIR-NexusQuestionnaire.pdf

- The pass-through entity has real, tangible, or intangible property physically located in Ohio; or
- The pass-through entity, either directly or indirectly (*e.g.*, via an investment in a pass-through entity) engages in a trade or business operating in Ohio.

In addition to discussing the general nexus standards and their application, the release addresses underlying nexus "safe harbor" provisions (including a listing of activities/contacts that would *not* otherwise trigger a pass-through entity's requirement to file a return and/or pay the Ohio withholding or composite income tax); explains the option to participate in Ohio's voluntary disclosure program; and includes a nexus questionnaire. Please contact us with any questions.

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Indirect / Sales / Use:
Alabama: Additional Motions Filed in Online Retailer's Legal Challenge of "Economic Presence" Rule for Out-of-State Sellers Making Threshold Sales into Alabama

In an online retailer's ongoing legal challenge before the Alabama Tax Tribunal concerning Alabama's administrative regulation (Rule 810-6-2-.90.03) – which establishes dollar threshold conditions under which certain out-of-state sellers must collect and remit Alabama sellers use tax for all transactions occurring on or after January 1, 2016 – the taxpayer recently filed a response to the Alabama Department of Revenue's motion from earlier this year to stay the proceeding pending the US Supreme Court's decision in *South Dakota v. Wayfair, Inc. et al.* [see previously issued Multistate Tax Alert for more details on this case challenging South Dakota's anti-*Quill* sales tax nexus law], arguing that a delay of the proceeding would not benefit the Alabama Tax Tribunal and would prejudice the taxpayer.
URL: https://www2.deloitte.com/us/en/pages/tax/articles/us-supreme-court-to-revisit-quills-physical-presence-standard.html?id=us:2em:3na:stm:awa:tax:022318

Note that Alabama's Rule 810-6-2-.90.03 imposes a collection obligation on out-of-state sellers who engage in one or more activities subjecting out-of-state sellers to Alabama's seller use tax levy, and who had $250,000 or more in retail sales sold into Alabama in the previous year. Regarding the ongoing legal challenge at hand, a June 2016 press release issued by the Department previously explained that:
URL: https://revenue.alabama.gov/2016/06/15/newegg-inc-files-appeal-challenging-adors-regulation-requiring-remote-sellers-to-collect-alabama-tax/

1. The online retailer filed the appeal in the Alabama Tax Tribunal challenging the administrative regulation because it requires collection of state sales and use taxes, regardless of whether the seller has a physical presence in Alabama, and
2. This administrative regulation was in fact designed to directly challenge *Quill Corp. v. North Dakota*, 504 US 298 (1992), and its requirement that a remote seller have physical presence in a state for the state to require the seller to collect its tax.

Please contact us with any questions.

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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

Fuel excise tax incentives extended and federal oil spill fee reinstated
On February 9, 2018, President Trump signed into law the Bipartisan Budget Act of 2018 (H.R. 1892), which includes the following modifications to current law:

- A one-year retroactive extension of the federal alternative fuel credit for 2017;
- A one-year retroactive extension of the federal alternative fuel mixture credit for 2017;
- A one-year retroactive extension of the federal biodiesel mixture credit for 2017;
- A one-time filing of all 2017 alternative fuel and biodiesel claims;
- An extension of second generation biofuel incentives; and
- Reinstatement of the Oil Spill Liability Trust Fund tax effective March 1, 2018.

This Multistate Tax Alert summarizes the federal excise tax changes provided in H.R. 1892, as well as offers some taxpayer considerations.
[Issued February 19, 2018]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/budget-deal-extends-fuel-excise-tax-incentives-and-reinstates-federal-oil-spill-fee.html?id=us:2em:3na:stm:awa:tax:022318

California FTB Issues Preliminary Report on California's Conformity to Various Provisions of the Federal Tax Reform Act
On December 22, 2017, President Trump signed into law P.L. 115-97 "The 2017 Tax Reform Act" ("the Act"). On February, 12, 2018, the California Franchise Tax Board (FTB) issued a Preliminary Report on Specific Provisions of the Act, Part 1 ("Preliminary Report") that addresses, among others, California Corporation Tax Law (CTL) conformity or lack thereof to certain provisions in the Act.
URL: https://www.ftb.ca.gov/aboutFTB/newsroom/Preliminary-Review-of-Federal-Tax-Reform-Part-1.pdf

In the Preliminary Report, the FTB notes that the CTL conforms generally to the IRC as of January 1, 2015, with one notable exception. In instances where California's water's-edge provisions refer to an IRC provision, "it is the IRC provision in effect for the same taxable period." However, neither existing CTL nor the water's-edge provisions within the CTL incorporate by reference (or specifically refer to) the new federal repatriation provisions found under IRC Sections 245A, 951A, and 965. Therefore, the FTB states that neither existing CTL nor California water's edge provisions conform to the federal repatriation provisions added by the federal Tax Act. In light of this nonconformity, the Preliminary Report concludes with an estimate of the potential impact upon California corporate tax revenues given the expectation that "many taxpayers may have an extraordinary repatriation dividend." Acknowledging the many variables and uncertainties which impact such a projection, the FTB estimates that the tax revenue increase by fiscal year would be $50 million in 2017-2018, $150 million in 2018-2019, $110 million in 2018-2019, and $40 million in 2019-2020. The FTB also indicates that it plans to issue additional reports addressing California's conformity to other provisions in the Tax Act on or before March 2, 2018, March 26, 2018, and April 20, 2018.
[Issued February 20, 2018]
URL: https://www2.deloitte.com/us/en/pages/tax/articles/california-ftb-issues-preliminary-report-on-californias-conformity-to-various-provisions-of-the-federal-tax-reform-act.html?id=us:2em:3na:stm:awa:tax:022318