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Articles:

Potential Taxpayer Implications of the Pending *Wayfair* Ruling

In this edition of Inside Deloitte, Rick Heller, Michael Bryan, David Welliver, and Stephanie Gilfeather of Deloitte Tax LLP consider the US Supreme Court's recent decision to possibly revisit the *Quill* physical presence nexus standard in

Wayfair. They also consider some common ways that states have expanded the notion of what is a physical presence, the recent trend toward adoption of economic presence sales and use tax nexus thresholds, and various compliance readiness considerations given that a US Supreme Court ruling in *Wayfair* is anticipated this summer.

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/potential-taxpayer-implications-of-the-pending-wayfair-ruling.html?id=us:2em:3na:stm:awa:tax:050418&sfid=70114000002G9ih>

Administrative:

MTC's Section 18 Alternative Apportionment Regulatory Project Moves Forward with Two Proposed Model Rules; Draft Model Use Tax Reporting Statute Also Advances

Hearing Officer Report, Multistate Tax Comm., Exec. Comm. (4/26/18). Under the Multistate Tax Commission's (MTC's) ongoing "Section 18 Regulatory Project" and pursuant to Multistate Tax Compact (Compact) Art. VII.(2)(a), the MTC's Executive Committee has approved a hearing officer's report on proposed amendments to Section 18 of its Model General Allocation and Apportionment Regulations – namely, i) Proposed Model Regulation IV.18.(c) Receipts Factor; and ii) Proposed Model Regulation IV.18.(d) Receipts Factor – Bank Holding Companies and Subsidiaries. These proposed amendments include 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 include special rules for assigning certain types of income – such as dividends, capital gains, investment income, and interest income – to a particular state(s).

URL: <http://www.mtc.gov/getattachment/The-Commission/Committees/Executive-Committee/Executive-Committee-Agenda-4-2018/MTC-Hearing-Memo-4-10-18-final.pdf.aspx>

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](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)

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](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 hearing officer initially had recommended removing the "insignificant in producing income" test from the "*de minimis*" language proposal to avoid subjectivity in application; however, the MTC Executive Committee instead agreed to inclusion of a drafter's note explaining that this "insignificant in producing income" test only applies in limited circumstances. The MTC Executive Committee adopted the amendments to Model Regulation IV.18.(d) with no changes. Both sets of the proposed amendments to Section 18 of the Model General Allocation and Apportionment Regulations now move forward to a "bylaw 7" survey of the states (*i.e.*, a survey in which member states are asked whether they would consider adoption of the proposals as amendments to their statutes and/or regulations).

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.

Separately, the MTC Executive Committee has also approved a draft Model Use Tax Reporting Statute, which is loosely based upon Colorado's 2010 sales and use tax notice and reporting statute, that would apply to certain non-collecting remote sellers and marketplace facilitators. This draft model statute will now move forward to a public hearing for further consideration.

URL: [http://www.mtc.gov/getattachment/Uniformity/Project-Teams/Model-SU-Notice-and-Reporting-Statute/Sales-and-Use-Reporting-draft-\(January-252018-CLEAN\).pdf.aspx?lang=en-US](http://www.mtc.gov/getattachment/Uniformity/Project-Teams/Model-SU-Notice-and-Reporting-Statute/Sales-and-Use-Reporting-draft-(January-252018-CLEAN).pdf.aspx?lang=en-US)

Please contact us with any questions.

— Valerie Dickerson (Washington, DC)
Partner
Deloitte Tax LLP
vdickerson@deloitte.com

Kristen Cove (Charlotte)
Partner
Deloitte Tax LLP
kcove@deloitte.com

Michael Bryan (Philadelphia)
Managing Director
Deloitte Tax LLP
mibryan@deloitte.com

Income/Franchise: Alabama DOR Issues Guidance on IRC Sec. 965 Transition Tax's Impact on State Tax Returns

Notice: IRC Section 965 – Guidance for Corporate Filers, Partnerships, S Corporations, and Individual Taxpayers, Ala. Dept. of Rev. (4/27/18). The Alabama Department of Revenue (Department) has issued a notice regarding the IRC Sec. 965 transition tax, specifically the repatriation impact for Alabama corporate, partnership, and individual taxpayers. As a result of the “special federal treatment” where IRC Sec. 965 repatriation income is reported separately (*i.e.*, not on the Federal Form 1120), the Department explains that it is providing specific instruction on how to report this item and compute the underlying tax due for Alabama corporate tax purposes. The notice states that, for Alabama purposes, items of income/expense related to IRC Sec. 965 that are reported on the federal “IRC 965 Transition Tax Statement” must be reported on Schedule A of the Alabama Form 20 C for corporate taxpayers, and that any items of IRC Sec. 965 income must be reported on Schedule A, line 9, Form 20C, with a brief description of the source of income in the space provided on this form. The notice additionally states that any items of IRC Sec. 965 expense must be reported on Schedule A, line 23 or 24, Form 20C, with a brief description of the expense in the space provided on this form. According to the notice, any tax associated with IRC Sec. 965 income should be computed with any other income tax liability due, and a separate payment is *not* required for Alabama income tax purposes for liabilities resulting from income from IRC Sec. 965 sources.

[URL: https://revenue.alabama.gov/2018/04/27/19452/](https://revenue.alabama.gov/2018/04/27/19452/)

The Department additionally explains that IRC Sec. 965 income (net of related deductions) may be offset by a dividends received deduction (DRD) if the corporate taxpayer reporting the deemed dividend owns more than 20% of the controlled foreign corporation from which the deemed dividend is received. The notice states that this DRD should be claimed on Schedule A, line 18, and that a statement should be provided as an attachment to the return that provides the name, taxpayer ID and ownership interest of the controlled foreign corporation from which the IRC Sec. 965 deemed dividend was received. The notice also explains that Alabama will require a copy of the “IRC 965 Transition Tax Statement” for documentation, so a copy generally must be provided as an attachment when the Alabama Form 20C is filed.

Lastly, the notice explains the tax treatment for flow-through entities and individuals. For partnerships, on Alabama Form 65, IRC Sec. 965 income must be reported on Schedule K, line 11, Other Income. Any deductions related to IRC Sec. 965 are to be reported on line 15, Other Deductions. Further, according to the notice, the tax treatment for S corporations and individuals are similar in that IRC Sec. 965 will *not* apply if an Alabama S corporation or individual is a direct shareholder of a foreign corporation that is subject to the provisions of IRC Sec. 965. Please contact us with any questions.

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

Meredith Harper (Birmingham)
Manager
Deloitte Tax LLP
meharper@deloitte.com

Income/Franchise:

California: FTB Moves Forward with New Draft Proposed Amendments to Market-Based Sourcing Regulation

Draft Proposed Regulation Section 25136-2: Market-Based Rules for Sales Other Than Sales of Tangible Personal Property, Cal. FTB (4/25/18). The California Franchise Tax Board (FTB) has scheduled its third “Interested Parties Meeting” (IPM) on proposed amendments to California’s market-based sourcing regulation (California Regulation Section 25136-2) for May 18, 2018 [see previously issued Multistate Tax Alert for more details on the earlier second IPM]. The focus of this upcoming IPM will be on the recently posted revised draft language amending California Regulation Section 25136-2; the first IPM for this second round of amendments was held on January 20, 2017, and the second IPM for this second round of amendments was held on June 16, 2017. For discussion purposes at the upcoming third IPM, the FTB has posted “50-state analysis” documents on asset management, definition of sales, freight forwarding, income producing activity/cost of performance, intangibles, and services. An explanation of the draft proposed language has also been posted. For more information or questions, please reach out to any of the following individuals listed below.

URL: <https://www.ftb.ca.gov/law/regs/25136-2/05182018-Draft-Language.pdf>

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/california-ftb-to-hold-second-interested-parties-meeting-on-amendments-to-market-based-sourcing-regulation.html?id=us:2em:3na:stm:awa:tax:050418&sfid=7011400002G9ih>

URL: <https://www.ftb.ca.gov/law/regs/25136-2/05182018-Explanation.pdf>

— Christopher Campbell (Los Angeles)
Principal
Deloitte Tax LLP
cwcampbell@deloitte.com

Steve West (Los Angeles)
Managing Director
Deloitte Tax LLP
stevewest@deloitte.com

Valerie Dickerson (Washington, DC)
Partner
Deloitte Tax LLP
vdickerson@deloitte.com

Kent Strader (San Francisco)
Managing Director
Deloitte Tax LLP
kstrader@deloitte.com

Brian Toman (San Francisco)
Senior Manager
Deloitte Tax LLP
btoman@deloitte.com

Shirley Wei (Los Angeles)
Senior Manager
Deloitte Tax LLP
shiwei@deloitte.com

Income/Franchise:

Florida DOR Issues Guidance on IRC Sec. 965 Transition Tax’s Impact on State Corporate Tax Returns

Tax Information Publication, No. 18C01-01, Fla. Dept. of Rev. (4/27/18). The Florida Department of Revenue (Department) has issued a tax information publication (TIP) regarding the IRC Sec. 965 transition tax, specifically the repatriation impact on Florida’s corporate income/franchise tax return (Form F-1120). The TIP explains the “unique one-time transition tax” at a reduced rate under P.L. 115-97 (*i.e.*, the federal 2017 Tax Reform Act) on certain foreign earnings as if they had been repatriated to the United States, as well as Florida’s recently enacted legislation [H.B. 7093; see previously issued Multistate Tax Alert for more details on this new law] that generally adopts the Internal Revenue Code for state corporate income tax purposes retroactively to January 1, 2018 – stating that Florida’s rolling conformity generally follows the computation of federal taxable income, including any IRC Sec. 965 income required to be included in the last taxable year beginning *before* January 1, 2018, and that repatriation income under IRC Sec. 965 generally does *not* flow into federal taxable income. Accordingly, because there are no specific Florida adjustments for repatriated income excluded from the federal income tax computation, “no Florida corporate income tax is due on repatriation income that is excluded from the standard computation of federal taxable income.” In addition, the TIP states that such repatriation income is excluded from the Florida apportionment fraction computation.

URL: https://revenue.law.floridarevenue.com/LawLibraryDocuments/2018/04/TIP-121710_TIP%2018C01-01%20FINAL%20RLL.pdf

URL: <https://www.flsenate.gov/Session/Bill/2018/07093?Tab=BillHistory>

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/enacted-florida-legislation-provides-for-irc-conformity-update-and-other-tax-law-changes.html?id=us:2em:3na:stm:awa:tax:050418&sfid=7011400002G9ih](https://www2.deloitte.com/us/en/pages/tax/articles/enacted-florida-legislation-provides-for-irc-conformity-update-and-other-tax-law-changes.html?id=us:2em:3na:stm:awa:tax:050418&sfid=7011400002G9ih)

The TIP does note that, to the extent repatriation income flows into federal taxable income (such as through a real estate investment trust (federal Form 1120-REIT)), it would be included in the starting point of the Florida corporate income tax computation on Line 1 of the front page of the Florida return; if this occurs, the repatriated amount is subtracted as subpart F income, net of direct and indirect expenses incurred in the taxable year, under state statutes.

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

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

Ian Lasher (Tampa)
Managing Director
Deloitte Tax LLP
ilasher@deloitte.com

Ben Jablow (Tampa)
Manager (Tampa)
Deloitte Tax LLP
bjablow@deloitte.com

Income/Franchise:

Kentucky: New Law Imposes Mandatory Unitary Combined Reporting Regime; Decouples from Recently Enacted IRC Sec. 199A Deduction

H.B. 487, became law without Governor's signature on 4/27/18. Effective immediately and generally applicable to taxable years beginning or after January 1, 2018, new law decouples from the new federal 20% deduction for pass-through income to individuals under IRC Sec. 199A. This new law also adopts a mandatory unitary combined reporting regime in Kentucky for state corporate income tax purposes, applicable for taxable years beginning on or after January 1, 2019 [note: Kentucky's current mandatory nexus consolidated filing continues for tax years beginning before January 1, 2019]. Among other changes involving net operating losses (NOLs), the new law adopts the 80% federal NOL limitation under IRC Sec. 172(a) for NOLs generated after January 1, 2018, as well as adopts the federal unlimited carryforward period for unused NOLs.

[URL: http://www.lrc.ky.gov/record/18RS/HB487.htm](http://www.lrc.ky.gov/record/18RS/HB487.htm)

Note that this new law was enacted in part in response to, and contains many provisions similar to, another recently enacted bill in Kentucky [H.B. 366; see previously issued Multistate Tax Alert for more details on this new law] that i) generally updates statutory corporate and personal income tax references to the IRC as in effect on December 31, 2017; ii) replaces Kentucky's graduated corporate and personal income tax rate structures with a flat 5% tax rate for corporations and individuals; iii) adopts a single-sales factor apportionment formula for apportioning a corporation's business income to Kentucky; iv) implements market-based sourcing rules for assigning receipts from certain services and intangibles to Kentucky; and v) revises various state sales and use tax-related provisions. Modifying H.B. 366, this new law generally extends the deadline for filing with the Kentucky Department of Revenue final federal tax audit changes from *90 days* to *180 days* after the federal audit's conclusion.

[URL: http://www.lrc.ky.gov/record/18RS/HB366.htm](http://www.lrc.ky.gov/record/18RS/HB366.htm)

[URL: https://www2.deloitte.com/us/en/pages/tax/articles/enacted-kentucky-legislation-provides-for-irc-conformity-update-apportionment-changes-and-flat-five-percent-tax-rate.html?id=us:2em:3na:stm:awa:tax:050418&sfid=7011400002G9ih](https://www2.deloitte.com/us/en/pages/tax/articles/enacted-kentucky-legislation-provides-for-irc-conformity-update-apportionment-changes-and-flat-five-percent-tax-rate.html?id=us:2em:3na:stm:awa:tax:050418&sfid=7011400002G9ih)

Stay tuned for a forthcoming Multistate Tax Alert for more details on this legislation and related taxpayer considerations, and please contact us with any questions.

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

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

Income/Franchise:

Ohio Supreme Court Holds in Taxpayer's Favor Regarding Credit Computation for Pre-CAT NOLs

Slip Opinion No. 2018-Ohio-1561, Ohio (4/24/18). The Ohio Supreme Court (Court) reversed an earlier Ohio Board of Tax Appeals ruling, holding in favor of the corporate taxpayer regarding its Ohio commercial activity tax (CAT) credit computation with respect to net operating losses (NOLs) that it had incurred before enactment of the CAT under Ohio's 2005 tax reforms (which generally provided for a phase-out of Ohio's corporation franchise tax and a phase-in of the CAT). Such credit generally may be computed based upon a corporation's applicable pre-CAT NOL amount filed with the Ohio Department of Taxation (Department) by June 30, 2006, and then claimed against the corporation's CAT liability for up to 20 years based upon the amortized amount. In this case, the Court agreed with the taxpayer that the Department's proposed adjustment to the CAT credit comprising of a percentage reduction consistent with the percentage reduction of the taxpayer's federal NOLs on account of cancellation-of-debt income that resulted from its bankruptcy, was *not* authorized by statute. The Department had attempted to make the adjustment to the taxpayer's reported amortizable amount pursuant to state law that authorizes the Department to audit and modify the amount no later than June 30, 2010, and due to the taxpayer's tax-free reorganization that was consummated prior to this date. The Court concluded that state law does *not* authorize an adjustment of the amortizable amount on account of the occurrence of a tax-free reorganization and, instead, i) permits the credit to transfer in this limited context, and ii) prescribes apportionment of the credit among successors to the extent that those successors obtain only a part, rather than all, of the predecessor's NOLs. Please contact us with any questions.

URL: <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-1561.pdf>

— Dave Adler (Columbus)
Managing Director
Deloitte Tax LLP
daadler@deloitte.com

Courtney Clark (Columbus)
Senior Manager
Deloitte Tax LLP
courtneyclark@deloitte.com

Income/Franchise:

Oregon DOR Issues Proposed Administrative Rule on New State Repatriation Tax Credit Pursuant to IRC Sec. 965 Repatriation Income for Tax Year 2017

Proposed OAR 150-317-0651 (Repatriation Tax Credit), Or. Dept. of Rev. (4/25/18). Pursuant to recently enacted Oregon legislation [S.B. 1529; see recently issued Multistate Tax Alert for more details on this new Oregon law] that addresses certain provisions of the federal 2017 Tax Reform Act (*i.e.*, P.L. 115-97), specifically the mandatory deemed repatriation income under IRC Sec. 965, the Oregon Department of Revenue (Department) has issued a proposed administrative rule that prescribes a method for computing the new state repatriation tax credit based upon the lesser of i) Oregon tax attributable to IRC Section 965, or ii) the amount of Oregon tax attributable to and imposed on the taxpayer pursuant to Oregon's tax haven law for tax years beginning on or after January 1, 2014 and before January 1, 2017. A related hearing on this administrative rule proposal is scheduled for May 22, 2018.

URL: http://www.oregon.gov/DOR/about/Documents/150-317-0651_Repatriation_Tax_Credit.pdf

URL: <https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/SB1529>

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/oregon-legislation-creates-new-add-backs-of-federal-tax-reform-deductions.html?id=us:2em:3na:stm:awa:tax:050418&sfid=70114000002G9ih>

Note that the Department has additionally summarized certain related provisions contained within S.B. 1529 as a current corporation tax topic, including how the new law:

URL: <http://www.oregon.gov/DOR/programs/businesses/Pages/corp-topics.aspx>

- Repeals the Oregon listed jurisdiction provisions at ORS 317.716 for tax years beginning on or after January 1, 2017;
- Requires an Oregon addition related to the IRC 965 inclusion for tax year 2017;
- Allows an Oregon subtraction related to the IRC 965 inclusion for tax year 2017; and
- Creates a credit related to the IRC 965 inclusion for tax year 2017.

Please contact us with any questions.

— Scott Schiefelbein (Portland)
Managing Director
Deloitte Tax LLP
sschiefelbein@deloitte.com

Anne-Marie Gorbett (Portland)
Manager
Deloitte Tax LLP
agorbett@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>

Enacted Kentucky legislation provides for IRC conformity update, apportionment changes and flat 5% tax rate

On April 13, 2018, Kentucky legislators voted to override Governor Matt Bevin's veto of House Bill 366 (H.B. 366). H.B. 366 includes the following significant modifications to Kentucky tax law:

- For tax years beginning on or after January 1, 2018, updates conformity to the Internal Revenue Code (IRC) as in effect on December 31, 2017 for both corporate and individual taxpayers, while continuing to decouple from federal depreciation provisions.
- Implementation of a flat 5% tax rate on corporations and individuals effective for tax years beginning on or after January 1, 2018.
- Adoption of a single sales factor apportionment formula and market-based sourcing provisions effective for tax years beginning on or after January 1, 2018.
- Adoption of economic nexus requirements for remote retailers for sales and use tax purposes.
- Expansion of the sales and use tax base to certain enumerated services.

This Multistate Tax Alert summarizes the significant provisions of the tax amendments provided by H.B. 366, and provides some taxpayer considerations.

[Issued April 27, 2018]

URL: <https://www2.deloitte.com/us/en/pages/tax/articles/enacted-kentucky-legislation-provides-for-irc-conformity-update-apportionment-changes-and-flat-five-percent-tax-rate.html?id=us:2em:3na:stm:awa:tax:050418&sfid=7011400002G9ih>

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