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State Tax Matters
The power of knowing.
January 14, 2022

In this issue:

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Income/Franchise:
Illinois DOR Appears to Decline "Convenience of Employer" Rule for Nonresident Withholding

General Information Letter IT-21-0008, Ill. Dept. of Rev. (10/1/21). Responding to a series of tax-related questions posed through a third-party survey, the Illinois Department of Revenue (Department) indicated that with respect to an employer's nonresident employees, if the assigned or primary office of a nonresident employee is in Illinois but the employee is working in another state for his or her convenience rather than the employer's necessity, Illinois would *not* source the wages to Illinois based on the location of the primary office – thus appearing to decline a "convenience of employer"-type rule for Illinois income tax withholding purposes. Other Department responses in the survey reflect legislation enacted in 2021 that amends several Illinois corporate tax provisions related to foreign dividends for tax years ending on or after June 30, 2021 [see Public Act 102-0016 (S.B. 2017 (2021)), and previously issued Multistate Tax Alert for more details on this legislation], including how Illinois decouples from:
URL: https://www2.illinois.gov/rev/research/legalinformation/letterrulings/it/Documents/2021/IT21-0008-GIL.pdf
URL: https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=102-0016&GA=102
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-mta-illinois-fiscal-year-2022-state-budget-enacted.pdf

- The federal 100% foreign dividends received deduction,
- The federal deduction for global intangible low-taxed income (GILTI), and
- The deduction under Internal Revenue Code (IRC) section 243(e) for foreign dividends treated as domestic dividends.

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The Department's responses also reflect new Illinois tax law that i) reinstates a $100,000 limitation on the net loss deduction for corporations for taxable years ending on or after December 31, 2021 and prior to December 31, 2024, and ii) decouples from all federal bonus depreciation allowance including 100% bonus depreciation and all future applicable bonus depreciation percentages under Internal Revenue Code section 168(k) for tax years ending on or after December 31, 2021. Please contact us with any questions.

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Income/Franchise:
Massachusetts: New Release Addresses State Treatment Arising from Federal Partnership Audit Changes

Technical Information Release (TIR) 22-1, Mass. Dept. of Rev. (1/6/22). The Massachusetts Department of Revenue (Department) adopted a technical information release (TIR 22-1) addressing certain provisions within the Massachusetts Fiscal Year 2021 Budget [see H.5164 (2020) for more details on this new law], specifically those involving partnerships that are the subject of a federal audit under the centralized federal partnership audit regime and how Massachusetts is responding to certain changes in the federal partnership audit and adjustment process. TIR 22-1 explains the new Massachusetts partnership tax audit provisions at G.L. c. 62C, § 30B ("§ 30B"), and describes the Massachusetts reporting and payment obligations of partnerships and partners that are subject to a centralized federal partnership audit. According to TIR 22-1, partnerships are subject to § 30B, including the notice requirements described within it, in any instance in which, as a result of a federal audit, there is a difference in the Massachusetts tax liability of any partner from that previously reported – and the "triggering event" for these obligations generally is the "final determination date" and includes a federal administrative adjustment issued to the partnership. TIR 22-1 also explains that the Department has developed a process that will allow partnerships to report federal audit adjustments and report and pay audit assessments on behalf of their partners through its electronic tax system (*i.e.*, *MassTaxConnect*).
URL: https://www.mass.gov/technical-information-release/tir-22-1-reporting-rules-related-to-centralized-federal-partnership-audits
URL: https://malegislature.gov/Bills/191/H5164

Note that previously issued administrative guidance [see *Technical Information Release (TIR) 21-4: Tax Provisions in the Fiscal Year 2021 Budget*, Mass. Dept. of Rev. (3/31/21)] explains that § 30B includes provisions that:
URL: https://www.mass.gov/technical-information-release/tir-21-4-tax-provisions-in-the-fiscal-year-2021-budget

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- Require audited partnerships to amend their Massachusetts nonresident composite returns or withholding reports;
- Allow audited partnerships to make an election to pay state tax on behalf of their partners; and
- Require partners in an audited partnership to directly pay state tax in certain instances.

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Income/Franchise:
Massachusetts Appellate Tax Board Says Taxpayer is a "Manufacturer" Under Corporate Excise Tax

Docket Nos. C332360, C334907, C336909, Mass. App. Tax Bd. (12/10/21). The Massachusetts Appellate Tax Board (ATB) held that a company providing its customers with software-based solutions for accelerating, managing, and improving the delivery of web and media content over the internet should be classified as a "manufacturing corporation" under G.L. c. 63, § 38, and thus eligible to use single sales factor apportionment to compute its Massachusetts corporate excise tax liability for certain tax periods at issue. In doing so, the ATB found the company that both uses internally developed software and sells software under a software-as-a-service (SaaS) model qualified as a manufacturer. Specifically, the ATB explained that given the highly fact-intensive inquiry of the taxpayer's business model and "reasonable inferences drawn therefrom:"
URL: https://www.mass.gov/doc/akamai-technologies-v-commissioner-of-revenue-and-the-board-of-assessors-of-the-city-of-cambridge-intervenor-december-10-2021/download

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- The revenues from the taxpayer's relevant business units for the periods at issue were derived from the development and sale of standardized computer software within the meaning of G.L. c. 63, § 42B, the use of which was by remote access;
- As of both January 1, 2017 and January 1, 2018, the taxpayer qualified as a manufacturing corporation and should be classified as such pursuant to G.L. c. 58, § 2 and G.L. c. 63, § 42B; and
- The taxpayer was entitled to status as a manufacturing corporation for the tax years 2010 through 2012 pursuant to G.L. c. 63, §§ 38 and 42B.

The Massachusetts Department of Revenue (Department) unsuccessfully claimed that the company was not selling a software product but merely selling services performed by software, and that there was no transfer of actual product or software to its customers and thus the company was *not* engaged in manufacturing. However, the ATB agreed with the taxpayer that its engineers created, modified, improved, and oversaw the development and production of standardized software products that were provided to its customers via a SaaS model to meet the needs of its customers' businesses – and thus was engaged in "manufacturing" for state corporate excise tax law purposes. The ATB's analysis was heavily dependent upon the Department's own administrative rulings under the sales tax concerning whether a particular transaction constitutes a taxable sale of software or a nontaxable service. The ATB also noted the Department's reliance upon the "object of the purchaser" analysis to determine the substance of the company's transactions where the company separately charged for services and software sales. In substance, the ATB concluded that where the company was selling software as well as providing services, the provision of services did not have the effect of changing the character of the software sales. Please contact us with any questions.

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Income/Franchise:
New York City: Court Denies Use of 2008 NOL in Computing City Tax and Says State and City NOL Lookback Periods Don't Have to Match

Case No. 154021/2021, N.Y. Sup. Ct., New York County (12/22/21). A recent New York State declaratory judgment action involved the extent to which a bank taxpayer was permitted to utilize net operating loss (NOL) deductions from previous tax years to compute its prior net operating loss conversion (PNOLC) subtraction amounts. These amounts would have reduced the taxpayer's New York City (City) Business Corporation Tax

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(BCT) liability for the audit period (*i.e.*, the tax years ending from December 31, 2015 through December 31, 2017). The taxpayer unsuccessfully claimed that the New York City Department of Finance (Department) must allow use of its 2008 NOLs in calculating its PNOLC subtraction amounts (which are essentially pre-2015 NOL carryforwards computed and utilized under special rules) for the BCT years at issue, because 2008 NOLs were permitted to be used for this purpose under a corresponding provision of New York State tax law Article 9-A, the New York State corporate franchise tax. The Department noted that under City law, bank taxpayers were able to utilize NOLs for tax years beginning January 1, 2009, while under New York State law, taxpayers were able to utilize NOLs for tax years beginning January 1, 2001; as such, a 2008 City NOL could *not* be utilized in computing a PNOLC subtraction amount for BCT purposes. In ruling against the taxpayer and granting the Department's motion to dismiss, the Court explained that the New York State legislature decided to enact laws with different NOL effective dates for New York State versus City tax purposes for certain taxpayers; and the legislature "was entitled to do so" just as it is entitled to provide for the imposition of City taxes that are "separate and apart from state taxes" – and the taxpayer failed to show any basis for conforming the two separate jurisdiction lookback periods. Please contact us with any questions.
URL: https://www.nycourts.gov/reporter/pdfs/2021/2021_32752.pdf

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Income/Franchise:
North Carolina: Summary Highlights Recent Law Changes Including IRC § 163(j)-Related Provisions

Bill Summary – Senate Bill 105: 2021 Appropriations Act – Finance Provisions, N.C. General Assembly (11/15/21). A bill summary posted on the North Carolina General Assembly website highlights various tax-related changes contained in its recently enacted state budget bill [see S.B. 105 and previously issued Multistate Tax Alert for more details on some of these law changes], including new state law that addresses North Carolina's decoupling from provisions under the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act (*i.e.*, P.L. 116-136) involving limitations on the deduction of business interest expense under Internal Revenue Code (IRC) section 163(j). The summary explains that under the federal CARES Act, Congress increased the IRC section 163(j) interest expense limitation from 30% to 50% for the 2019 and 2020 taxable years, but that North Carolina decoupled from this federal law change and remains at 30% – thus requiring

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North Carolina corporate income taxpayers to add back the difference. Accordingly, North Carolina's recently enacted budget bill provides the following related to this IRC section 163(j) addback adjustment:
URL: https://dashboard.ncleg.gov/api/Services/BillSummary/2021/S105-SMSV-80(CCSMLxr-3)-v-4
URL: https://www.ncleg.gov/BillLookUp/2021/sb105
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-multistate-tax-alert-north-carolina-enacts-income-and-franchise-tax-law-changes.pdf

- The addback adjustment is not required to the extent the amount was added back under another provision of North Carolina law to "avoid a double add-back;" and
- A North Carolina taxpayer may deduct over a five-year period the amount of interest expense allowed under federal law that exceeds North Carolina's 30% limit.

Other summarized tax law changes included in the enacted budget bill discuss updating North Carolina's general income tax conformity provisions to the IRC, phasing out North Carolina's corporate income tax, simplifying the calculation of North Carolina's corporate franchise tax, creating a new pass-through entity (PTE) tax, and making various changes to North Carolina's individual income tax provisions. Please contact us with any questions.

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Income/Franchise:
Pennsylvania: Court Says Philadelphia Validly Denied Wage Tax Credit for Taxes Paid to Other State

Case No. 1063 C.D. 2019, Pa. Commw. Ct. (1/7/22). Responding to a resident of the City of Philadelphia, Pennsylvania who worked full-time in the City of Wilmington, Delaware and argued entitlement to an additional credit against her City of Philadelphia wage taxes for the portion of income taxes that she paid to the State of Delaware, which was not credited against her income taxes paid to the State of Pennsylvania, the Pennsylvania Commonwealth Court (Court) denied the claim and held that she is *not* paying income tax twice on her interstate income and there is no support for her position that local and state taxes must be aggregated for Commerce Clause purposes. In doing so, the Court referenced the *Wynne* case and reasoned that the City of Philadelphia and State of Pennsylvania are "two distinct taxing jurisdictions administering two distinct taxes to two different sets of citizenry," and because the City of Philadelphia fully credited income tax withheld for

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her City of Wilmington earned income tax, Philadelphia's refusal to additionally credit the remaining income tax withheld for the State of Delaware income tax does *not* amount to double taxation. In the underlying case facts, the resident's employer withheld applicable City of Philadelphia wage tax and City of Wilmington earned income tax, as well as both Delaware and Pennsylvania state individual income taxes. Please contact us with any questions.
URL: https://www.pacourts.us/assets/opinions/Commonwealth/out/1063cd19_1-7-2220220107_091437_0466373.pdf#search=%22zilka%20%27Commonwealth%2bCourt%27%22

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Income/Franchise:
Virginia DOT Responds to Ruling Request on PTE SALT Cap Workaround and Credit for Taxes Paid to Another State

Ruling Request: Credit for Taxes Paid to Another State, Va. Dept. of Tax. (12/28/21); *VSCPA News: Virginia Department of Taxation responds to SALT CAP workaround*, Vir. Society of CPAs (12/30/21). The Virginia Department of Taxation recently responded to a ruling request addressing pass-through entity (PTE) state and local tax (SALT) deduction cap "workarounds" enacted in response to the $10,000 cap on the deduction for state and local taxes imposed by the Tax Cuts and Jobs Act (*i.e.*, P.L. 115-97), specifically requesting clarification related to a credit for state income taxes paid to another state by Virginia residents who are owners in PTEs that make an election to be taxed at the entity level. The issue in the ruling request originated with respect to legislation enacted in Maryland and concludes as follows:
URL: https://www.vscpa.com/sites/default/files/2021-12/SALT%20CAP%20Ruling.pdf
URL: https://www.vscpa.com/news/virginia-department-taxation-responds-salt-cap-workaround

> "The Maryland PTE SALT cap workaround involves a tax on income for which a Virginia credit for taxes paid to another state is typically available. However, for purposes of the out-of-state credit allowable under Virginia Code § 58.1-332, a tax imposed at the entity level is not attributable to the individual members, unless they are shareholders of an S-corporation. Virginia residents who are shareholders of an S corporation that elects to be taxed at the entity level pursuant to Maryland's PTE SALT cap workaround must then determine on a case-by-case basis if the tax payment would otherwise qualify for the credit for taxes paid to another state in the hands of the individual shareholder. If so, the Virginia resident would be entitled to claim the credit as if it had been paid by the individual directly.

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Under current law, however, Virginia resident taxpayers holding interests in other types of PTEs that make the election in order to take advantage of Maryland's PTE SALT cap workaround will not be eligible for the credit."

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Sales/Use/Indirect:
California: Upcoming Public Hearing Will Address Proposed Changes to Marketplace Sales Regulation

Proposed Changes to Cal. Code of Regs., Title 18, section 1684.5, Marketplace Sales, Cal. Dept. of Tax & Fee Admin. (1/5/22). The California Department of Tax and Fee Administration (Department) is proposing changes to its emergency regulation ("Regulation 1684.5") implementing marketplace facilitator legislation (MFA) enacted in 2019 [see A.B. 147 (2019) and *State Tax Matters*, Issue 2019-17, and S.B. 92 (2019) and *State Tax Matters*, Issue 2019-26, for more details on this 2019 legislation] that are "intended to further implement the MFA, clarify the provisions of the emergency regulation, and generally help businesses understand and comply with their obligations to register with the Department, and collect and pay the applicable sales and use taxes." Among the proposed changes is added language to clarify that for purposes of determining whether a marketplace facilitator or marketplace seller is a retailer engaged in business in California under Cal. Rev. and Tax Code section 6203(c)(4), it must include all sales of tangible personal property for delivery in California "regardless of whether the sales are taxable." An interested parties meeting (IPM) to discuss the proposed changes and related discussion paper is scheduled for January 26, 2022, and the deadline to provide written comments is February 11, 2022. Please contact us with any questions.
URL: https://www.cdtfa.ca.gov/taxes-and-fees/Combined1684-5.pdf
URL: http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB147
URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190503_8.html
URL: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB92
URL: http://newsletters.usdbriefs.com/2019/Tax/STM/190705_11.html

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Sales/Use/Indirect:
California: Upcoming Public Hearing Will Address Audit Manual Changes on Statistical Sampling

Discussion Paper: Proposed Amendments to Audit Manual Chapter 13, Statistical Sampling, and Chapter 4, General Audit Procedures, Cal. Dept. of Tax & Fee Admin. (1/10/22). The California Department of Tax and Fee Administration is proposing changes to its "Audit Manual (AM) Chapter 13, Statistical Sampling, and Chapter 4, General Audit Procedures" to clarify and update policies and procedures followed when using statistical sampling in audits. Among the proposed changes, is the elimination of the "minimum error rule" for purposes of projecting a sample. An interested parties meeting (IPM) to discuss the proposed changes and related discussion paper is scheduled for February 2, 2022, and the deadline to provide written comments is February 23, 2022. Please contact us with any questions.
URL: https://www.cdtfa.ca.gov/taxes-and-fees/CombinedCh13.pdf

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Sales/Use/Indirect:
Illinois DOR Addresses Taxation of Service Provider's SaaS and Cloud-Based Remote Work Tools

Private Letter Ruling ST-21-0008-PLR, Ill. Dept. of Rev. (11/23/21). Responding to an inquiry on the sales and use taxation of a service provider's software as a service (SaaS) and cloud-based remote work tools for collaboration, information technology management and customer engagement, the Illinois Department of Revenue (Department) concluded in a private letter ruling that, under the provided facts, the company acts as a "serviceman" when it provides its SaaS and cloud-based remote work tools. Furthermore, the Department explained that because the company confirmed that its Illinois customers download an underlying applet for free from a server that is located outside of Illinois, and there is neither a separate charge for the applet, nor a charge for the applet included in the charge for a subscription, the company incurs no Illinois use tax liability for providing the applet to Illinois customers. Under the provided facts, the applet is offered for free to customers whether they are charged a subscription fee for the enhanced SaaS application, or whether they are enrolled in the company's basic plan that is made available free of charge. Lastly, the Department explained that Illinois does not impose occupation or use taxes on subscriptions and thus the company is not liable for Illinois occupation or use tax on the subscription fees it charges. Please contact us with any questions.
URL: https://www2.illinois.gov/rev/research/legalinformation/letterrulings/st/Documents/2021/ST21-0008-PLR.pdf

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Sales/Use/Indirect:
New Mexico: Determining Gross Receipts Tax Location Code and Rate for Professional Services

FYI: Location Code for Professional Services and Digital Product or Service, N.M. Tax. & Rev. Dept. (rev. 1/22). The New Mexico Taxation and Revenue Department (Department) issued guidance on determining the appropriate New Mexico gross receipts tax (GRT) location code/rate to use for professional services, where a "professional service" generally is defined as a service being performed that requires either:

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URL: https://klvg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/34821a9573ca43e7b06dfad20f5183fd/c7128f81-2379-4f7b-929e-d08118c49399/FYI-265.pdf

- A license from the State of New Mexico to perform, or
- An advanced degree from an accredited post-secondary educational institution.

In doing so, the Department explains that the business location for professional services generally is the location where the services are performed, or where the seller of the product of the services is located, and the business location is the reporting location for the receipts and sets the location code which determines the GRT rate. However, if professional services are performed "in person," – that is, those services are required to be done either upon property or a person at a location that is not the business location of the professional service provider – then the Department explains that the location where the product of the services is delivered provides the location code and GRT rate for those receipts.

Other topics in this GRT guidance address "in-person" services generally; the sale of digital products over the internet to an individual that uses that product in New Mexico; and professional digital services (*e.g.*, classes or services that are not required to be performed in person that are done through online internet platforms such as video conferences). Please contact us with any questions.

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Sales/Use/Indirect:
New York: Marketer's Subscriptions and Information Reports for Distributors Deemed Not Taxable

Determination DTA No. 829134, N.Y. Div. of Tax App., ALJ Division (12/30/21). An administrative law judge with the New York Division of Tax Appeals held in a multilevel marketing company's favor that certain subscriptions to its web-based "sales tracking" services and underlying information reports provided to its distributors were *not* subject to New York sales and use tax because, under the facts, the subscriptions did *not* constitute taxable sales of prewritten computer software, and the furnishing of tailored and confidential financial information did *not* constitute taxable information services. Under the facts, the information provided by the company's subscription-based sales of "eSuite" services is personal to the subscriber and is confidential, and the company maintains all the proprietary information that is used in the reports provided to subscribers. The judge reasoned that the primary function of the subscriptions in this case is the generation of the underlying information reports rather than any transfer of prewritten software, and such information reports generated for subscribers are confidential, unique and individual to the distributors and serve a key component in

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understanding and maximizing a distributor's compensation. Because the reports are tailored to the growth and sales performance of each individual distributor, they were deemed to constitute nontaxable information services. Please contact us with any questions.
URL: https://www.dta.ny.gov/pdf/determinations/829134.det.pdf

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Sales/Use/Indirect:
Tennessee DOR Explains Procedures Under Recently Repealed Drop Shipment Rule for Suppliers

Notice No. 22-01, Tenn. Dept. of Rev. (1/22). The Tennessee Department of Revenue (Department) issued a notice (Notice No. 22-01) reflecting that, effective as of January 10, 2022, if a Tennessee supplier sells to an out-of-state dealer (including an out-of-state marketplace seller) personal property or taxable services for resale and drop ships the goods to the out-of-state dealer's Tennessee customer, the Tennessee supplier *may* accept a resale certificate issued by another state or a fully completed Streamlined Sales and Use Tax Exemption Certificate that includes the sales tax identification (ID) number issued by the other state to make drop-shipped sales for resale without tax. With Notice No. 22-01, the Department repeals prior "Rule 96," which provided that the Tennessee supplier had to collect Tennessee sales tax on the sales price of the product sold to the out-of-state dealer unless the out-of-state dealer provided a Tennessee resale certificate or Streamlined Sales Tax Exemption Certificate with a Tennessee sales tax ID number. Please contact us with any questions.
URL: https://www.tn.gov/content/dam/tn/revenue/documents/notices/sales/sales22-01.pdf

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Gross Receipts and Other/Miscellaneous:
Tennessee Appellate Court Affirms that Business Tax is Due on Retail Rather than Wholesale Rate

Case No. M2020-01075-COA-R3-CV, Tenn. Ct. App. (1/5/22). In a case involving a corporation's challenge to its Tennessee Business Tax (TBT) liability – that is, Tennessee's tax on gross receipts that used to be administered and enforced locally but which now is administered and enforced by the Tennessee Department of Revenue (Department) – the Tennessee Court of Appeals (Court) affirmed the judgment of a trial court granting summary judgment in favor of the Department that the company's TBT liability should be based on the TBT's higher retail tax rate, rather than the lower wholesale tax rate. In doing so, the Court agreed that:
URL: https://www.tncourts.gov/sites/default/files/m2020-01075_-_bearing_opn_-_electronically_signed.pdf

- The company's sales of tangible personal property to customers subsequently incorporating the products into manufacturing machinery did not constitute "wholesale sales" for TBT purposes;
- The company's TBT statutory burden to demonstrate more than 50% of its sales as wholesale sales was legitimately possible for it to meet without tracing the disposition of every item sold, and the company could have met this burden with already available documentation; and
- The trial court did not err in declining to find that generally accepted accounting principles (GAAP) be applied to the wholesale definition under the TBT Act.

Under the facts in this case, the company sold original equipment manufacturer (OEM) and industrial maintenance, repair, and operations products to various manufacturers. The company unsuccessfully claimed that because it typically sold its products to manufacturing customers, who incorporate the purchased products into machinery and equipment utilized during the manufacturing process, it could calculate its TBT liability based on the wholesale tax rate. 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: https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive.html?id=us:2em:3na:stm:awa:tax

No new alerts were issued this period. Be sure to refer to the archives to ensure that you are up to date on the most recent releases.

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