Deloitte.

State Tax Matters
The power of knowing.
March 11, 2022

In this issue:

Income/Franchise:
Indiana DOR Addresses Nexus, Combined Filing and Business Income Under Financial Institution Tax

Letter of Findings 18-20210085, Ind. Dept. of Rev. (3/2/22). In an administrative ruling, the Indiana Department of Revenue (Department) held that an auditor correctly excluded a financial institution from its affiliate group's combined Indiana financial institution tax (FIT) returns as the facts showed that the entity did *not* conduct financial business in Indiana during the years at issue and, as a result, lacked requisite Indiana nexus. In doing so, the Department explained that the entity did not maintain an office in Indiana or generate income from Indiana during the years at issue and that its Indiana activities were "de minimus." Furthermore, the Department reasoned that including the financial institution's losses incurred during the audit period "would not fairly represent the combined group's income attributable to Indiana for FIT purposes," and that the entity "has not met its statutory burden under IC § 6-8.1-5-1(c) of establishing that the audit's analysis and the subsequent assessment were wrong." The Department also agreed with the auditor that state FIT law does not provide a "business" versus "nonbusiness" income classification distinction and therefore a subsidiary's position to the contrary and attempt to exclude certain "nonbusiness income" from the sale of stock from its Indiana FIT base was erroneous. Please contact us with any questions.
URL: http://iac.iga.in.gov/iac/20220302-IR-045220063NRA.xml.pdf

— Amanda Suasnabar (Indianapolis)
Managing Director
Deloitte Tax LLP
asuasnabar@deloitte.com

Tom Engle (St. Louis)
Manager
Deloitte Tax LLP
tengle@deloitte.com

Income/Franchise:
Maine: Proposed Rules Reflect New Bright-Line Nexus Standard Under Corporate Income Tax

Proposed Reg. Section 18-125-801; Proposed Reg. Section 18-125-810, Me. Rev. Serv. (3/1/22). Maine Revenue Services (MRS) is proposing to amend "Rule 810" (Maine Unitary Business Taxable Income, Combined Reports and Tax Returns) to:
URL: https://legislature.maine.gov/publicrulemaking/Public.aspx

1. Reflect recent legislative changes related to factor presence nexus thresholds that apply to tax years beginning on or after January 1, 2022 [see LD 1216 / HP 891 (2021) for more details on these law changes],
   URL: http://www.mainelegislature.org/legis/bills/display_ps.asp?ld=1216&PID=1456&snum=130
2. Address the utilization of income tax credits among taxable corporations that are members of a unitary group, and
3. Make certain technical changes.

Maine corporate income tax law now incorporates a "bright-line" economic nexus standard applicable to tax years beginning on or after January 1, 2022, so that a corporation generally is deemed to have nexus with Maine if it:

- Is organized or commercially domiciled in Maine; or
- Is organized or commercially domiciled outside Maine but has property, payroll or sales in Maine exceeding any of the following thresholds for the taxable year:
    - For property, $250,000;
    - For payroll, $250,000;
    - For sales, $500,000; or
    - 25% of the corporation's property, payroll, or sales.

MRS is also proposing to amend "Rule 801" (Apportionment) to reflect the new factor presence nexus standards, provide a definition for "affiliated group," and make certain technical changes. Comments on these proposed rule changes are due by April 8, 2022. Please contact us with any questions.

— Bob Carleo (Boston)
Managing Director
Deloitte Tax LLP
rcarleo@deloitte.com

Alexis Morrison-Howe (Boston)
Principal
Deloitte Tax LLP
alhowe@deloitte.com

Ian Gilbert (Boston)
Senior Manager
Deloitte Tax LLP
iagilbert@deloitte.com

Income/Franchise:
Montana DOR Explains State Treatment of Federal RARs & Partnership Audit Regime Changes

Changes to Partnership Income and Corresponding Montana Source Income from House Bill 53, Mont. Dept. of Rev. (3/4/22); House Bill 53, Mont. Dept. of Rev. (3/7/22). The Montana Department of Revenue (Department) issued summaries of legislation enacted in 2021 [see H.B. 53 (2021) for more details on the legislation] that addresses how and when some partnerships must report federal tax adjustments to the Department in response to changes in the federal partnership audit and adjustment process under the federal 2015 Bipartisan Budget Act. According to the Department, partnerships generally must file a federal adjustment report with the Department within 90 days of receiving a final federal determination, and such report must include both a copy of the federal determination and a detailed statement explaining the change in Montana source income. Moreover, the Department explains that, by default, partnerships must amend their Montana tax returns and Montana Schedules K-1 for the reviewed year, and the partnership is responsible for the payment of additional

composite and withholding taxes when applicable, as well as for "pushing out" the adjustment to its direct partners. Direct partners must then file their Montana returns and pay the additional taxes within 180 days of the final federal determination.
URL: https://mtrevenue.gov/2022/03/04/changes-to-partnership-income-and-corresponding-montana-source-income-from-house-bill-53/
URL: https://mtrevenue.gov/2022/03/07/house-bill-53/
URL:
http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=53&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=

The Department also explains that a partnership may elect to pay an amount in lieu of its direct, indirect, or both partners' tax, and that the adjusted partnership may elect to pay the imputed underpayment of Montana tax when filing the federal adjustment report, "or no later than 90 days after receiving the final federal determination." In a tiered structure, the Department provides that "any partnership may make such election no later than 90 days after the required time to provide amended MT Schedules K-1 to its partners" – noting that Montana administrative rules "regarding tiered structures and the calculation of the tax for the partnership-pay election" are under development. Lastly, the Department explains that the time to file an amended Montana return with the Department following a federal adjustment is now extended to 180 days and claims for refunds now must be made on or before the latter of:

1. The last day of the regular revision period, or
2. One year from the date the federal adjustment report was due to the Department.

Please contact us with any questions.

— Roburt Waldow (Minneapolis)
Principal
Deloitte Tax LLP
rwaldow@deloitte.com

Gregory Bergmann (Chicago)
Partner
Deloitte Tax LLP
gbergmann@deloitte.com

Olivia Schulte (Washington, DC)
Manager
Deloitte Tax LLP
oschulte@deloitte.com

Income/Franchise:
New Mexico: New Law Offers Elective Entity-Level Taxation for Some Pass-through Entities

H.B. 102, signed by gov. 3/8/22. Applicable for tax years beginning on or after January 1, 2022, recently signed legislation provides an annual election for some pass-through entities to pay a new entity-level income tax. If

elected, the new PTE tax would be imposed on the distributed net income of the electing pass-through entity for the taxable year at a tax rate equal to the higher of the maximum tax rate imposed pursuant to section 7-2-7 NMSA 1978, or the maximum tax rate imposed pursuant to section 7-2A-5 NMSA 1978 for the taxable year (i.e., at the highest New Mexico corporate and/or individual income tax rate, as applicable). The net income subject to the new PTE tax is exempt from both New Mexico corporate and individual income taxation. The legislation also addresses how to make the PTE tax election, when to file the return, and how to calculate the entity's distributed net income.
URL: https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=102&year=22

See recently issued Multistate Tax Alert for more details on this legislation, and please contact us with any questions.

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

Cindy James (Phoenix)
Senior Manager
Deloitte Tax LLP
cyjames@deloitte.com

Jimmy Westling (Phoenix)
Manager
Deloitte Tax LLP
jawestling@deloitte.com

Olivia Schulte (Washington, DC)
Manager
Deloitte Tax LLP
oschulte@deloitte.com

Gross Receipts:
Virginia BPOL Ruling Addresses Payroll Factor Calculation Involving In-State Remote Workers

Public Document No. 21-131, Va. Dept. of Tax. (9/28/21). In an administrative ruling involving a global company with employees working both at its Virginia office located within a certain Virginia county (County) and remotely from residences throughout Virginia, the Virginia Department of Taxation (Department) held in the company's favor in part that it must compute its payroll apportionment numerator for purposes of the County's business, professional and occupational license (BPOL) tax based only on payroll attributed to the definite place of business in that County. In doing so, the Department rejected the County's attempt to compute the company's BPOL payroll apportionment numerator by including the payroll of *all its employees* who worked in Virginia, concluding that any employees who worked remotely from homes outside of the County must be excluded from the numerator.
URL: https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/21-131

The company's proposed calculation methodology of the payroll apportionment numerator was to include only those employees working at the County location or those Virginia remote workers who reported to the County office. The Department clarified, however, that the payroll apportionment numerator "should not

include any employees who worked remotely outside of the County, regardless of what office they reported to." In making this clarification, the Department explained that requiring the payroll of home-based employees to be apportioned using the suggested "direction and control basis" for BPOL tax purposes "would reintroduce the types of factual complexities that payroll apportionment was designed to avoid," and thus the company "could not commingle another situs rule with payroll apportionment."

Further, in responding to the County's reference to state corporate income tax caselaw from other jurisdictions, the Department reasoned that a taxpayer's activities within a "state as a whole" would be relevant in determining the taxpayer's liability for such type of tax but that the BPOL tax "is a local tax separate and distinct from a state-level corporate income tax" and thus "has no relevance whatsoever on the issue presented." Please contact us with any questions.

— Joe Carr (McLean)
Managing Director
Deloitte Tax LLP
josecarr@deloitte.com

Jennifer Alban-Bond (McLean)
Senior Manager
Deloitte Tax LLP
jalbanbond@deloitte.com

Ryan Trent (Charlotte)
Senior Manager
Deloitte Tax LLP
rtrent@deloitte.com

Lauren Pflugrath (Charlotte)
Manager
Deloitte Tax LLP
lpflugrath@deloitte.com

Indirect/Sales/Use:
North Carolina: Private Letter Ruling Addresses if Online Platform is a Marketplace Facilitator

Sales and Use Tax Private Letter Ruling SUPLR 2022-0001, N.C. Dept. of Rev. (2/28/22). The North Carolina Department of Revenue (Department) issued a redacted private letter ruling to a taxpayer that "created a business-to-business ('B2B') online platform" enabling select online participants to list their parts inventory on the internet and allowing certain logged in customers to place parts orders through the platform. In it, the Department concluded that based on the provided facts, the taxpayer operated as a "marketplace facilitator" who makes marketplace facilitated sales in North Carolina for sales and use tax purposes. The Department explained that North Carolina provides a two-part definition of a marketplace facilitator that may be satisfied directly or indirectly:
URL: https://www.ncdor.gov/media/13155/open

1. The person "[l]ists or otherwise makes available for sale a marketplace seller's items through a marketplace owned or operated by the marketplace facilitator;" and
2. The person collects the sales or purchase price, processes payments, or makes payment processing available.

Under the presented facts, the Department reasoned that the taxpayer met both parts of the definition. In this case, the taxpayer owns and administers the electronic infrastructure of the platform and provides the necessary support to enable select users to connect to the platform. Furthermore, purchasing customers on the platform have the option to pick up the parts at a physical location in North Carolina, and the taxpayer makes payment processing services available to them in two different ways. Please contact us with any questions.

— Joe Garrett (Birmingham)
Managing Director
Deloitte Tax LLP
jogarrett@deloitte.com

Kathy Saxton (Atlanta)
Managing Director
Deloitte Tax LLP
katsaxton@deloitte.com

Ryan Trent (Charlotte)
Senior Manager
Deloitte Tax LLP
rtrent@deloitte.com

Other/Miscellaneous:
Maryland: Federal Judge Partially Dismisses Lawsuit Challenging New Digital Advertising Tax

Case 1:21-cv-00410-LKG, US D. Ct. Dist. of Md. (3/4/22). Following Maryland's enactment in 2021 of a new and novel digital advertising revenues tax – which imposes a tax on annual gross revenue from digital advertising services in Maryland based on a tiered tax rate schedule [see H.B. 732 (2020) and previously issued Multistate Tax Alert for more details on this new tax, as well as S.B. 787 (2021) and previously issued Multistate Tax Alert, for details on subsequently enacted legislation that pushed the start date of the new digital advertising tax to 2022] – the US District Court for the District of Maryland (Court) partially granted the Comptroller of the Treasury of Maryland's motion to dismiss a lawsuit brought forth by various trade and industry groups challenging the tax's validity and seeking a declaration and injunction against its enforcement. Specifically, the Court held that the federal Tax Injunction Act (TIA) bars the plaintiffs' federal challenge to the charge imposed by the new law because "this charge is a tax and Maryland law provides a plain, speedy and efficient remedy for plaintiffs to challenge this tax in state court." However, the Court held that the TIA does *not* preclude plaintiffs' challenge to the new law's "pass-through prohibition provision," because this provision does not involve the "assessment, levy or collection" of a tax.
URL: https://www2.mdd.uscourts.gov/Opinions/Opinions/Chamber.FINAL.pdf
URL: http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb0732/?ys=2020rs
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-maryland-enacts-tax-on-digital-advertising-services.pdf
URL: http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0787?ys=2021RS
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-mta-maryland-enacts-emergency-bill-addressing-taxation-of-digital-advertising-and-digital-products.pdf

Among the plaintiffs' assertions in this federal lawsuit are claims that the Maryland digital advertising revenues tax:

- Is preempted by the federal Internet Tax Freedom Act (ITFA), which prohibits states from imposing "multiple and discriminatory taxes on electronic commerce;" and
- Violates the Due Process and Commerce Clauses of the US Constitution by burdening and penalizing purely out-of-state conduct and interfering with foreign affairs.

Please contact us with any questions.

— Joe Carr (McLean)
Managing Director
Deloitte Tax LLP
josecarr@deloitte.com

Ryan Trent (Charlotte)
Senior Manager
Deloitte Tax LLP
rtrent@deloitte.com

Inna Volfson (Boston)
Senior Manager
Deloitte Tax LLP
ivolfson@deloitte.com

Michael Spencer (Washington, DC)
Manager
Deloitte Tax LLP
mispencer@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: https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive.html?id=us:2em:3na:stm:awa:tax

Virginia Supreme Court Upholds Refund for Tobacco Company by Allowing Exclusion of Stored Leaf Tobacco from Property Factor
On February 10, 2022, the Virginia Supreme Court issued its opinion in *Virginia Department of Taxation v. R.J. Reynolds Tobacco Co*. The court upheld a lower court's decision that Lorillard Tobacco Company ("Taxpayer") can exclude the value of leaf tobacco stored in Virginia warehouses and facilities from its property factor because the leaf tobacco is not being "used" while stored. As a result of the decision, the Virginia Department of Taxation must refund R.J. Reynolds Tobacco Company, a successor by merger of Taxpayer, approximately $11 million in corporate income tax, plus interest.
URL: https://www.vacourts.gov/opinions/opnscvwp/1201263.pdf

This Multistate Tax Alert summarizes the *R.J. Reynolds* decision.
[Issued March 8, 2022]

URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-virginia-supreme-court-upholds-refund-tobacco-company-allowing-exclusion-stored-leaf-tobacco-property-factor.pdf