State Tax Matters
The power of knowing.
April 22, 2022

In this issue:

Income/Franchise:
Colorado: Proposed Rules Address Treatment of Foreign Source Income and IRC §78 Dividends

Proposed Amended Rule section 39-22-303(10); *Proposed Amended Rule section 39-22-304(3)(j)*; *Stakeholder Workgroup Meeting – Foreign Source Income and Corporate Subtraction for Section 78 Dividends*, Colo. Dept. of Rev. (4/22). The Colorado Department of Revenue (Department) is proposing administrative rule amendments that, among other listed reasons, attempt to:

URL:
https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Ftax.colorado.gov%2Fsites%2Ftax%2Ffiles%2Fdocuments%2FDraft%2520Rule%252039-22-303%252810%2529.doc
URL:
https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Ftax.colorado.gov%2Fsites%2Ftax%2Ffiles%2Fdocuments%2FDraft%2520Rule%252039-22-304%25283%2529%2528j%2529.doc
URL: https://tax.colorado.gov/news-article/stakeholder-workgroup-meeting-foreign-source-income-and-corporate-subtraction-for

- Provide guidance regarding the definition of foreign source income, the calculation of the amount of foreign source income considered in the apportionment and allocation of a C corporation's net income, and the requirement to report any changes to that amount for Colorado corporate income tax purposes;
- Clarify that the provisions in both statute and rule regarding the exclusion of foreign source income apply collectively to all C corporations included in the same combined, consolidated, or combined/consolidated Colorado return;
- Specify that foreign source income potentially eligible for exclusion include the types of income enumerated in Internal Revenue Code (IRC) section 862(a), income allocated to sources outside the United States pursuant to IRC section 863, Subpart F income, and global intangible low-tax income (GILTI);
- Explain the application of the foreign source income exclusion to C corporations that have elected to claim foreign taxes paid or accrued as a federal deduction;
- Coordinate the foreign source income exclusion with provisions in Colorado House Bill 21-1311 [see previously issue Multistate Tax Alert for more details on these 2021 state law changes] regarding C corporations that are incorporated in a foreign jurisdiction for the purpose of tax avoidance;

URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-mta-colorado-enacts-several-law-changes-impacting-income-and-indirect-taxes.pdf

- Coordinate the foreign source income exclusion with the subtraction authorized under state law by Colo. Rev. Stat. section 39-22-304(3)(j) for "section 78 dividends"; and
- Advise taxpayers that the subtraction from federal taxable income for amounts treated as dividends pursuant to IRC section 78 is limited to amounts included in federal taxable income, as well as clarify that no such subtraction is allowed for amounts already deducted, pursuant to IRC section 250 or otherwise, in the calculation of federal taxable income.

The Department has scheduled a stakeholder workgroup meeting on May 18, 2022 to discuss these proposed changes, which may be attended in-person or remotely. Written comments on these proposals are due by May 18, 2022, too. Please contact us with any questions.

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Income/Franchise:
Illinois: Proposed Apportionment Rule Changes Align with MTC Model Rule on Throwback/Throwout

Proposed Amended 86 Ill. Adm. Code 100.3200, Ill. Dept. of Rev. (4/15/22). The Illinois Department of Revenue has proposed administrative rule changes to "remove the stipulation regarding treaties with foreign countries in determining whether a taxpayer is subject to tax" for ascertaining whether it is taxable in another country for Illinois "throwback" or "throwout" purposes. Currently, the rule contains a restriction that the taxpayer will *not* be considered subject to tax for such purposes if a treaty exempts its activities from taxation. To better align the Illinois rule with the Multistate Tax Commission's model rule, the proposal provides:
URL: https://www.ilsos.gov/departments/index/register/volume46/register_volume46_issue_16.pdf

> "For taxable years beginning on or after January 1, 2021, if jurisdiction is otherwise present, that foreign country or political subdivision is not considered as being without jurisdiction by reason of the provisions of a treaty between that foreign country or political subdivision and the United States."

Comments on this proposal are due no later than 45 days after its publication. Please contact us with any questions.

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

H.B. 2239, signed by gov. 4/14/22. Applicable for taxable years beginning on or after January 1, 2022, new law permits pass-through entities, including partnerships and S corporations, to make an election to pay an entity level state income tax in Kansas at a flat tax rate of 5.7%. In turn, electing pass-through entity owners may claim a credit against their income tax equal to their direct share of the Kansas pass-through entity tax. Any excess credit is refundable to the electing pass-through entity owner. The legislation is in response to the $10,000 cap on the federal individual income tax deduction for state and local taxes that was enacted in the 2017 federal tax overhaul legislation known as the Tax Cuts and Jobs Act (*i.e.*, P.L. 115-97).
URL: http://kslegislature.org/li/b2021_22/measures/HB2239/

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

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Income/Franchise:
Maine: New Law Updates State Conformity to Internal Revenue Code

L.D. 1763 / H.P. 1314, signed by gov. 4/14/22. Effective immediately and applicable to tax years beginning on or after January 1, 2021, and "to any prior tax years as specifically provided by the United States Internal Revenue Code of 1986 and amendments to that Code as of December 31, 2021," new law generally conforms state corporate and personal income tax references to the "Internal Revenue Code" to the federal Internal Revenue Code (IRC) as in effect as of December 31, 2021. Please contact us with any questions.
URL: https://legislature.maine.gov/LawMakerWeb/dockets.asp?ID=280081986

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

H.B. 1691, signed by gov. 4/14/22. Applicable from and after January 1, 2022, new law permits partnerships, S corporations, or similar pass-through entities to make an election to pay an entity level state income tax (PTE tax) in Mississippi for the 2022 calendar year, and for each calendar year thereafter. The election is binding for that taxable year and all taxable years thereafter until revoked. Owner members, partners, or shareholders of an electing pass-through entity, in turn, may claim a credit against Mississippi income tax equal to their pro rata or distributive share of tax paid by the electing pass-through entity with respect to the corresponding taxable year.
URL: http://billstatus.ls.state.ms.us/2022/pdf/history/HB/HB1691.xml

See recently issued Multistate Tax Alert for more details on this new PTE tax, and please contact us with any questions.
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-mississippi-enacts-pass-through-entity-tax-election.pdf

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Income/Franchise:
New York: Taxpayer Must Include Royalty Payments Received from Foreign Affiliates in Tax Base

Determination DTA No. 828091, N.Y. Div. of Tax App., ALJ Division (4/7/22). Referencing state caselaw on the subject, including New York Tax Tribunal rulings from 2020 and 2021 [see Decision DTA No. 828304, N.Y. Tax App. Trib. (8/6/20) and Decision DTA Nos. 827825, 827997 and 827998, N.Y. Tax App. Trib. (3/5/21) for more details on these two rulings], an administrative law judge with the New York Division of Tax Appeals held that certain royalty payments received by a taxpayer from its foreign affiliates (as “related members” under the statute) could not be excluded under a former statutory royalty exclusion in effect for the prior tax years at issue in computing the taxpayer’s Article 9-A corporation franchise tax combined return “entire net income” (ENI). Similarly, the judge also concluded that the former statutory royalty exclusion (*i.e.*, under Tax Law former § 208 (9)(o)(3)) as applied did *not* discriminate against the taxpayer in violation of the dormant Commerce Clause. In doing so, the judge explained that based on the overall statutory scheme of Tax Law former § 208 (9)(o), the royalty income exclusion provision of one related member is conditioned on the application of the royalty add back by another related member, and that because the foreign affiliate related members were not subject to New York's corresponding royalty expense add-back provisions, the royalty exclusion provision was not available to the taxpayer. Lastly, the judge held that because the royalty payments at issue cannot be excluded from the taxpayer's federal taxable income in computing its entire net income, they may be included in the denominator of the receipts factor of its business allocation percentage. Please contact us with any questions.

URL: https://www.dta.ny.gov/pdf/determinations/828091.det.pdf
URL: https://www.dta.ny.gov/pdf/decisions/828304.dec.pdf
URL: https://www.dta.ny.gov/pdf/decisions/827825.dec.pdf

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Income/Franchise:
North Carolina DOR Issues Guidance on Pass-through Entity Tax Election

Important Notice Regarding North Carolina's Recently Enacted Pass-Through Entity Tax, N.C. Dept. of Rev. (4/14/22). The North Carolina Department of Revenue (Department) issued a notice reflecting state budget legislation enacted in 2021 that allows certain pass-through entities (PTEs) to elect to pay North Carolina income tax at the entity level effective for tax years beginning on or after January 1, 2022 [see S.B. 105 (2021) and previously issued Multistate Tax Alert for more details on this new tax]. The Department explains that this new PTE tax was established in response to the $10,000 cap on the federal individual income tax deduction for state and local taxes that was enacted in the 2017 federal tax overhaul legislation known as the Tax Cuts and Jobs Act (*i.e.*, P.L. 115-97). The notice includes answers to a series of implementation-related frequently asked questions (FAQs), and explains that an eligible PTE has the option to make this election on its timely filed annual North Carolina tax return, which must be made by the due date of the PTE's annual return, including extensions.

URL: https://www.ncdor.gov/media/13359/open
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-pass-through-entity-tax-election.pdf

See forthcoming Multistate Tax Alert for additional details on this new PTE tax, and please contact us with any questions in the meantime.

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Income/Franchise:
Texas Comptroller Adopts Changes to Franchise Tax Rule on Computing Compensation

Amended Tex. Admin. Code tit. 34 section 3.589, Tex. Comptroller of Public Accounts (4/15/22). The Texas Comptroller of Public Accounts adopted regulatory amendments on how to compute “compensation” for Texas franchise (margin) tax purposes to “implement statutory changes to definitions, incorporate policy decisions, and improve readability.” Among the changes is new language concerning wages and cash compensation paid to employees in a foreign country, pursuant to Accession No. 201510539L (June 14, 2016). Please contact us with any questions.
URL: https://www.sos.state.tx.us/texreg/pdf/backview/0415/0415is.pdf

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Income/Franchise:
Virginia Department of Taxation Issues Guidance on New PTE Tax Election and Announces Some Delays

Tax Bulletin 22-6, Vir. Dept. Tax. (4/15/22). The Virginia Department of Taxation (Department) issued a tax bulletin “intended to provide taxpayers with preliminary guidance” on new law that permits qualifying pass-through entities to make an annual election in Virginia to pay an entity-level state income tax (PTE tax) for taxable years beginning on and after January 1, 2021, but before January 1, 2026 [see H.B. 1121 / S.B. 692, signed by gov. 4/11/22, and previously issued Multistate Tax Alert for more details on this new tax]. In this guidance, the Department states that pass-through entities interested in making the election for taxable year 2021 must file returns by their original or extended due date, “but do not try to pay the elective PTE tax” with such taxable year 2021 returns as the Department “cannot accept or process the elective PTE tax at this time.” Correspondingly, the Department states that individuals must file their taxable year 2021 returns by their original or extended due date “but do not try to claim a credit for the elective tax paid by your PTE to Virginia,” warning that doing so may result in the assessment of interest and penalties. Instead, the Department explains that if a PTE makes the election for taxable year 2021, the corresponding individuals “will receive information from your PTE on or after October 2023 informing you of the amount to claim and how to claim it.”
URL: https://www.tax.virginia.gov/laws-rules-decisions/tax-bulletins/22-6
URL: https://lis.virginia.gov/cgi-bin/legp604.exe?ses=221&typ=bil&val=hb1121
URL: https://lis.virginia.gov/cgi-bin/legp604.exe?ses=221&typ=bil&val=sb692
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-virginia-enacts-pass-through-entity-tax-election.pdf

Under Virginia’s new law, individuals may claim a credit for certain taxes paid by a pass-through entity under another state’s substantially similar pass-through entity level state income tax for taxable years beginning on and after January 1, 2021, but before January 1, 2026; the bulletin states that the implementation of this provision is *not* delayed. As such, for taxable year 2021, individuals may claim a credit for taxes paid by a pass-through entity under another state’s substantially similar pass-through entity level tax in proportion to their ownership in such pass-through entity. Please contact us with any questions or comments.

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Income/Franchise:
Wisconsin: New Law Addresses Some Added Impacts of Federal Partnership Audit Changes

S.B. 794 (Act 262), signed by gov. 4/15/22. Partly in response to changes in the federal partnership audit and adjustment process under the federal 2015 Bipartisan Budget Act, new law modifies several aspects related to Wisconsin Department of Revenue (Department) tax audits of certain pass-through entities, including partnerships, limited liability companies, and tax-option corporations. Among the changes are provisions that permit the Department in some situations to:
URL: https://docs.legis.wisconsin.gov/2021/proposals/reg/sen/bill/sb794

- Assess and collect additional tax from a pass-through entity on income otherwise reportable by its pass-through members;
- Direct the Wisconsin Secretary of the Department of Administration to refund to a pass-through entity the part of an overpayment paid by the entity and not by the entity's members;
- Assess an adjustment to reduce a tax credit to a pass-through entity if the entity previously computed the credit and reported the credit to its members;
- Assess an adjustment to increase a tax credit to offset additional tax assessed to a pass-through entity; and
- Assess any pass-through member of a pass-through entity for their allocated portion of additional tax otherwise due in certain instances.

See forthcoming Multistate Tax Alert for additional details on these law changes, and please contact us with any questions in the meantime.

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Gross Receipts:
Washington DOR Proposes Rule Implementing B&O Tax Workforce Education Surcharges

Proposed Reg. Section 458-20-NEW Workforce education investment surcharge, Wash. Dept. of Rev. (4/6/22). Following the initial enactment of Washington's three-tiered state business and occupation (B&O) tax "workforce education surcharges" in 2019 [see E2SHB 2158 (2019) for more details on these 2019 law changes] and subsequently enacted legislation [see ESSB 6492 (2020) and previously issued Multistate Tax Alert for more details on these 2020 law changes] that modified and delayed the effective date of the workforce education surcharges on select advanced computing businesses to April 1, 2020, the Washington Department of Revenue has proposed a new administrative rule that provides information about the taxability of, and surcharge imposed on, select advanced computing businesses as described in Wash. Rev. Code section 82.04.299. The proposal also reflects recently enacted legislation [see SB 5799 (Chap. 170) for more details on this new law], which exempts certain provider clinics offering primary care, multispecialty and surgical services from the surcharge. A virtual public hearing on this proposal is scheduled for May 10, 2022, and written comments are also being accepted. Please contact us with any questions.
URL: https://dor.wa.gov/sites/default/files/2022-04/20-290cr2frmdraftApril22.pdf?uid=6259966c906d0
URL: https://app.leg.wa.gov/billsummary?BillNumber=2158&Initiative=false&Year=2019
URL: https://apps.leg.wa.gov/billsummary/?BillNumber=6492&Year=2020
URL: https://www2.deloitte.com/us/en/pages/tax/articles/new-washington-law-revises-workforce-education-surcharge-and-increases-the-business-occupation-tax-rate-for-service-and-other-activities.html?id=us:2em:3na:stm:awa:tax:042222&sfid=7015Y000003WdIDQA0
URL: https://apps.leg.wa.gov/billsummary/?BillNumber=5799&Year=2022

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Indirect/Sales/Use:
Kentucky: New Law Subjects Additional Services to Taxation, Including Some Business Inputs

H.B. 8, legislature overrode governor's veto 4/13/22. Effective January 1, 2023, recently enacted legislation expands Kentucky's sales and use tax base to include some additional taxable services such as marketing services; telemarketing services; lobbying services; executive employee recruitment services; website design and development services; website hosting services; and prewritten computer software access services.
URL: https://apps.legislature.ky.gov/record/22RS/hb8.html

See recently issued Multistate Tax Alert for more details on these and other tax-related measures included in this legislation, and please contact us with any questions.
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-kentucky-enacts-various-indirect-and-income-tax-changes-and-establishes-a-tax-amnesty-program.pdf

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Indirect/Sales/Use:
New York Appellate Court Denies Sales Tax Refunds on Device Sales in Gift Card Promotion

Case No. 531284, N.Y. App. Div. (4/14/22). The New York Appellate Division, Third Department (Court), recently affirmed a 2019 New York Tax Appeals Tribunal (Tribunal) decision [see Decision DTA No. 827287, N.Y. Tax App. Trib. (12/24/19) for details on the earlier ruling] addressing the proper method for computing sales tax on sales made in a taxpayer's "back-to-school" (BTS) promotion for two tax years at issue. Under the BTS promotion, some customers received, as applicable, either a $100 or $50 gift card with purchases of certain computers/electronics. The Court essentially agreed with the Tribunal that, under the facts, state sales tax should be computed on the full price of the qualifying purchase, without regard to the value of the gift card. Under the BTS promotion, if an individual declined the gift card, he/she would be charged for the entire price of the taxpayer product and the individuals were unable to return the gift card separately. The Court explained that because the gift card was given, rather than sold, upon the purchase of qualifying products, no sales tax collected at the time of that purchase was attributable to the card's value. In this respect, the Court reasoned that sales tax would be owed on the card's value only when it was applied toward a later purchase, and thus "it follows that the Tribunal rationally determined that such value was not subjected to double taxation." Please contact us with any questions.
URL: https://nycourts.gov/reporter/3dseries/2022/2022_02459.htm
URL: https://www.dta.ny.gov/pdf/decisions/827287.dec.pdf

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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

California Office of Tax Appeals concludes gain from goodwill constitutes apportionable business income to nonresident S corporation shareholders
On January 5, 2022, the California Office of Tax Appeals (OTA) issued its opinion in *In the Matter of the Appeal of: T. Faries and Estate of D. Faries Jr. (Dec'd)* (*Faries*). The OTA concluded that (1) the gain derived from an S corporation's sale of goodwill constituted apportionable business income to its nonresident shareholders under California Code of Regulations, title 18, ("Regulation") section 17951-4(f), (2) the S corporation's sale of goodwill constituted an "occasional sale," and accordingly, its gross receipts therefrom were properly excluded from the sales factor under Regulation section 25137(c)(1)(A), and (3) the taxpayer failed to demonstrate by clear and convincing evidence that exclusion of such gross receipts pursuant to Regulation 25137(c)(1)(A) caused the S corporation's apportionment percentage to unfairly reflect the extent of its business activities in California.
URL: https://ota.ca.gov/wp-content/uploads/sites/54/2022/03/18043049_Faries_Opinion_010522wm.pdf

This Multistate Tax Alert summarizes some of the highlights from the *Faries* decision and provides some taxpayer considerations.
[Issued April 14, 2022]
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-california-ota-concludes-gain-from-goodwill-constitutes-apportionable-business-income-to-nonresident-s-corporation-shareholders.pdf

California Franchise Tax Board issues guidance on sourcing gross receipts from sales of services to business entities
On March 25, 2022, the California Franchise Tax Board issued Legal Ruling 2022-01, which provides guidance on how to source gross receipts derived from sales of services by one business to another business for purposes of calculating the California sales factor.
URL: https://www.ftb.ca.gov/tax-pros/law/legal-rulings/2022-01.pdf

This Multistate Tax Alert summarizes Legal Ruling 2022-01, and unless otherwise noted, quotations in this Alert are from the ruling.

[Issued April 18, 2022]
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-california-franchise-tax-board-issues-guidance-on-sourcing-gross-receipts-from-sales-of-services-to-business-entities.pdf

Idaho enacts law to protect Idaho businesses from taxation by other jurisdictions
On March 29, 2022, Idaho's Governor signed House Bill 677 (H.B. 677) into law. Effective upon signage, H.B. 677 provides that no out-of-state taxing entities may impose tax on Idaho businesses for conducting sales in Idaho between Idaho businesses and nonresidents physically present in the State.
URL: https://legislature.idaho.gov/sessioninfo/2022/legislation/H0677/

This Multistate Tax Alert summarizes some of the provisions of H.B. 677.
[Issued April 13, 2022]
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-idaho-enacts-law-to-protect-idaho-businesses-from-taxation-by-other-jurisdictions.pdf

Kentucky enacts various indirect and income tax changes and establishes a tax amnesty program
On April 13, 2022, Kentucky's legislature overrode the governor's veto to enact House Bill 8 (H.B. 8). The legislation, among other things, expands the sales and use tax base by adding new taxable services, creates new excise taxes on vehicle sharing or renting and electric vehicle charging, reduces the individual income tax rate if certain budgetary conditions are met, updates Kentucky's Internal Revenue Code conformity date for state income tax purposes, and establishes a tax amnesty program.
URL: https://apps.legislature.ky.gov/record/22RS/hb8.html

This Multistate Tax Alert summarizes some of the provisions of H.B. 8.
[Issued April 18, 2022]
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-kentucky-enacts-various-indirect-and-income-tax-changes-and-establishes-a-tax-amnesty-program.pdf

Mississippi enacts pass-through entity tax election
On April 14, 2022, Mississippi's Governor signed House Bill 1691 (H.B. 1691) into law, effective from and after January 1, 2022. Under the legislation, any partnership, S corporation, or similar pass-through entity may make an election to pay an entity level state income tax for the 2022 calendar year, and for each calendar year thereafter.
URL: http://billstatus.ls.state.ms.us/2022/pdf/history/HB/HB1691.xml

This Multistate Tax Alert summarizes some of the provisions of H.B. 1691.
[Issued April 19, 2022]

URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-mississippi-enacts-pass-through-entity-tax-election.pdf

West Virginia adopts single sales factor and market-based sourcing for flow-through entities

On March 30, 2022, West Virginia's Governor signed into law House Bill 4410 (H.B. 4410). The bill adopts a single-sales factor apportionment formula with market-based sourcing for flow-through entities, effective for the 2022 tax year. This development generally brings the apportionment formula for flow-through entities in conformity with the corporate income tax apportionment changes enacted in 2021, which are also effective for the 2022 tax year.

URL: https://www.wvlegislature.gov/bill_status/bills_history.cfm?INPUT=4410&year=2022&sessiontype=RS

This Multistate Tax Alert summarizes some of the provisions in H.B. 4410.

[Issued April 19, 2022]

URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-west-virginia-adopts-single-sales-factor-and-market-based-sourcing-for-flow-through-entities.pdf

Lawmakers enact and propose fuel tax suspensions and relief

Lawmakers in Maryland, Georgia, and Connecticut have enacted temporary suspensions of their motor fuel taxes. Additionally, lawmakers in other states have proposed legislation to suspend their motor fuel taxes. On the federal level, Congressional lawmakers have introduced legislation to suspend the federal gasoline tax through December 31, 2022.

This Multistate Tax Alert outlines the enacted fuel tax suspensions in Maryland, Georgia, and Connecticut, summarizes other fuel tax suspension proposals, and provides some considerations and implications for taxpayers.

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URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-lawmakers-enact-and-propose-fuel-tax-suspensions-and-relief.pdf