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Income/Franchise:
**California Superior Court Denies Summary Judgment in Case Challenging FTB
Guidance on P.L. 86-272**

Case No. CGC-22-601363, Cal. Super. Ct. (8/29/23). In a lawsuit involving an industry trade association challenging the validity of the California Franchise Tax Board’s (FTB) Technical Advice Memorandum (TAM) 2022-01 [see previously issued Multistate Tax Alert for more details on this FTB memo] and related FTB publication (FTB 1050) addressing the application of P.L. 86-272 to activities conducted via the internet [see *State Tax Matters*, Issue 2022-34, for more details on the industry trade association’s original filed complaint], a California superior court (Court) recently denied the trade association’s motion for summary judgment. This motion had sought a judicial declaration that these two FTB documents are invalid because they contradict P.L. 86-272 and the US Constitution. In denying the motion, the Court explained that although these two FTB documents “raise significant concerns as to the FTB’s interpretation and application of P.L. 86-272,” it cannot conclude as a matter of law that the use of generic hypotheticals in these documents contradict P.L. 86-272 on their face such that the entire documents are invalid. According to the Court, the industry trade association relied upon the use of general fact patterns in the two FTB documents to seek summary judgment “without adequate supporting facts or substantive argument regarding post-sales assistance and internet cookies.” However, the Court determined that the two FTB documents constitute a regulation not enacted in compliance with the California Administrative Procedure Act, and are therefore void, but explained that it could not consider summary judgment on this basis because the industry trade association did not move for summary judgment on this ground. Please contact us with any questions.

- URL: <https://www.ftb.ca.gov/tax-pros/law/technical-advice-memorandums/2022-01.pdf>
- URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/california-franchise-tax-board-guidance-application-pl86272-activities-conducted-internet.pdf>
- URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2022/STM/220826_1.html

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Income/Franchise:

California OTA Says It Lacks Authority to Declare Rule Invalid and FTB Correctly Sourced Mutual Fund Service Receipts

Case No. 20096605, 2023 – OTA – 443, Cal. Office of Tax App. (7/27/23). In a nonprecedential opinion, the California Office of Tax Appeals (OTA) recently concluded that the OTA does not have jurisdiction to determine if the California Franchise Tax Board properly promulgated California Code of Regulations, title 18, (Regulation) section 25137-14 under the California Administrative Procedure Act (APA). In doing so, two members of the OTA panel explained that under the APA, the California Office of Administrative Law (OAL) is the only state agency vested with the authority to determine whether another agency's regulation complied with the APA [see also *State Tax Matters*, Issue 2023-32, for details regarding the OTA's pending opinion request to the California Attorney General to issue a formal opinion addressing whether the OTA has the legal authority and jurisdiction to declare a provision in the California Code of Regulations to be invalid.] As a result, the panel then considered whether Regulation section 25137-14 is the standard apportionment rule for assigning the taxpayer's mutual fund service receipts. The OTA concluded that for the taxable years at issue (2013 through 2016) the taxpayer had not provided evidence demonstrating that the standard formula is an unfair representation of its in-state business activity to warrant application of California Revenue and Taxation Code (CRTC) section 25137, and thus, Regulation section 25137-14 is the standard apportionment rule for sourcing the taxpayer's receipts. In a concurring opinion, an OTA panel member stated that even assuming the OTA had jurisdiction to invalidate a regulation, the taxpayer had not met its burden of proving (that it was entitled to a

refund by producing evidence to support) its proposed sourcing methodology under CRTC section 25136 and Regulation section 25136-2. Please contact us with any questions.

URL: <https://ota.ca.gov/wp-content/uploads/sites/54/2023/09/20096605-Janus-Capital-Group-Opinion-072723wm.pdf>

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/STM/230811_2.html

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Income/Franchise:

Georgia DOR Discusses Updated State Conformity to IRC and Decoupling from TCJA Changes to IRC §174

Income Tax Federal Tax Changes, Ga. Dept. of Rev. (9/23). The Georgia Department of Revenue (Department) issued guidance on 2023 enacted legislation updating certain provisions of state tax law in response to federal changes to the Internal Revenue Code (IRC), including law that updated Georgia's corporate and individual income tax conformity to the IRC provided for in federal law enacted on or before January 1, 2023, but that did not adopt the federal provision in the Tax Cuts and Jobs Act (TCJA) relating to the treatment of research and experimental expenditures paid or incurred in tax years beginning after December 31, 2021 [see S.B. 56 (2023), and *State Tax Matters*, Issue 2023-18, for more details on this enacted legislation]. The Department explains that while research and experimental expenditures paid or incurred in tax years beginning after December 31, 2021 must be amortized ratably over a five-year period (fifteen-year period for certain research or experimental expenditures attributable to foreign research) under the TCJA, "Georgia still allows a deduction

for research and experimental expenditures paid or incurred in tax years beginning after December 31, 2021, and taxpayers are not required to amortize such expenditures.” Please contact us with any questions.

URL: <https://dor.georgia.gov/taxes/tax-rules-and-policies/income-tax-federal-tax-changes>

URL: <https://www.legis.ga.gov/legislation/63791>

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/STM/230505_1.html

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Income/Franchise:

Illinois DOR References Caselaw Addressing Nexus for Out-of-State Insurance Companies

General Information Letter IT 23-0004-GIL, Ill. Dept. of Rev. (5/31/23). Responding to an out-of-state insurance agency’s general information letter inquiry about whether it has nexus and would be required to file an Illinois corporate income tax return, the Illinois Department of Revenue (Department) stated that because nexus determinations are inherently fact specific, it does not issue letter rulings on nexus. However, the Department commented that pursuant to an Oklahoma Supreme Court decision from 2012, merely receiving payments from an in-state customer with no other contacts in the taxing jurisdiction was insufficient to constitute nexus under the Due Process Clause in that case. The Department also commented that pursuant to a US Supreme Court decision from 1962, “insuring risk on property located in the state without more is not a valid basis to assert nexus.” Please contact us with any questions.

URL:
<https://tax.illinois.gov/content/dam/soi/en/web/tax/research/legalinformation/letterrulings/it/documents/2023/it23-0004-gil.pdf>

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Indiana DOR Memo Says Indiana Conforms to Federal Capital Loss Carryback Provisions

Memorandum of Decision 02-20231357, Ind. Dept. of Rev. (8/30/23). In an administrative memorandum involving an out-of-state manufacturing company conducting business in Indiana and routinely filing Indiana corporate income tax returns, the Indiana Department of Revenue (Department) held that the taxpayer was correct when it claimed that its amended 2017 Indiana corporate income tax return was timely filed and that it was entitled to carry back certain losses three years from the tax year of the loss, rather than the year to which the loss was carried back. In doing so, the Department explained that Indiana conforms to the federal capital loss carryback provisions given that Indiana law does not specifically address capital loss carry backs. Please contact us with any questions.

[URL: http://iac.iga.in.gov/iac/20230830-IR-045230589NRA.xml.pdf](http://iac.iga.in.gov/iac/20230830-IR-045230589NRA.xml.pdf)

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Kansas DOR Announces Corporate Income Tax Rate is Reduced to 3.5% as of January 1, 2024

Notice of Corporate Income Tax Normal Rate Reduction, Kan. Dept. of Rev. (8/31/23). Pursuant to statutory authority permitting it to do so if certain conditions are met, the Kansas Department of Revenue announced that the Kansas corporate income tax rate set forth in Kan. Stat. Ann. 2022 Supp. 79- 32,110(c)(1) “shall be reduced to 3.5% of Kansas taxable income, effective January 1, 2024.” Currently, the Kansas corporate income tax rate is 4%. Please contact us with any questions.

[URL: https://sos.ks.gov/publications/Register/Volume-42/PDF/Vol-42-No-35-August-31-2023.pdf](https://sos.ks.gov/publications/Register/Volume-42/PDF/Vol-42-No-35-August-31-2023.pdf)

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Minnesota DOR Summarizes New Law Updating Conformity to IRC, Taxing GILTI, and Revising DRD and NOL Amounts

2023 Individual Income and Corporate Franchise Tax Legislative Bulletin, Minn. Dept. of Rev. (6/23). The Minnesota Department of Revenue issued a 2023 legislative summary reflecting several significant changes to Minnesota corporate income/franchise tax and individual income tax laws [see H.F. 1938 (2023), and previously issued Multistate Tax Alert for more details on these law changes], including generally updating Minnesota's definition of the Internal Revenue Code (IRC) as amended through May 1, 2023; classifying global intangible low-taxed income under IRC section 951A as dividend income; and reducing permitted amounts under Minnesota's dividends received and net operating loss deductions. Please contact us with any questions.

URL: <https://www.revenue.state.mn.us/sites/default/files/2023-06/2023-income-and-corporate-franchise-legislative-bulletin.pdf>

URL: <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF1938&ssn=0&y=2023>

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-minnesota-enacts-several-changes-to-its-income-and-franchise-tax-laws.pdf>

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Nebraska DOR Posts Guidance and Forms Reflecting New Law that Retroactively Permits PTE Tax Election

Nebraska Pass-Through Entity Tax (PTET), Neb. Dept. of Rev. (9/23). The Nebraska Department of Revenue posted guidance and forms reflecting new law that retroactively establishes an elective pass-through entity tax for qualifying pass-through entities applicable for taxable years beginning on or after January 1, 2018 [see L.B. 754 (2023), and previously issued Multistate Tax Alert for more details on this new tax]. Please contact us with any questions.

URL: <https://revenue.nebraska.gov/businesses/nebraska-pass-through-entity-tax-ptet>

URL: https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=50792

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-nebraska-enacts-pass-through-entity-tax-election.pdf>

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Income/Franchise:

New Jersey: New and Updated Bulletins Reflect CBT Law Changes Involving Nexus and Combined Reporting

Tax Bulletin No. TB-108: Nexus for Corporation Business Tax for Privilege Periods Ending on and after July 31, 2023, N.J. Div. of Tax. (9/5/23); *Tax Bulletin No. TB-79 (R): Nexus for Corporation Business Tax for Privilege Periods Ending Before July 31, 2023*, N.J. Div. of Tax. (rev. 9/5/23); *Tax Bulletin No. TB-109: Combined Group Filing Methods for Privilege Periods Ending on and After July 31, 2023*, N.J. Div. of Tax. (9/5/23); *Tax Bulletin No. TB-89(R): Combined Group Filing Methods for Privilege Periods Ending Before July 31, 2023*, N.J. Div. of Tax. (rev. 9/5/23). The New Jersey Division of Taxation (Division) posted new and updated bulletins reflecting recently enacted legislation that made significant changes to New Jersey's corporation business tax (CBT) for

privilege periods ending on and after July 31, 2023 [see A.B. 5323 (2023) and previously issued Multistate Tax Alert for more details on these recent law changes]. One new bulletin addresses New Jersey's bright-line economic nexus standard and provides general guidelines for determining whether the activities of a corporation create nexus with New Jersey for CBT purposes for privilege periods ending on and after July 31, 2023. An accompanying revised bulletin includes links to this new bulletin "for information on the updated nexus standards established under P.L. 2023, c. 96, as well as the updated P.L. 86-272 guidelines established by the Multistate Tax Commission as adopted by the Division that went into effect for privilege periods ending on and after July 31, 2023," and provides general guidelines for determining whether the activities of a corporation create nexus with New Jersey for CBT purposes for privilege periods ending *before* July 31, 2023. Another new bulletin discusses the CBT combined reporting allocation method, income reporting, and filing methods effective for privilege periods ending on and after July 31, 2023 – including a one-time exception to prospectively allow a change to the combined group's filing method on the 2023 New Jersey Form CBT-100U. The new bulletin also discusses the impact of treaties on non-US corporations, as well as potential for penalty relief in certain situations. An accompanying revised bulletin links to this new bulletin and discusses the combined group filing methods and allocation methods for privilege periods ending *before* July 31, 2023. Please contact us with any questions.

[URL: https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb108.pdf](https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb108.pdf)

[URL: https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb79r.pdf](https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb79r.pdf)

[URL: https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb109.pdf](https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb109.pdf)

[URL: https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb89.pdf](https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb89.pdf)

[URL: https://www.njleg.state.nj.us/bill-search/2022/A5323](https://www.njleg.state.nj.us/bill-search/2022/A5323)

[URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-new-jersey-enacts-changes-to-corporation-tax-laws.pdf](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-new-jersey-enacts-changes-to-corporation-tax-laws.pdf)

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Income/Franchise:

Oregon: Proposed Changes to CAT Rules Address Cost Inputs or Labor Cost Subtraction, Filing Extensions, and Farming

Proposed Amended OAR section 150-317-1200, Or. Dept. of Rev. (8/29/23); Proposed Amended OAR section 150-317-1330, Or. Dept. of Rev. (8/29/23); Proposed Amended OAR section 150-317-1170, Or. Dept. of Rev. (8/29/23). The Oregon Department of Revenue (Department) proposed changes to its corporate activity tax (CAT) rule addressing how taxpayers must compute the cost inputs or labor cost subtraction by adding guidance to determine the 35% CAT subtraction for unitary groups that elect to subtract "cost inputs" in their Oregon CAT return and are made up of members that:

[URL: https://www.oregon.gov/dor/SiteAssets/Pages/rules-laws/150-317-1200%20notice%20of%20rulemaking%2008292023.pdf](https://www.oregon.gov/dor/SiteAssets/Pages/rules-laws/150-317-1200%20notice%20of%20rulemaking%2008292023.pdf)

URL: <https://www.oregon.gov/dor/SiteAssets/Pages/rules-laws/150-317-1330%20notice%20of%20rulemaking%2008292023.pdf>

URL: <https://www.oregon.gov/dor/SiteAssets/Pages/rules-laws/150-317-1170%20notice%20of%20rulemaking%2008292023.pdf>

1. Report cost of goods sold (COGS) for federal income tax purposes, and
2. Are engaged in farming operations that do not report COGS for federal income tax purposes.

Other proposed CAT rule changes involve requests for extension of time to file CAT returns and additional guidance for CAT taxpayers with farming operations. A virtual public hearing to discuss these proposed changes has been scheduled for September 26, 2023, and any public comments are due on the same date. Please contact us with any questions.

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Income/Franchise:

South Carolina DOR Addresses State Conformity to Internal Revenue Code from 2021 through 2023

South Carolina's Guide to Internal Revenue Code Conformity from 2021 – 2023, S.C. Dept. of Rev. (8/23). The South Carolina Department of Revenue (Department) issued guidance explaining South Carolina's "substantial" conformity to the Internal Revenue Code (IRC) and how recent federal changes to the IRC enacted in 2021 and 2022 have necessitated guidance for South Carolina taxpayers (as well as tax professionals) in preparing their current year South Carolina income tax returns and South Carolina amended returns for some prior years. According to the Department, the goal of this guide is to assist taxpayers in understanding the federal income tax laws to which South Carolina currently conforms, and the South Carolina tax consequences when South Carolina does *not* adopt certain federal income tax laws. The guidance includes various charts listing specific provisions of the IRC that are *not* adopted by South Carolina. Please contact us with any questions.

URL: <https://dor.sc.gov/resources-site/lawandpolicy/Documents/Conformity%20Guide%202023.pdf>

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Sales/Use/Indirect:

California OAL Approves Department of Tax and Fee Administration's New Marketplace Sales Rule

Notice of Approval of Regulatory Action: Cal. Code of Regs., Title 18, section 1684.5, Cal. Off. of Admin. Law (8/28/23); Cal. Code of Regs., Title 18, section 1684.5, Marketplace Sales, Cal. Dept. of Tax & Fee Admin. (8/28/23). The California Office of Administrative Law (OAL) has approved the California Department of Tax and Fee Administration's (CDTFA) finalized changes to an emergency rule ("Regulation 1684.5") implementing California's marketplace facilitator legislation (MFA) enacted in 2019 [see A.B. 147 (2019) / S.B. 92 (2019) for more details on this 2019 legislation, and *State Tax Matters*, Issue 2023-4, for details on the February 7, 2023 public hearing on these rule changes], including clarifying underlying registration requirements, addressing sellers versus advertisers, and authorizing delivery network companies to elect to be deemed marketplace facilitators. According to earlier comments made by the CDTFA, the adopted amendments are intended to:

URL: <https://www.cdtfa.ca.gov/taxes-and-fees/Reg1684-5-OAL-Approval-2023.pdf>

URL: <https://www.cdtfa.ca.gov/taxes-and-fees/Reg1684-5-Text-2023-Final.pdf>

URL: http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB147

URL: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB92

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/STM/230127_6.html

- Further carry out the MFA,
- Clarify that all sales of tangible personal property (i.e., taxable and nontaxable) are counted for purposes of meeting California's annual \$500,000 sales threshold,
- Provide procedures for a "delivery network company" to elect and retain an election to be deemed a marketplace facilitator,
- Define and clarify certain important terms and phrases such as facilitate, fulfillment or storage services, listing products for sale, order taking, payment processing services, providing customer service, or accepting or assisting with returns or exchanges, setting prices, and virtual currency,
- Help businesses understand when the "advertising exclusion" applies to a sale, and
- Provide some examples of websites that both do and do not qualify as "marketplaces."

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Sales/Use/Indirect:

South Carolina: Comments Requested on Draft Ruling on Expanded Meaning of Motor Vehicle for Exemption Purposes

SC REVENUE RULING #23-XX, S.C. Dept. of Rev. (Public Draft 8/28/23). The South Carolina Department of Revenue (Department) posted a draft revenue ruling intended to provide updated guidance concerning which vehicles are “motor vehicles” subject to the partial state sales and use tax exemption under S.C. Code Ann. § 12-36-2110, following a recent South Carolina Court of Appeals opinion, which held that the term “motor vehicle” includes certain vehicles that the Department previously excluded from the maximum tax (*i.e.*, “cap”) provisions in S.C. Code Ann. § 12-36-2110. Pursuant to this recent caselaw, the draft revenue ruling provides that, effective April 26, 2023, for purposes of the maximum tax provisions of S.C. Code Ann. § 12-36-2110, the term “motor vehicle” includes any motorized, self-propelled, and wheeled vehicle that does not run on rails; therefore, all-terrain vehicles, utility task vehicles, golf carts, and legend race cars are subject to the maximum tax provisions. Note that in addition to the \$500 cap on sales and use tax, “maximum tax” items are subject to tax at a 5% rate, rather than South Carolina’s standard 6% sales and use tax rate, and they are exempt from local taxes. Comments on this draft revenue ruling are due to the Department by September 18, 2023. Please contact us with any questions.

URL: <https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/Public-Draft-Max-Tax-8-28-23.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>

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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