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Income/Franchise:

New Jersey: New and Updated Bulletins Reflect CBT Law Changes Involving GILTI, FDII, and Combined Reporting

Tax Bulletin No. TB-110: Corporation Business Tax GILTI Treatment for Privilege Periods Ending on and After July 30, 2023, N.J. Div. of Tax. (9/12/23); *Tax Bulletin No. TB-92(R): SOURCING IRC §951A (GILTI) and IRC §250 (FDII) for Privilege Periods Ending Before July 31, 2023*, N.J. Div. of Tax. (rev. 9/12/23); *Tax Bulletin No. TB-88(R): Combined Groups: Exclusion of Double Inclusion of GILTI and Treatment of Related Party Addbacks for Privilege Periods Ending Before July 31, 2023*, N.J. Div. of Tax. (rev. 9/12/23). 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 the CBT changes to the treatment of global intangible low-taxed income (GILTI), the Internal Revenue Code (IRC) section 250(a) deduction and foreign-derived intangible income (FDII), including the increase in New Jersey’s net GILTI deduction to 95% by treating GILTI as a dividend for privilege periods ending on and after July 31, 2023. An accompanying revised bulletin includes a link to this new bulletin and discusses the application of IRC section 951A and IRC section 250 enacted as part of the federal Tax Cuts and Jobs Act to the CBT for privilege periods ending *before* July 31, 2023. Another accompanying revised bulletin includes a link to the new bulletin and discusses IRC section 951A, IRC section 250, and CBT law in the context of New Jersey combined returns 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/tb110.pdf>

URL: <https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb92.pdf>

URL: <https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb88.pdf>

URL: <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>

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Income/Franchise:

New York ALJ Says Investment Bank May Source Income from Securities Transactions Using Alternate Method

Determination DTA Nos. 829218 and 829219, N.Y. Div. of Tax App., ALJ Div. (8/31/23). In a 100+ page multi-issue ruling involving an investment bank challenging the New York Division of Taxation's (Division) application of a former version of New York's broker-dealer sourcing statute to its own set of facts and specific records to compute the business receipts factor of the business allocation percentage for Article 9-A corporate franchise tax combined filing purposes, an administrative law judge (ALJ) with the New York Division of Tax Appeals held that although it has been determined that the provisions of Tax Law former § 210(3)(a)(9) do not permit the investment bank to source its receipts based upon an approximation of the location of its underlying investors, the Division in this case must apply its statutory discretionary authority to source the receipts in such a manner. That is, rather than source such income to the location of the financial intermediaries and collective investment vehicles (collectively, "institutional intermediaries") themselves, the Division must source such income based on the location of the underlying investors of the institutional intermediaries directing the transactions. In doing so, the ALJ reasoned that the Division's allocation method "was very distortive because the Division's calculation of the receipts allocation factor grossly overstated, by a factor of three or four times, the results reached using an allocation method that reasonably approximates the location of the individual investors" (i.e., the customers), which "results in an unconstitutional distortion of petitioner's income that does not accurately reflect how that income is generated." The reasonable approximation method approved by the ALJ was New York's share of the US Census data during the years at issue (6.48%). The ALJ also upheld the investment tax credits and related employment incentive credits claimed by the taxpayer for the years at issue for leasehold improvements and tangible property used in its investment banking, prime brokerage, and research departments. Please contact us with any questions.

URL: <https://www.dta.ny.gov/pdf/determinations/829218.det.pdf>

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Income/Franchise:

Oregon: P.L. 86-272 Guidance Issued for Portland Metro Area's Business Income Taxes

Application of Public Law 86-272 to Business Taxes, City of Portland, Or. (rev. 4/12/23). Tax Administration Policy for the City of Portland, Oregon (City) issued guidance on the application of P.L. 86-272 to the City's Metro Area business income taxes, including the City of Portland Business License Tax, Multnomah County Business Income Tax, and Metro Supportive Housing Services (SHS) Business Income Tax. The guidance explains that these respective City Metro Area taxing jurisdictions apply P.L. 86-272 "on an intrastate basis for tax years beginning prior to January 1, 2023," meaning "that P.L. 86-272 protections apply to a business, for these tax years, unless a business' activities within these taxing jurisdictions exceed solicitation of sales (or activities entirely ancillary to solicitation of sales) of tangible personal property."

URL: <https://www.portland.gov/revenue/policy-application-public-law-86-272-business-taxes>

For tax years beginning on or after January 1, 2023, the City adopts the interstate application of P.L. 86-272 for its Metro Area business income taxes. Reminding that the City adopted market-based sourcing rules for tax years beginning on or after January 1, 2023 for the City's Metro Area business income taxes [see *State Tax Matters*, Issue 2022-44, for more details on this adoption], the guidance provides that a business with nexus in the City Metro Area taxing jurisdictions, whose activities exceed solicitation of sales (or activities entirely ancillary to solicitation of sales) of tangible personal property anywhere within the State of Oregon, is *not* protected by P.L. 86-272 from income taxation by the City Metro Area taxing jurisdictions. Moreover, the guidance states that the City Metro Area taxing jurisdictions do *not* utilize "throwback sales" treatment for apportionment purposes; accordingly, for businesses that apportion their income, sales to a customer outside the City Metro Area taxing jurisdiction(s) are *not* included in the numerator of the sales factor. Lastly, the guidance includes some working examples to help illustrate its concepts, which apply to tax years beginning on or after January 1, 2023. Please contact us with any questions.

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2022/STM/221104_5.html

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Sales/Use/Indirect:

California: Guidance Issued on Software Technology Transfer Agreements and Underlying Refund Claims

Software Technology Transfer Agreements, Cal. Dept. of Tax & Fee Admin. (9/23). In recently posted guidance, the California Department of Tax and Fee Administration (CDTFA) explains that if a taxpayer holds patent or copyright interests in non-custom software and makes retail sales of the software on tangible media, then a portion of the proceeds from such retail sales of the software may be excluded from its gross receipts subject to California sales tax. Conversely, if a taxpayer purchases non-custom software on tangible media in a transaction that is subject to use tax from a retailer who holds patent or copyright interests in the software, then a portion of the price the taxpayer paid for the software may be excluded from the sales price of the software that is subject to California use tax. The CDTFA also explains that, pursuant to state caselaw, the California Court of Appeal determined that an agreement for the sale of non-custom software may qualify as a “technology transfer agreement” (TTA); according to the CDTFA, an agreement for the sale or purchase of non-custom software on tangible storage media may qualify as a TTA when the agreement for the sale or purchase also assigns or licenses the right to make and sell a product or the right to use a process that is subject to a patent or copyright interest. However, because Cal. Rev. and Tax. Code sections 6011(c)(10) and 6012(c)(10) require that the retailer also hold the patent or copyright interests being assigned or licensed, “most agreements for sales of off-the-shelf software will not qualify as technology transfer agreements.”

URL: <https://www.cdtfa.ca.gov/taxes-and-fees/software-technology-transfer-agreements.htm>

Regarding underlying refund claims in TTA transactions, the CDTFA states that if a taxpayer purchased non-custom software from a California retailer under a TTA and paid California sales tax reimbursement to that retailer, then the taxpayer must contact the retailer to apply for a refund of any excess California sales tax reimbursement that the retailer may have collected on the purchase of that software. However, if the taxpayer paid use tax, rather than sales tax, on the purchase and the non-custom software was transferred under a TTA, then such taxpayer may file a refund claim with the CDTFA for any California use tax overpaid. Such claimants must provide documentation that the transaction qualified as a TTA, including that the retailer held the patent and copyright interests at the time the software was purchased, to support the claimed refund amount.

For those selling non-custom software in tangible form and the software is transferred under a TTA, the CDTFA generally recommends:

- Documenting that the sale of software qualifies as a TTA (*i.e.*, there must be a written agreement and the retailer of the software must also be the holder of the patent or copyright interests transferred; otherwise, the transaction does not qualify as a TTA, and the entire sales price of the software is subject to tax); and
- Setting a selling price for the tangible personal property portion of the transaction that is reasonable pursuant to the statutory provisions.

Please contact us with any questions.

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Sales/Use/Indirect:

Louisiana: New Bulletin Addresses Tax Collection and Remittance for Merchants Making Marketplace and Direct Sales

Remote Sellers Info. Bull. No. 23-001: Guidance on Collection and Remittance Requirements for Louisiana Merchants making Marketplace Sales and Direct Sales, La. Sales and Use Tax Comm. for Remote Sellers (9/8/23). The Louisiana Sales and Use Tax Commission for Remote Sellers (Commission) issued a new bulletin intended to provide guidance to Louisiana merchants making sales through marketplace facilitators, as well as direct sales to consumers, including associated Louisiana sales and use tax collection and remittance requirements. According to the bulletin, a Louisiana merchant who makes sales via a marketplace facilitator is making remote sales, and these remote sales allow the Louisiana merchant/marketplace seller to rely on the marketplace facilitator to collect and remit sales taxes to the Commission on its behalf. However, the bulletin explains that there may be instances when a Louisiana merchant sells through a marketplace facilitator and still continues to make direct sales to consumers throughout Louisiana – cautioning that Louisiana merchants making direct sales that do not occur via a marketplace are responsible for collecting and remitting Louisiana state and local sales tax as the dealer for those direct transactions pursuant to La. Rev. Stat. section 47:303. In doing so, the Commission explains that being deemed a remote seller due to the use of a marketplace facilitator does not mean all sales of a Louisiana merchant are “remote sales.” Please contact us with any questions.

URL: <https://cst.informz.net/cst/data/images/RSIB%2023-001%20Marketplace%20Facilitators%20and%20Louisiana%20Merchants.pdf>

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Sales/Use/Indirect:

Michigan: Bulletin Explains Implementation of New Law Exempting Delivery and Installation Charges

Revenue Administrative Bulletin 2023-16: Sales Tax and Use Tax—Taxability of Delivery and Installation Charges, Mich. Dept. of Treas. (9/11/23). The Michigan Department of Treasury (Department) issued a new bulletin summarizing and explaining the implementation of new law [see H.B. 4039 / H.B. 4253, signed by gov. 4/26/23, and *State Tax Matters*, Issue 2023-17, for more details on this new law] that amends Michigan sales and use tax provisions by modifying the definitions of taxable “sales price” and “purchase price” to exclude certain delivery and installation charges from those definitions when the charges are separately stated on the invoice, bill of sale, or similar document provided to the purchaser, *and* adequate underlying books and records of such transactions are maintained. However, the bulletin explains that utilities supplying gas or electricity must include delivery charges such as transmission and distribution charges in the tax base, regardless of how those charges are stated on customers’ bills or in utilities’ books or records. Moreover, the bulletin states that while these law changes also require the Department to cancel outstanding balances relating to delivery charges and installation charges on notices of intent to assess or on final assessments issued before the new law’s April 26, 2023 effective date and prohibit the Department from assessing any taxpayer for delivery charges or installation charges for any period before this effective date, the law changes do *not* require the Department to issue underlying refunds of tax remitted for periods before the April 26, 2023 effective date. Please contact us with any questions.

URL: [https://www.michigan.gov/taxes/rep-legal/rab/2023-revenue-administrative-bulletins/revenue-administrative-bulletin-2023-16#:~:text=RAB%202023%2D16.&text=Effective%20April%2026%2C%202023%20\(the,delivery%20charges%20and%20installation%20charges.](https://www.michigan.gov/taxes/rep-legal/rab/2023-revenue-administrative-bulletins/revenue-administrative-bulletin-2023-16#:~:text=RAB%202023%2D16.&text=Effective%20April%2026%2C%202023%20(the,delivery%20charges%20and%20installation%20charges.)

URL: [https://www.legislature.mi.gov/\(S\(2n5h5aqtodp4lcgyfg241nea\)\)/mileg.aspx?page=getObject&objectName=2023-HB-4039](https://www.legislature.mi.gov/(S(2n5h5aqtodp4lcgyfg241nea))/mileg.aspx?page=getObject&objectName=2023-HB-4039)

URL: [https://www.legislature.mi.gov/\(S\(hc3exohvrdq2mj0vnfzsbv\)\)/mileg.aspx?page=getObject&objectname=2023-HB-4253](https://www.legislature.mi.gov/(S(hc3exohvrdq2mj0vnfzsbv))/mileg.aspx?page=getObject&objectname=2023-HB-4253)

URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/STM/230428_8.html

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Sales/Use/Indirect:

Missouri DOR Proposes Changes to Rule Addressing How to Determine Applicable Local Taxes

Proposed Amendments to Reg. section 10-117.100, Mo. Dept. of Rev. (9/15/23). The Missouri Department of Revenue proposed changes to its rule addressing how to determine applicable local sales and use taxes, including amendments to a section providing that if the order is taken outside Missouri for a sale of tangible personal property subject to Missouri sales tax, the sale is subject to the local sales tax in effect where title to the item transfers to the purchaser. The proposed changes provide an exception to this provision “if the merchandise is shipped from one of the seller’s Missouri locations to the Missouri customer,” and in such instance, “the sale is subject to the local sales tax at the location of the Missouri seller from where the merchandise was shipped.” Another proposed change adds that “sales made entirely at a temporary location, such as a food truck, will be subject to the local sales tax in effect at that location.” Comments on these proposed changes must be received within 30 days after their September 15 publication in the Missouri Register. Please contact us with any questions.

URL: <https://www.sos.mo.gov/CMSImages/AdRules/moreg/2023/v48n18Sept15/v48n18.pdf>

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Sales/Use/Indirect:

Rhode Island Administrative Ruling Says Charges for Online Educational Courses and Software are Taxable

Ruling Request No. 2023-02, R.I. Div. of Tax. (9/5/23). Responding to a ruling request from a business primarily providing online educational courses, furnishing in-person teaching support, and hosting networking and best practices sharing events, the Rhode Island Division of Taxation (Division) concluded that, based on the provided facts, the taxpayer’s charges for its online programs and computer software are subject to Rhode Island sales and use tax. Specifically, the Division explains that the computer courses that the taxpayer sells directly to its customers are taxable “tangible personal property” under Rhode Island sales tax law. Additionally, because infrastructure as a service (“IaaS”), platform as a service (“PaaS”), and software as a service (“SaaS”) are taxable as long as there is a charge to a Rhode Island customer for the use of the virtual infrastructure, platform, or for software that is accessed through the internet or on a vendor-hosted server, any charges for Rhode Island customers to access the taxpayer’s online courses and software services are taxable as IaaS, PaaS, SaaS, and as part of the sale and/or license of the software to the customer. Please contact us with any questions.

URL: <https://tax.ri.gov/guidance/declaratory-rulings/ruling-request-no-2023-02>

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Sales/Use/Indirect:

Tennessee Appellate Court Holds for Taxpayer that Manufacturing Exemption Does Not Require Production of New Product

Case No. M2022-01019-COA-R3-CV, Tenn. Ct. App. (majority opinion, 9/6/23); *Case No. M2022-01019-COA-R3-CV*, Tenn. Ct. App. (dissenting opinion, 9/6/23). In a case involving a taxpayer who rented hygienically-clean textiles to its customers and challenged the revocation of three Tennessee industrial machinery tax exemption certificates that it previously had been issued, a Tennessee Court of Appeals (Court) affirmed the Tennessee Chancery Court for Davidson County – which had reversed an administrative law judge’s earlier ruling that ruled against the taxpayer – to hold that the taxpayer was entitled to the exemption under state law, because its operations constituted “manufacturing” that was necessary for processing tangible personal property. The Tennessee Department of Revenue unsuccessfully contended that while it agreed that the taxpayer subjects its textiles to a “rigorous and highly specialized cleaning process that makes them marketable,” this process does not constitute “processing” because “bar towels and uniforms are the same bar towels and uniforms before and after” the taxpayer’s sanitization process. In ruling for the taxpayer, the Court explained that unlike many other states, Tennessee’s industrial machinery exemption does not include a requirement that a taxpayer produce a new or substantially different product to qualify for the exemption. Rather, according to the Court, the Tennessee General Assembly chose to require only that the taxpayer use the “machinery, apparatus and equipment . . . primarily for [] the fabrication or processing of tangible personal property for resale and consumption off the premises.” A dissenting opinion follows. Please contact us with any questions.

URL: <https://www.tncourts.gov/sites/default/files/OpinionsPDFVersion/Majority%20Opinion%20-%20M2022-01019-COA-R3-CV.pdf>

URL: <https://pch.tncourts.gov/CaseDetails.aspx?id=85073&Number=True>

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Sales/Use/Indirect:

Tennessee: Letter Ruling Explains Taxation of Online Courses Providing Varying Interactive Features

Letter Ruling No. 23-07, Tenn. Dept. of Rev. (9/6/23). In a letter ruling involving an online licensing course that provides customers with pre-recorded audio lectures and written transcripts of the lectures, as well as an online exam guide course that provides customers with text-based lessons and practice exams, the Tennessee Department of Revenue (Department) concluded that such courses are subject to Tennessee sales and use tax as remotely accessed computer software and that the addition of a “live chat” feature in these situations did not alter the taxability of these transactions. The letter ruling also concludes that a course textbook available as a “downloadable PDF” is *not* subject to Tennessee sales and use tax because textbooks are not subject to sales and use tax under Tennessee law whether in digital or physical form. Regarding a proposed mortgage loan originating “hybrid” course offering some live instruction and some online aspects for quizzes and exams, the letter ruling concludes that the “self-paced course” would be considered computer software subject to Tennessee sales and use tax under a true object analysis. Please contact us with any questions.

URL: <https://www.tn.gov/content/dam/tn/revenue/documents/rulings/sales/23-07.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>

Updated New York State and New York City pass-through entity tax guidance

On August 17, 2023, the New York State Department of Taxation and Finance (“Department”) announced it has updated its website for content related to the New York State pass-through entity tax (“NYS PTET”) and New York City pass-through entity tax (“NYC PTET”).

URL: <https://content.govdelivery.com/accounts/NYTAX/bulletins/3640f0b>

This Multistate Tax Alert summarizes some of the updated and new administrative guidance provided by the Department.

[Issued September 8, 2023]

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-updated-new-york-state-and-new-york-city-pass-through-entity-tax-guidance.pdf>

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