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Income/Franchise:
**Multistate Tax Commission Work Group Circulates Discussion Draft Model Rules
on Guaranteed Payments**

State Tax Sourcing of Guaranteed Payments for Services & Additional Credit for Taxes Paid to Other States Proposed Models – Discussion Draft, Multistate Tax Commission, Uniformity Committee (10/12/23). Draft proposed statutes and a model regulation prepared by the staff of the Multistate Tax Commission (MTC) as part of the MTC Uniformity Committee’s project on the state taxation of partnerships have been posted for discussion, addressing how states should source income received by direct, individual, nonresident partners in exchange for services when those partners reported that income as a guaranteed payment for services for federal income tax purposes. The discussion draft generally characterizes such guaranteed payments as a partner’s distributive share rather than as compensation and also addresses guaranteed payments to retired partners and foreign partners, including some related “simple” examples. Please contact us with any questions.

URL: <https://www.mtc.gov/wp-content/uploads/2023/10/Guaranteed-Payments-Model-Rule-Discussion-Draft-October-12-2023.pdf>

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Income/Franchise:

Indiana: Updated Bulletin Clarifies DOR's Positions on Apportionment and Business Versus Nonbusiness Income

Information Bulletin #12, Ind. Dept. of Rev. (10/23). The Indiana Department of Revenue (Department) issued an updated bulletin, which has been changed to clarify the Department's positions on "apportionment and business/nonbusiness income." In it, the Department explains that for tax years ending before January 1, 2019, receipts from the provision of services and most intangible personal property are apportioned to Indiana if the greater portion of the income-producing activity is performed in Indiana than in any other state, based on the cost of performance. However, for tax years beginning after December 31, 2018, receipts from the provision of services and most intangible personal property, other than telecommunications and broadcast services, are apportioned based on the extent the market for those sales were in Indiana. Regarding business income, the bulletin provides that business income is all income that is apportionable to Indiana under the US Constitution and that all income earned by a business "shall be presumed to be apportionable business income unless it clearly does not relate to the operation of the taxpayer's unitary business." Please contact us with any questions.

URL: <https://www.in.gov/dor/files/reference/ib12.pdf>

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Income/Franchise:

Mississippi DOR Explains New Law on Depreciation and Expensing for Some Qualifying Expenditures and Property

Notice 80-23-003, Miss. Dept. of Rev. (10/20/23). The Mississippi Department of Revenue (Department) issued guidance on legislation enacted earlier this year [see H.B. 1733, signed by gov. 3/27/23, and *State Tax Matters*, Issue 2023-13, for more details on this legislation], that revises methods of Mississippi corporate and individual income tax depreciation and expensing that may be used for certain qualifying expenditures and property. In it, the Department explains that for tax years beginning after December 31, 2022, a taxpayer may treat specified research or experimental expenditures that were paid or incurred by the taxpayer during the tax year

in connection with the taxpayer's trade or business as expenses that are not chargeable to the capital account, and may elect to take a full and immediate deduction for such expenditures and/or to depreciate the expenditures in accordance with Internal Revenue Code (IRC) section 174 as it existed on January 1, 2021.

URL: <https://www.dor.ms.gov/sites/default/files/News/Depreciation%20Notice%20Draft%2010-20-23.pdf>

URL: <http://billstatus.ls.state.ms.us/2023/pdf/history/HB/HB1733.xml>

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230331_4.html

Furthermore, for tax years beginning after December 31, 2022, the Department explains that expenditures for business assets that are qualified property or qualified improvement property (QIP) shall be eligible for 100% bonus depreciation and may be deducted as an expense incurred by the taxpayer during the tax year in which the property was placed in service. For such purposes, "qualified property" has the same meaning as defined in IRC section 168(k) as it existed on January 1, 2021, and QIP has the same meaning as defined in IRC section 168(e)(6) as it existed on January 1, 2021. The Department also explains that a taxpayer may elect to take a bonus depreciation deduction for such expenditures and/or to depreciate the expenditures in accordance with IRC section 168.

Lastly, the Department explains that a taxpayer may also elect to treat the cost of any IRC section 179 property that was placed in service during the taxable year as an expense which is not chargeable to a capital account, and "any cost so treated shall be allowed as a deduction for that year" – concluding that Mississippi's treatment of the deduction shall conform to the provisions of IRC section 179 in effect for that year. Please contact us with any questions.

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Income/Franchise:

New Jersey Division of Taxation Explains "Convenience of the Employer" Rule for Connecticut Residents

Convenience of the Employer Sourcing Rule Enacted for Gross Income Tax, N.J. Div. of Tax. (rev. 9/26/23). The New Jersey Division of Taxation (Division) issued updated guidance [see *State Tax Matters*, Issue 2023-33, for details on this guidance as originally issued] pertaining to recently enacted New Jersey legislation that adopts a "convenience of the employer" rule for nonresident income sourcing for New Jersey gross (individual) income tax purposes [see A.B. 4694 (2023), and *State Tax Matters*, Issue 2023-30, for more details on these law changes], addressing how this new rule applies to employees who are residents of Connecticut as New Jersey "recognizes that Connecticut law contains a convenience of the employer rule." The guidance explains that upon review of Connecticut's relevant provision, which is codified in Conn. Gen. Stat. § 12-711, "it appears that Connecticut's convenience of the employer rule is reciprocal, much like New Jersey's newly enacted law." Accordingly, the Division concludes that "an employee who works from home in Connecticut for a New Jersey

employer will not implicate New Jersey’s convenience of the employer rule.” The Divisions also explains that “although it is New Jersey’s expectation that Connecticut will adopt a similar position with regard to the application of its convenience of the employer rule to employees who work in New Jersey for a Connecticut employer, it is recommended that taxpayers and practitioners look for formal guidance from Connecticut.” Please contact us with any questions.

URL: <https://www.state.nj.us/treasury/taxation/conveniencerule.shtml>

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230818_5.html

URL: <https://www.njleg.state.nj.us/bill-search/2022/A4694>

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230728_4.html

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Income/Franchise:

Oregon: Adopted Changes to CAT Rules Address Cost Inputs or Labor Cost Subtraction and Farming

Amended OAR section 150-317-1200, Or. Dept. of Rev. (10/20/23); Amended OAR section 150-317-1170, Or. Dept. of Rev. (10/20/23). The Oregon Department of Revenue (Department) adopted 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://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=298540>

URL: <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=298653>

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 adopted CAT rule changes provide additional guidance generally for CAT taxpayers with farming operations. The amendments are effective November 1, 2023. Please contact us with any questions.

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Income/Franchise:

Pennsylvania: City of Philadelphia DOR Explains Wage Tax Application for Remote and Hybrid Work

Wage Tax policy guidance for non-resident employees (UPDATED), City of Philadelphia, Penn. Dept. of Rev. (10/12/23). The City of Philadelphia, Pennsylvania (City) Department of Revenue (Department) issued updated guidance explaining its longstanding “Requirement of Employment” policy that the compensation of nonresident employees who perform work for City-based employers is *not* subject to the City’s Wage Tax during the time they are required to work remotely from a location outside the City, including working from home. However, if the City-based employer allows a nonresident employee to work from home, at the convenience and discretion of the employee, the employee’s compensation will be subject to the City’s Wage Tax – noting that it did not change this Wage Tax policy during the COVID-19 pandemic. The Department also provides some illustrative examples of its policy under various hybrid work arrangement scenarios, as well as addresses how nonresident employees of City employers may request a refund for City Wage Tax withheld during the time they were required to perform their duties from outside the City. Please contact us with any questions.

URL: <https://www.phila.gov/media/20231024112123/UPDATED-Wage-Tax-policy-guidance-for-non-resident-employees.pdf>

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Income/Franchise:

Texas: Settlement Payment Deemed for Tort Damages and Thus Not Deductible as COGS for Franchise Tax Purposes

Case No. 13-21-00335-CV, Tex. Ct. App. (10/19/23). The Texas Thirteenth Court of Appeals (Corpus Christi – Edinburg) affirmed that an oil and gas company could *not* deduct a settlement payment made to a third-party as costs of goods sold (COGS) for Texas franchise tax purposes, because the payment was deemed to be “a cost of committing a tort” and did *not* constitute direct costs of acquiring or producing goods. Although the Court of Appeals agreed in general that the language of a settlement agreement should not definitely control for Texas franchise tax purposes, the Court explained the ineluctable evidence supported the trial court’s finding that the settlement payment went towards tort damages, “which are not identified as COGS deductions.” Please contact us with any questions.

URL: <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=bf37c6eb-1b0a-4377-9ef0-d40f2c33d94d&MediaID=ffc45503-108d-4ffa-b08f-32a2c48079fc&coa=%22%20+%20this.CurrentWebState.CurrentCourt%20+%20@%22&DT=Opinion>

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Income/Franchise:

Texas: Guidance Addresses Costs Included as Benefits for Compensation Deduction for Franchise Tax Purposes

Letter No. 202310005L, Tex. Comptroller of Public Accounts (10/13/23). In a publication issued by Tax Policy explaining the types of costs allowed when determining the compensation deduction, the Texas Comptroller of Public Accounts (Comptroller) explained costs that may be included as benefits must:

URL: <https://star.comptroller.texas.gov/view/202310005L>

- Be similar to the items listed in Texas Tax Code section 171.1013(b)(2) (e.g., workers’ compensation benefits, health care, employer contributions made to employees’ health savings accounts, and retirement) and provide value to an employee in a personal capacity;
- Be deductible for federal income tax purposes;
- Not already be included in wages and cash compensation; and
- Meet all the other requirements of title 34 Tex. Admin. Code section 3.589(e).

The Comptroller also provided a non-exhaustive list of items that may be included in the compensation deduction as benefits *under certain circumstances* (e.g., certain immigration expenses, meals, relocation/travel

expenses, company-provided vehicles, health checkups, sports club memberships, cell phone expenses, entertainment expenses, book and journal subscriptions, professional dues, and studies/tuition reimbursement), and also lists certain items that may *not* be included as benefits. Please contact us with any questions.

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Income/Franchise:

Washington DOR Issues Capital Gains Tax Guidance on §1256 Contracts and Credit for Taxes Paid to Other States

Interim statement regarding the capital gains excise tax and Section 1256 contracts, Wash. Dept. of Rev. (10/11/23); *Interim statement regarding the capital gains excise tax and calculation of credit for taxes paid to another taxing jurisdiction*, Wash. Dept. of Rev. (10/11/23). The Washington Department of Revenue (Department) issued guidance in the form of “interim statements” intended to provide taxpayers with additional information on calculating Washington’s tax on long-term capital gains earned by some individuals from the sale or exchange of certain capital assets at the rate of 7% beginning January 1, 2022 [see E.S.S.B. 5096 and previously issued Multistate Tax Alert (May 13, 2021) for more details on this state tax, as well as previously issued Multistate Tax Alert (March 27, 2023) for more details on the Washington Supreme Court’s decision upholding the validity of the tax]. One interim statement explains that for purposes of Washington’s capital gains excise tax, “Section 1256 contracts” that are treated as sold at the close of the taxable year pursuant to Internal Revenue Code section 1256(a) are considered sold for Washington capital gains excise tax purposes. Thus, any long-term capital gain or loss from such sale, as determined by Internal Revenue Code section 1256(a)(3), is included in the calculation of the individual’s adjusted capital gain and Washington capital gains to the extent such gain or loss is included in calculating the individual’s federal net long-term capital gain, and the Department provides some examples to illustrate. Another interim statement addresses computation of the Washington capital gains excise tax credit for taxes paid in another taxing jurisdiction, including two example scenarios to help illustrate this calculation. Please contact us with any questions.

URL: <https://dor.wa.gov/laws-rules/interim-statement-regarding-capital-gains-excise-tax-and-section-1256-contracts>

URL: <https://dor.wa.gov/laws-rules/interim-statement-regarding-capital-gains-excise-tax-and-calculation-credit-taxes-paid-another>

URL: <https://app.leg.wa.gov/billssummary?BillNumber=5096&Year=2021&Initiative=false>

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/washington-law-imposes-new-excise-tax-on-capital-gains.pdf>

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-multistate-tax-alert-washington-supreme-court-upholds-capital-gains-tax.pdf>

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Sales/Use/Indirect:

Colorado DOR Updates Proposed Rule on Refund Claims and Potential Penalties on Incomplete Claims

REVISED Proposed Reg. section 39-26-703-2, Colo. Dept. of Rev. (10/17/23). Reflecting legislation enacted last year that permits the Colorado Department of Revenue (Department) to assess and collect a new civil penalty if a purchaser files a Colorado sales and use tax refund claim for certain tax years that is incomplete, duplicative of another claim, or lacks a reasonable basis in law or fact [see H.B. 1118 (2022), and *State Tax Matters*, Issue 2022-17, for more details on these law changes], the Department is proposing an updated new rule [see *State Tax Matters*, Issue 2023-39, for details on the rule as originally proposed last month] intended to provide guidance regarding the penalty imposed for incomplete refund claims, as well as protective refund claims for sales and use tax paid to a seller. The rule also prescribes the form for making an application for refund of sales or use taxes and the data, information, and documentation an applicant must provide. A virtual public hearing on the proposal is still scheduled for November 2, 2023, and any written comments are due on the same date. Please contact us with any questions.

URL: <https://tax.colorado.gov/news-article/notice-of-revised-proposed-rule-house-bill-22-1118-buyers-claims-for-refund-of-sales>

URL: <https://leg.colorado.gov/bills/hb22-1118>

URL: https://dhub.deloitte.com/Newsletters/Tax/2022/STM/220429_9.html

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230929_8.html

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Sales/Use/Indirect:

Illinois DOR Proposes Rule Addressing Bad Debt Deductions on Installment Contracts for Cash Basis Retailers

Proposed Amended 86 Ill. Adm. Code 130.1960, Ill. Dept. of Rev. (10/20/23). Pursuant to state caselaw from 2021 that permitted bad debt refund claims for a cash basis taxpayer making installment sales [see *State Tax Matters*, Issue 2021-46, for additional details on this case], the Illinois Department of Revenue is proposing amendments to an Illinois retailers' occupation tax rule to clarify that a cash basis retailer that cannot claim a bad debt deduction on its federal income tax return *is* entitled to claim a refund for Illinois sales tax paid by the retailer on that portion of an installment contract found to be worthless or uncollectable. The proposed amendment provides new guidance on the calculation of a bad debt, including examples, as well as additional direction regarding procedural requirements and recordkeeping. Comments on this proposal are due no later than 45 days after its October 20, 2023 publication. Please contact us with any questions.

URL: https://www.ilsos.gov/departments/index/register/volume47/register_volume47_42.pdf

URL: https://dhub.deloitte.com/Newsletters/Tax/2021/STM/211119_4.html

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Sales/Use/Indirect:

Washington Appellate Court Affirms Use Tax and B&O Tax Due on Internal Sales Based on Comparable External Sales

Case No. 847198-I, Wash. Ct. App. (10/23/23). In an unpublished opinion involving an asphalt manufacturer with in-state production facilities that provides asphalt both to its own construction division via internal exchanges (*i.e.*, “internal sales”) and to other third-party entities that perform construction work (*i.e.*, “external sales”), a Washington Court of Appeals (Court) affirmed that the company owed Washington use tax and manufacturing business and occupation (B&O) tax on its internal sales even though a formal sales price was not charged. Furthermore, the Court held that the sales price on these internal sales must be calculated based on the manufacturer’s external sales rather than on its costs as the transactions were deemed “comparable” under the facts at hand. Please contact us with any questions.

URL: <https://www.courts.wa.gov/opinions/pdf/847198.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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