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Income/Franchise:

California Franchise Tax Board Adopts Rule Changes on Alternative Apportionment Petitions

Amended California Code of Regulations, Title 18, Section 25137, Cal. FTB (11/3/23). The California Franchise Tax Board (FTB) filed final amendments with the California Secretary of State to its rule on alternative apportionment method petition procedures (*i.e.*, Regulation 25137) that took effect on November 3, 2023. The amendments generally are intended to provide clearer rules, conditions, and deadlines for filing such petitions with the FTB; clarify the briefing process and specify procedures related to hearings on such petitions; and address application of “ex parte communications” to help streamline the petition process and support consistent application of procedures. Please contact us with any related questions.

URL: <https://www.ftb.ca.gov/tax-pros/law/final-regulations/25137-final-text.pdf>

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Income/Franchise:

Massachusetts DOR Explains 4% Surcharge on Individual Income in Excess of \$1 Million

Technical Information Release (TIR) 23-12: Provisions in the Fiscal Year 2024 Budget Pertaining to the 4% Surtax and the Extension of the Brownfields Tax Credit, Mass. Dept. of Rev. (11/15/23). The Massachusetts Department of Revenue (Department) issued a technical information release (TIR 23-12) that addresses provisions of the Massachusetts Fiscal Year 2024 Budget (“FY24 Budget”) pertaining to Massachusetts’ recently codified 4% surcharge on individual income in excess of \$1 million, which was approved by Massachusetts voters through ballot measure in 2022 [see previously issued Multistate Tax Alert for more details on the

Massachusetts Fiscal Year 2024 Budget]. TIR 23-12 explains how the FY24 Budget clarifies computing taxable income subject to the 4% individual income surtax and announces that the Department “intends to issue further guidance with respect to the administration of the 4% surtax.” Moreover, TIR 23-12 explains how the FY24 Budget extends Massachusetts’ brownfields tax credit by an additional five years. Please contact us with any questions.

URL: <https://www.mass.gov/technical-information-release/tir-23-12-provisions-in-the-fiscal-year-2024-budget-pertaining-to-the-4-surtax-and-the-extension-of-the-brownfields-tax-credit>

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-massachusetts-adopts-significant-tax-legislation-including-adoption-of-single-sales-factor-in-2025.pdf>

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Income/Franchise:

Michigan: US Supreme Court Denies Reviewing Case on Apportionment Formula Validity as Applied to Gain from Deemed Asset Sale

Docket No. 23-443, US (petition for cert. denied 11/20/23). The US Supreme Court (Court) denied the taxpayer’s petition for review in a case involving the gain on sale of an out-of-state business pursuant to an Internal Revenue Code section 338(h)(10) election and application of the statutory standard apportionment formula (*i.e.*, single sales factor) under the Michigan business tax (MBT) for the prior short-year at issue. Earlier this year, the Michigan Supreme Court held that applying the standard formula to the circumstances in the case did not run afoul of the US Constitution’s Due Process and Commerce Clauses [see Case No. 163742, Mich. (7/31/23) and *State Tax Matters*, Issue 2023-31, for more details on this earlier ruling]. In its filed petition with the Court, the taxpayer had contended that “this case concerns a state’s attempt to tax a company’s value based on de minimis, temporary contacts when that company is already subject to tax on such value in another state,” as well as involves “an issue of national importance affecting interstate commerce, extraterritorial taxation, and a split among state courts of last resort.” Please contact us with any questions.

URL: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-443.html>

URL: [https://www.courts.michigan.gov/4a2539/siteassets/case-documents/opinions-orders/msc-term-opinions-\(manually-curated\)/22-23/vectren-op.pdf](https://www.courts.michigan.gov/4a2539/siteassets/case-documents/opinions-orders/msc-term-opinions-(manually-curated)/22-23/vectren-op.pdf)

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230804_4.html

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Income/Franchise:

Minnesota Supreme Court Affirms Gain Involving Goodwill from Unitary Asset is Business Income

Case No. A23-0222, Minn. (11/22/23). The Minnesota Supreme Court (Court) affirmed [see *State Tax Matters*, Issue 2023-1, for more details on the Minnesota Tax Court's earlier ruling in this case] that a nonresident individual's income stemming from goodwill generated by the sale of her stock ownership interests in two S corporations pursuant to an election under Internal Revenue Code section 338(h)(10) to treat the stock sales as sales of the underlying corporate assets constituted income of a unitary business subject to apportionment at the entity level under Minn. Stat. § 290.17, subds. 3 and 4. In doing so, the Court explained that income of a trade or business that does not constitute "nonbusiness income" is business income subject to apportionment under Minnesota law, and that the income from the sales of the corporations in this case was derived from a unitary asset and thus may be constitutionally apportioned as business income.

URL: <https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Standard%20Opinions/OPA230222-112223.pdf>

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230106_10.html

As part of its argument to the contrary, the taxpayer claimed such income constituted nonbusiness income pursuant to unappealed Minnesota Tax Court caselaw that should be viewed as precedential and binding on the Minnesota Department of Revenue (Department). However, the Court declined to "announce a brightline rule about the binding nature of unappealed tax court decisions," thus maintaining that Minnesota Tax Court decisions generally are non-precedential holdings. A dissenting opinion follows, commenting that the Department's decision to disregard the Minnesota Tax Court's interpretation of a statute and instead adopt its "own interpretation without notice to the public" raises "serious concerns about the fundamental fairness of the underlying audit that led to this appeal." Please contact us with any questions.

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Income/Franchise:

Pennsylvania Supreme Court Affirms Philadelphia Validly Denied Wage Tax Credit for Taxes Paid to Other State

Case Nos. 20 EAP 2022 and 21 EAP 2022, Pa. (11/22/23). In a case involving a resident of the City of Philadelphia, Pennsylvania (City) who worked full-time in the City of Wilmington, Delaware, the Pennsylvania Supreme Court (Court) affirmed denial of the resident's claim for an additional City wage tax credit for a portion of the Delaware state taxes incurred [see *State Tax Matters*, Issue 2022-2, for details on the Pennsylvania Commonwealth Court's 2022 ruling in this case]. The City allowed the taxpayer to claim a credit against her Philadelphia wage taxes for City of Wilmington taxes she incurred, but the taxpayer argued she was entitled to an additional credit against her Philadelphia wage taxes for the portion of income taxes that she paid to the State of Delaware in excess of what was credited against her income taxes paid to the Commonwealth of Pennsylvania. The Court concluded that state and local taxes need not be aggregated in conducting a dormant Commerce Clause analysis, and that, ultimately, the City's wage tax scheme does *not* discriminate against interstate commerce. In doing so, the Court rejected the taxpayer's claim that the City unconstitutionally discriminated against interstate commerce by subjecting a City resident who worked exclusively out-of-state to its wage tax and allowing her credit against that City wage tax only for the local income tax she paid to another jurisdiction, while declining to afford her additional credit for the out-of-state income tax she paid.

URL: <https://www.pacourts.us/assets/opinions/Supreme/out/J-5B-2023mo%20-%20105746608246962463.pdf>

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/220114_6.html

In reaching this conclusion, the Court explained that it placed "paramount importance" on the *Wynne* case, which it found to be "instructive on the question of aggregation." The Court stated that consistent with *Wynne*, the City's wage tax was enacted and operates "as a purely local tax, given that it was promulgated by Philadelphia's City Council and is collected by the [City Department of Revenue] for the sole benefit of the City and its residents; as a result, we will not consider these state and local taxes in the aggregate in applying the *Complete Auto* test." In this context, the Court concluded that the City did not violate the dormant Commerce Clause by:

1. Imposing upon the resident the City's wage tax,
2. Crediting her for the similar local tax she paid to the City of Wilmington, Delaware, yet
3. Declining to afford her an additional credit for the state taxes she paid to Delaware, "as the tax scheme is both internally and externally consistent and is not discriminatory against interstate commerce, in conformance with the *Complete Auto* test."

Concurring and dissenting opinions follow. Please contact us with any questions.

URL: <https://www.pacourts.us/assets/opinions/Supreme/out/J-5B-2023co%20-%20105746608246964128.pdf>

URL: <https://www.pacourts.us/assets/opinions/Supreme/out/J-5B-2023do%20-%20105746608246963794.pdf>

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Gross Receipts:

Washington DOR Posts Guidance Explaining that Patent Income May Be Subject to B&O Tax

Tax Topics: Patent income may be taxable, Wash. Dept. of Rev. (11/15/23). In recently posted “tax topic” guidance, the Washington Department of Revenue (Department) explains that income received from patents may be subject to Washington’s business and occupation (B&O) tax, and the taxability of the income depends on whether the amounts are business or nonbusiness income. According to the guidance, income from patent royalties and patent sales is subject to B&O tax when received as a regular part of business activities, and three examples of taxable patent income include:

URL: <https://dor.wa.gov/forms-publications/publications-subject/tax-topics/patent-income-may-be-taxable>

- Patent royalties earned by an inventor for the right to use a patented process or to manufacture a patented item (*i.e.*, taxed under the royalties B&O tax classification);
- Income from the sale of a patent by an inventor (*i.e.*, taxed under the “services and other activities” B&O tax classification); and
- Patent royalties received by an investment firm that owns patents and other intangible assets for investment purposes (*i.e.*, taxed under the royalties B&O tax classification).

In these three instances, the Department explains that the patent income is a regular part of the business operations because it is relied on to sustain the business. Furthermore, the Department notes that income subject to B&O tax under either the royalties or services and other activities classification is apportionable. The Department also explains that royalty income earned by a person who purchased the patent for pure speculation along with other investments generally would *not* be subject to B&O tax on such patent income if the person has no business operations related to the patent. Please contact us with any questions.

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Sales/Use/Indirect:

Utah: Online Streaming Entertainment Company Owes Tax on Monthly Subscription Fees as Bundled Transactions

Appeal No. 22-1274, Utah State Tax Comm. (9/19/23). In a ruling involving a multinational provider of licensed and original entertainment programming that offers subscriptions to its streaming services platform for a monthly fee that includes the ability to download programming and view it offline, the Utah State Tax Commission held that while the company's online streaming alone is not subject to Utah sales tax under state law, Utah may impose sales tax on the monthly subscription fees in this case as a bundled transaction. In doing so, the administrative law judge explained that based on the provided facts, the company did not prove by reasonable and verifiable standards that there was no charge for the offline-download feature embedded in its total subscription price during the audit period at issue, and thus the entire monthly subscription price is taxable as a bundled transaction. Please contact us with any questions.

URL: <https://tax.utah.gov/commission/decision/22-1274.pdf>

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Sales/Use/Indirect:

Washington: Proposed Rule Reflects Expansion and Extension of Exemption for Some International Investment Management Companies

Proposed Amended Wash. Admin. Code (WAC) section 458-20-15503 (WSR 23-23-068), Wash. Dept. of Rev. (11/9/23). The Washington Department of Revenue issued proposed revisions to its sales and use tax rule on digital products to reflect recently enacted legislation [see S.B. 5565, signed by gov. 5/9/23, and *State Tax Matters*, Issue 2023-20, for more details on this new law], and explain that the purchase of standard financial information by a qualifying international investment management company, or by persons affiliated with a qualifying international investment management company, is exempt from both Washington retail sales and use tax. The proposal includes some relevant definitions for this exemption, as well as sunsets it on July 1, 2031, rather than July 1, 2021. The proposal is being made through an expedited rulemaking process, and any

objections to this process must be made in writing and received by January 22, 2024. Please contact us with any questions.

URL: <https://dor.wa.gov/sites/default/files/2023-11/20-15503cr5frmdraftNov23.pdf?uid=6554060822abd>

URL: <https://app.leg.wa.gov/billsummary?BillNumber=5565&Initiative=false&Year=2023>

URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230519_14.html

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Multistate Tax Alerts

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Archive: <https://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-archive.html?id=us:2em:3na:stm:awa:tax>

Delaware unclaimed property audit notices sent to companies that failed to respond to VDA invitations

Many companies that did not respond to the July 2023 invitations to enroll in the Delaware Secretary of State's Voluntary Disclosure Agreement (VDA) program have received unclaimed property audit examination notices (on or around October 17, 2023) from Delaware's Department of Finance. While Delaware generally is required to invite and allow 90 days for companies to enroll in the VDA program prior to selecting companies for audit, there are several statutory exceptions whereby a company may be selected for audit—that may yield a harsher result—without receiving a VDA program invitation first.

This Multistate Tax Alert summarizes some recent developments surrounding the VDA program.

[Issued November 20, 2023]

URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-delaware-unclaimed-property-audit-notices-sent-to-companies-that-failed-to-respond-to-vda-invitations.pdf>

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