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State Tax Matters
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In this issue:

Administrative:

New York Appellate Court Says Retroactive Application of Surcharge Violates Due Process

Case No. CV-23-0150, N.Y. App. Div. (5/23/24). In a case challenging New York's imposition of an excise tax surcharge imposed on pharmaceutical companies pursuant to the Opioid Stewardship Act (OSA) enacted in April 2018, the New York Supreme Court, Appellate Division (Court), held that while certain "pass-through" provisions in the OSA were determined to be invalid in a separate case, such invalid provisions were severable and the remaining OSA provisions were validly imposed in 2018; however, retroactive surcharge assessments for 2017 violated the taxpayer's due process rights. In doing so, the Court explained that the taxpayers had no forewarning for 2017 on the "15½-month period of retroactivity" and had no opportunity to "alter their behavior in anticipation of the [new law]." The Court explained that, in contrast, for 2018, the taxpayers were aware of the impending law change for most of the year. In this respect, the Court concluded that the OSA excise tax surcharge was valid for 2018 but invalid for 2017. Please contact us with any questions.
URL: https://decisions.courts.state.ny.us/ad3/Decisions/2024/CV-23-0150.pdf

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Income/Franchise:

Connecticut: CORRECTION from Last Week's *State Tax Matters*, Issue 2024-21: Pending Bill Would Extend NOL Carryforward Period and Create Deduction for Shift to Combined Reporting

H.B. 5524, passed House and Senate 5/22/24. A pending bill, if enacted into law, would extend the state corporation business tax net operating loss (NOL) carryforward period from 20 to 30 income years, applicable

for NOLs incurred in income years starting on or after January 1, 2025. If enacted into law, the pending legislation also would, effective January 1, 2025, permit certain combined groups meeting specified qualifications to deduct, over a 30-year period, the amount necessary to offset the increase in the valuation allowance against NOLs and tax credits in Connecticut that resulted from Connecticut's shift to combined reporting, which was first implemented in Connecticut in the 2016 income year.
URL: https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2024&bill_num=5524

Last week's "State Tax Matters, Issue 2024-21" prematurely reported that Connecticut House Bill 5524 was signed into law; however, Connecticut House Bill 5524 remains pending as of early this week. Please contact us with any questions.

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Income/Franchise:
Missouri Appellate Court Affirms City Earnings Tax Does Not Apply to Remote Work from Outside City

Case No. ED111495, Mo. Ct. App. E.D. (5/28/24). Contrary to the City of St. Louis, Missouri (City) Collector of Revenue's interpretation since 2020 that with respect to its individual "Earnings Tax," nonresident employees who have been working remotely due to the COVID-19 pandemic must be treated as working at their original, principal place of work, a Missouri Court of Appeals affirmed [see *State Tax Matters*, Issue 2023-4 for details on a lower court ruling in this case] that pursuant to clear and unambiguous applicable City ordinances, nonresident employee work done and/or services performed must be rendered *in* the City to be subject to its Earnings Tax. In doing so, the Court explained that it interprets the City ordinance term "in" to mean the work or "services performed or rendered" must be done in the geographic parameters of the City; consequently, the earnings from qualifying work or services completed by nonresident employees when they work remotely outside of the City are not subject to the Earnings Tax. Accordingly, the Court held that the individual taxpayers in the case were *not* liable for the City's Earnings Tax for the days they worked remotely outside of the City and thus were entitled to underlying refunds. Please contact us with any questions.
URL: https://www.courts.mo.gov/file.jsp?id=208475
URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230127_4.html

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Income/Franchise:
Ohio: Couple's Gain from Sale in Equity Interest of Company Deemed Apportionable Business Income

Final Determination: Refund Claim No. 0044350439, Ohio Dept. of Tax., Tax Commissioner's Office (3/28/24). In a determination involving a nonresident couple that filed an amended 2018 Ohio individual income tax return claiming a refund based on 2016 Ohio Supreme Court caselaw holding that Ohio's taxation of capital gain from the sale of equity interest in a limited liability company was unconstitutional as applied to that taxpayer, the Ohio Department of Taxation (Department) denied the couple's refund claim based on their gain from sale of equity interest in a national skincare company that did business in Ohio – reasoning that unlike the 2016 Ohio Supreme Court case facts, the couple in this case was actively involved in the company's business operations. In this respect, the Department held that the couple's underlying gains must be apportioned to Ohio and were *not* allocable outside Ohio. Furthermore, the Department held that the couple's gains constituted apportionable business income under Ohio law. Under the facts in this case, the wife (a dermatologist) had founded the skincare company, developed products for the company, acted as a spokesperson for the company, and was featured prominently on the company's website. Please contact us with any questions.
URL: https://nsdhub.com/3R6T6ti

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Gross Receipts:
Washington DOR Adopts Changes to Rule Addressing Sourcing of Services for B&O Tax Purposes

Amended Rule section WAC 458-20-19402, Wash. Dept. of Rev. (5/15/24). Based on "interim guidance" and certain stakeholder feedback regarding its rule addressing the sourcing of services for Washington business and occupation (B&O) tax purposes (*i.e.*, WAC 458-20-19402), the Washington Department of Revenue (Department) adopted changes clarifying the apportionment analysis on how to attribute receipts from services relating to the customer's business activities, including a lengthy list of illustrative examples. Regarding the B&O tax cascading rules, the amendments explain that most taxpayers are expected to be able to attribute apportionable receipts because they will either have access to books and records that contain sufficient information from which to determine where the customer actually received the benefit of their service, or will be able to use a "reasonable method of proportionally attributing receipts" that fairly apportions, and does not distort the apportionment of, where the customer received the benefit of their services. To this end, if a taxpayer is affiliated with another entity that has information indicating where the customer received the benefit of the taxpayer's service, the amended rule explains that the Department "will presume, unless the facts indicate otherwise, that the taxpayer is able to access that information from the affiliated entity." The amended B&O tax sourcing rule was adopted May 15, 2024 and becomes effective June 15, 2024 – and it "may be used to determine tax liability on and after the effective date, until the codified version is available from the code reviser's office." Please contact us with any questions.
URL: https://dor.wa.gov/sites/default/files/2024-05/20-19402cr3frmdraftMay24.pdf

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Sales/Use/Indirect:
Colorado: Online Marketplace's Subscription-Based Membership Fees for Free Delivery Services are Not Taxable

Private Letter Ruling PLR-23-006, Colo. Dept. of Rev. (12/1/23). In a recently posted private letter ruling, the Colorado Department of Revenue (Department) held that based on the provided facts involving an online marketplace that connects purchasers with third-party retailers that sell goods and independent third parties that provide delivery and related services, the fee that the online marketplace charges for a subscription-based membership is *not* subject to Colorado sales or use tax. Under the facts, the primary benefit of the subscription-based membership is to provide the purchaser with free delivery on future orders that meet specific conditions. Moreover, the nature of the delivery and other services provided in exchange for the membership remained the same whether contracted for at the time of purchase or at a later date, and the

services could be contracted for at the time of the customer's initial purchase or at a later time. Under these facts, the Department reasoned that because the membership is invoiced separately on either a monthly or yearly basis, the fee for the membership is both separable and separately stated and is not an enumerated taxable service subject to Colorado sales or use tax. Please contact us with any questions.
URL: https://tax.colorado.gov/sites/tax/files/documents/PLR-23-006.pdf

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Sales/Use/Indirect:
Tennessee: Notice Reflects Adoption of Streamlined Sales Tax Sourcing Provisions Effective July 1

Notice No. 24-08, Tenn. Dept. of Rev. (5/24). The Tennessee Department of Revenue (Department) issued a notice reflecting legislation enacted in 2023 and scheduled to become effective on July 1, 2024 that, among other sales and use tax law changes, adopts "a majority of the sourcing provisions consistent with the Streamlined Sales and Use Tax Agreement" [see H.B. 323 (2023), and previously issued Multistate Tax Alert for details on sales and use tax law changes in the bill relating to sourcing sales]. According to the notice, some of these law changes include the following:
URL: https://www.tn.gov/content/dam/tn/revenue/documents/notices/sales/sales24-08.pdf
URL: https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0323&GA=113
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-tennessee-enacts-changes-to-sales-and-use-tax-laws.pdf

- Destination sourcing for interstate sales of services performed on tangible personal property and computer software;
- Destination sourcing for leased property, including licensed computer software or specified digital products, where the primary property location moves out of Tennessee during the lease period;
- For all sales, including services, made through a marketplace facilitator's marketplace, sourcing based on where the product is received by the purchaser; and
- Destination sourcing for sales of "direct mail" distributed to mail recipients outside Tennessee.

The notice explains that these new sourcing rules help clarify for sellers "which state's tax is due on a sale into or outside the state." Note that an updated "Sales and Use Tax Manual" similarly reflects these various sales

and use tax law changes [see *Sales and Use Tax Manual*, Tenn. Dept. of Rev. (updated 5/24) for details]. Please contact us with any questions.
URL: https://www.tn.gov/content/dam/tn/revenue/documents/tax_manuals/June-2024/Sales-Use-Tax-Manual.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.