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State Tax Matters
The power of knowing.
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In this issue:

Income/Franchise:
Massachusetts Appellate Tax Board Says Pandemic-Based Telecommuting Rule is Valid and Denies Nonresident's Refund

Case No. C347594, Mass. App. Tax Bd. (7/8/24). In a fairly lengthy opinion, the Massachusetts Appellate Tax Board (ATB) held that pursuant to Massachusetts' COVID-19 pandemic-related telecommuting regulation – which was in effect from March 10, 2020 until September 13, 2021 [see *State Tax Matters*, Issue 2021-10, for more details on this "COVID Regulation"] – Massachusetts validly assessed individual income tax on a nonresident federal government employee for work performed outside of his regular Massachusetts office for those days he worked from home (*i.e.*, in New Hampshire) due to the COVID-19 pandemic for the 2020 tax periods at issue. The individual had challenged application of Massachusetts' "COVID Regulation" to his income for the period from March 16, 2020 through the end of the tax year at issue, contending that the regulation violated the US Constitution's Commerce and Due Process Clauses, and further that his income for that period had no connection to Massachusetts.
URL: https://www.mass.gov/doc/sakowski-scott-e-v-commissioner-of-revenue-july-8-2024/download
URL: https://dhub.deloitte.com/Newsletters/Tax/2021/STM/210312_4.html

Denying the taxpayer's underlying refund claim, the ATB concluded that the individual "failed to advance sufficient evidence or convincing arguments that application of the COVID-19 Regulation to the income at issue resulted in improper taxation." The ATB also explained that the individual "advanced no evidence establishing that any other state had staked claim to his income during his pandemic-related telecommuting," and that even if another state "laid rightful claim to the same income due to his physical presence in that state while teleworking," Massachusetts' COVID-19 Regulation offered a credit to "prevent double taxation of the income, thus satisfying Constitutional concerns with fair apportionment." Under the facts, apart from not appearing at the Massachusetts office, the individual's job duties did not change, and his employer did not adjust his income tax withholdings during the remainder of the 2020 tax year at issue. That is, the individual's employer continued to withhold Massachusetts income tax from his paychecks as if he were working full time (*i.e.*, eight hours per day, five days per week, for a total of forty hours per week) from the Massachusetts office.

Interestingly, the ATB's "Findings of Fact and Report" includes a dissenting opinion. This dissent does not contend that the COVID Regulation violates the US Constitution, but rather essentially posits that its promulgation was beyond the Massachusetts Commissioner of Revenue's statutory authority and that even if it was not, the COVID Regulation did not apply in this case as it only can apply to Massachusetts source income which, the dissent asserts, the nonresident had none. The dissent asserts that as a nonresident, having performed all of his services from outside Massachusetts, he had no Massachusetts source income – which is the factual predicate for invocation of the nonresident income statute. Please contact us with any questions.

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Income/Franchise:
Minnesota: State High Court Affirms Out-of-State Company's In-State Activities Exceed P.L. 86-272 Protections

Case No. A23-1561, Minn. (8/7/24). Affirming the Minnesota Tax Court's 2023 decision [see *Case No. 9435-R*, Minn. Tax Ct. (6/23/23) and *State Tax Matters*, Issue 2023-26, for more details on this earlier ruling], the Minnesota Supreme Court (Court) held that the in-state activities of an out-of-state company operating as a "business-to-business catalog" and web-based distributor of industrial and packaging products went beyond solicitation of sales under P.L. 86-272, were not *de minimis*, and thus not immune from Minnesota corporate income or franchise taxation. The Court explained that, under the facts, "the mandatory practice of what amounts to market research performed by the out-of-state company's sales team in Minnesota" is *not* considered "solicitation of orders" under P.L. 86-272 and therefore is not protected from Minnesota income or franchise taxation. Under the facts, the company's in-state sales representatives regularly and systematically collected and reported market data, including data concerning competitors. Please contact us with any questions.
URL: https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Standard%20Opinions/OPA231561-080724.pdf
URL: https://mn.gov/tax-court-stat/published%20orders/2023/Uline%20Inc.%20v.%20COR%2006-23-23.pdf
URL: https://dhub.deloitte.com/Newsletters/Tax/2023/STM/230630_4.html

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Income/Franchise:
Missouri DOR Adopts Various Rule Updates Involving Net Operating Loss Computation

Amended 12 CSR 10-2.165: Net Operating Losses on Corporate Income Tax Returns, Mo. Dept. of Rev. (8/1/24); *Proposed Amended 12 CSR 10-2.165: Net Operating Losses on Corporate Income Tax Returns*, Mo. Dept. of Rev. (3/1/24). The Missouri Department of Revenue adopted various revisions to its administrative rule on computing net operating losses (NOLs) to, among other changes, update it to "better take into account changes in the law since the most recent amendment to this rule," as well as accommodate some subsequent NOL-related decisions from the Missouri Administrative Hearing Commission. The updates clarify that nothing in the rule shall be interpreted as incorporating a federal agency's rule or guideline, as well as provide that, with some exceptions, to the extent an NOL is carried backward for more than two years or carried forward for more than twenty years on the federal income tax return, that amount of the NOL generally must be added to federal taxable income in arriving at Missouri taxable income. Moreover, "any amount of NOL taken against federal taxable income but disallowed for Missouri income tax purposes under section 143.121.2(4), RSMo, may be carried forward and taken against any income on the Missouri corporate income tax return" for a period of not more than twenty years following the year of initial loss.
URL: https://www.sos.mo.gov/CMSImages/AdRules/moreg/2024/v49n15Aug1/v49n15.pdf
URL: https://www.sos.mo.gov/CMSImages/AdRules/moreg/2024/v49n5March1/v49n5.pdf

Another change clarifies, "If a corporate member of an affiliated group incurs an NOL arising from a loss year for which such member files a separate Missouri return or no Missouri return, then that NOL cannot be carried to a consolidated Missouri income tax return for a different tax year (the carryover tax year), except insofar as that particular NOL is carried forward or backward and actually deducted on the affiliated group's consolidated federal income tax return for that carryover tax year, as reflected in the affiliated group's federal taxable income for that carryover tax year."

Another addition explains that "in the situation of a corporate merger where the taxpayer whose loss year gave rise to the NOL did not survive the merger, the net operating loss addition modification must still be computed by reference to the addition and subtraction modifications for the loss year of the corporation that did not survive the merger." These various changes become effective 30 days after publication in the Missouri Code of State Regulations. Please contact us with any questions.

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Gross Receipts:
Washington Appellate Court Replaces B&O Tax Ruling on Rates for In- and Out-of-Network Fuel Card Users

Case No. 57952-9-II, Wash. Ct. App. (8/6/24). A Washington Court of Appeals (Court) replaced its opinion from earlier this year in a case involving an in-state fuel station operator and the applicable Washington business and occupation (B&O) tax rate on fuel obtained by its own fuel-card users from fuel stations outside of its networks and on fuel obtained at its own stations from out-of-network fuel-card users [see *Case No. 57952-9-II*, Wash. Ct. App. (5/29/24) and *State Tax Matters*, Issue 2024-23, for more details on this earlier ruling], and affirmed the trial court's order denying the taxpayer's B&O tax refund claims in their entirety. In doing so, the Court held that the taxpayer is *not* entitled to a tax refund for transactions when its own fuel-card users obtained fuel from stations in other networks, or when fuel card holders from other networks obtained fuel from its own station. As before, the Court continued to hold that:
URL: https://www.courts.wa.gov/opinions/pdf/D2%2057952-9-II%20Published%20Opinion.pdf
URL: https://www.courts.wa.gov/opinions/pdf/D2%2057952-9-II%20Published%20Opinion.pdf
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/STM/240607_6.html

- The fuel station operator made B&O retail sales to its fuel card users when they obtained fuel from other fueling stations, because in those transactions the operator purchased the fuel from the fuel network participant at a price set by the fuel network and then resold the fuel to its own fuel-card users at a price that it determined; and
- The fuel station operator made B&O wholesale sales of fuel to other fuel station operator participants when their respective fuel-card users obtained fuel at its own stations, because it sold the fuel to the participant at a price set by the fuel network and the participant then resold the fuel to its respective fuel-card users.

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Sales/Use/Indirect:
California Office of Tax Appeals Says Act of Processing Customer's Water to Snow is a Taxable Sale

Case No. 21088332, Cal. Off. of Tax App. (5/21/24). In a case involving an out-of-state company that contracts with customers to operate snowmaking equipment, produce artificial snow onsite at the customer location, and provide related services, a recently posted unpublished California Office of Tax Appeals (OTA) opinion held that the company's process of making snow for its California customers constitutes a taxable sale of tangible personal property for California sales and use tax purposes. Under the facts, the company brought its snowmaking equipment to its customers' sites and used its customers' liquid water (which the customers owned, respectively, both before and after the water was processed into snow) to make snow onsite. The OTA explained that the act of processing tangible personal property for customers who provide the material used in the processing is a taxable sale of tangible personal property under California law.
URL: https://ota.ca.gov/wp-content/uploads/sites/54/2024/08/309-Snowmagic-PFR.pdf

The OTA also noted that after the company created the snow using its customers' water, its customers (and the customers' guests) then used the snow in California. Accordingly, because the company operated in California for the purpose of selling tangible personal property and that tangible property was used by its customers in California, the company was a retailer engaged in business in California and, at a minimum, had an obligation to collect and remit use tax. Moreover, the OTA concluded that the true object desired by the company's customers was the snow itself and thus the transactions at issue constituted a "sale" of tangible personal property under California law. Among its arguments to the contrary, the company contended that its snowmaking process was *not* a taxable sale of tangible personal property because the process did not use chemical additives and simply reconditioned water from a liquid form to a solid form where nothing different was created. In response, the OTA explained that there is no requirement under Cal. Rev. & Tax Code section 6006(b) and accompanying California Code of Regulations, title 18, section 1526(a) that tangible personal property must undergo a change in its molecular composition to be considered a taxable sale in California. Please contact us with any questions.

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Sales/Use/Indirect:
Colorado: Letter Ruling Says True Object of DNA Testing Service Involving TPP is Nontaxable Service

Private Letter Ruling PLR-24-007, Colo. Dept. of Rev. (7/2/24). In a recently posted private letter ruling involving a company providing DNA testing and analysis and ancestral/health history reports to individual customers worldwide, the Colorado Department of Revenue (Department) held that the company's ancestral and health reports and saliva kits are *not* subject to sales tax in Colorado, but its use of saliva kits to collect a customer's DNA for generating the reports are subject to use tax in Colorado. In doing so, the Department reasoned that based on the provided facts, the "true object" for the customer is the service (*i.e.*, the DNA analysis that results in ancestral and health history reports), rather than the tangible personal property of the saliva kit. Accordingly, because the service and the tangible personal property are inseparable, and the true object of the customer is the service, the Department concluded that neither the company's ancestry and health history reports nor the saliva kits used in the analysis are subject to sales tax in Colorado. However, because the company, as a service provider, is the user of the saliva testing kits for its Colorado customers, the Department explained that it owes Colorado use tax on such kits. Please contact us with any questions.
URL: https://tax.colorado.gov/sites/tax/files/documents/PLR-24-007.pdf

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Sales/Use/Indirect:
Mississippi: Amended Rule Explains Manufacturer Exemption on Sales of Certain TPP Shipped Out-of-State

Amended Reg. section 35.IV.07.03, Miss. Dept. of Rev. (7/26/24). The Mississippi Department of Revenue adopted amendments reflecting state law that exempts the gross proceeds of sales of tangible personal property by a qualified manufacturer when shipped out-of-state and first use occurs out-of-state, including a list of some activities that do *not* establish a first use. Specifically, the amended Mississippi rule provides that "sales of tangible personal property by the manufacturer or custom processor are exempt on the gross proceeds of sale when shipped, transported, or exported from the State and first use occurs in another state or country, whether such shipment is made by the seller, purchaser, or any third party." Under the amended rule, the activities of "providing instructions, training, or allowing an inspection of the property between the seller and the buyer prior to the shipment of property does not establish a first use" in Mississippi. The amended rule takes effect on August 26, 2024. Please contact us with any questions.
URL: https://www.sos.ms.gov/adminsearch/ACProposed/00027614a.pdf

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Sales/Use/Indirect:
Pennsylvania: Cloud Computing and Support Services for Canned Computer Software Deemed Taxable

BF&R Docket Nos. 2317877 and 2317876, Penn. Bd. of Fin. & Rev. (6/27/24). In a decision concerning a company providing software installation, setup, design, implementation, and training services for its canned computer software licensing customers, the Pennsylvania Board of Finance and Revenue held that the company's activities involved taxable cloud computing and support services to canned computer software rather than nontaxable professional services. Among its claims to the contrary, the company argued that it provided separately stated customer software configuration and training services, as well as migration services, which collectively constituted nontaxable professional services. Please contact us with any questions.
URL: https://bfrcases.patreasury.gov/OpenDocument.aspx?id=48214&fname=S548%20-%202317876%20-%20ONE%20MARKET%20DATA%20LLC%20-%2095916_Redacted.pdf

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Property:
Tennessee: Use of Dark Stores as Sales Comparables Skews Big-Box Retail Store Valuation

Case No. 53.02-232875J, Tenn. State Bd. of Eq. (6/5/24). In a case involving the property tax valuation of an operating "big-box" retail store, the Tennessee State Board of Equalization (Board) held that while the store successfully showed a valuation reduction was warranted under the income approach, "little weight" was given to its sales comparison approach because its reliance on dark store sales "skewed the range of sales comparables for each tax year lower and artificially deflated the subject's value." In doing so, the Board referenced earlier rulings which "previously held that the Dark Store Theory is not given weight in Tennessee," and stated that this "remains the case." Please contact us with any questions.
URL: https://comptroller.tn.gov/content/dam/cot/sboe/judges-decisions/level-1/2024/2024.06.05-LowesHomeCentersInc.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

Missouri enacts changes to pass-through entity tax, including opt-out election
On July 12, 2024, Missouri House Bill 1912 (H.B. 1912) was signed into law. The legislation revises various provisions under Missouri law allowing qualifying pass-through entities to make an annual election to pay an entity-level state tax.
URL: https://documents.house.mo.gov/billtracking/bills241/hlrbillspdf/4602H.01P.pdf

This Multistate Tax Alert summarizes some of the provisions of H.B. 1912.
[Issued July 31, 2024]
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-missouri-enacts-changes-to-pass-through-entity-tax-including-opt-out-election.pdf