



**The National Multistate  
Tax Symposium West**

Move forward with confidence—State implications of tax reform

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## **Western states roundtable**

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# Agenda

- Arizona
- California
- Colorado
- Idaho
- Montana
- New Mexico
- Oregon
- Utah
- Washington

# Some Arizona Developments

# Arizona Legislative Developments

- H.B. 2438 (Signed March 31, 2017) provides that despite any federal income tax law implications, a change in the organizational structure of a corporation—including an S corporation, limited liability company, partnership or any other entity however organized—into another organizational structure generally is not a taxable event for Arizona income tax purposes, so long as there is no change among the owners, their ownership interests, or the assets of the organization.
- S.B. 1290 (Signed March 2, 2017) updates Arizona conformity to the IRC for tax years beginning from and after December 31, 2016 to the state corporate and personal income tax references to the IRC as in effect on January 1, 2017.
- H.B. 2647 (Passed House and transmitted to Senate on February 23, 2018). If passed, for tax years beginning in 2017, would conform to the IRC in effect on January 1, 2017 and the provisions of the Tax Cuts and Jobs Act (P.L. 115-97) that are retroactively effective during taxable years beginning in 2017. The bill would also conform to the Bipartisan Budget Act of 2018 (P.L. 115-123) that are retroactively effective during taxable year beginning in 2017. For tax years beginning in 2018, the bill would only conform to the IRC in effect on January 1, 2017 and does ***NOT*** include the provisions of The Tax Cuts and Jobs Act (P.L. 115-97), which would therefore require another bill to reconcile Arizona's Tax Code with the provisions of the Federal Tax Reform Act of 2017.

# Some California Developments

# California Legislative Developments

- A.B. 398 (Signed July 25, 2017) – expanded CA’s partial sales and use tax exemption (unchanged at 3.9375% resulting in taxation at a rate of 3.3125% plus applicable district taxes) currently available for manufacturing and research and development to include, with some limitations, electric power generation and agricultural businesses, effective January 1, 2018.
- A.B. 102 (Signed June 27, 2017) – reduced the functions of the Board of Equalization (“BOE”) to the core responsibilities granted to it under the CA Constitution and creates two new tax agencies—the Office of Tax Appeals (“OTA”) and the California Department of Tax and Fee Administration (“CDTFA”)—which have taken over many of the responsibilities previously handled by the BOE.
  - The CDTFA now administers certain taxes and fees that were once administered by the BOE, including sales and use tax and business and excise taxes.
  - The OTA takes over the appeals function from the BOE members and hears appeals of taxes and fees administered by the CDTFA and appeals of FTB determinations relating to income and franchise tax.
- A.B. 131 (Signed September 16, 2017) – contained several “clean-up” provisions related to A.B. 102 and the creation of the OTA and CDTFA.

## California Legislative Developments (Continued)

- A.B. 119 (Signed June 27, 2017) – provided penalty relief for partnerships filing 2016 CA partnership returns by the 15<sup>th</sup> day of the 10<sup>th</sup> month following the close of the taxable year and provided a 7 month extension applicable to returns required to be filed for tax years beginning on or after January 1, 2017.
- S.B. 227 (Introduced January 3, 2018, Passed Senate January 30, 2018) - would create a “California Excellence Fund Tax Credit” equal to contribution amount to the Fund as a “charitable contribution” deduction.
- Assembly Constitutional Amendment 22 (Introduced January 18, 2018; requires a two-thirds vote in the legislature to be approved for ballot) - would impose a percentage surtax (either 10% or 7%) “on the net income of all corporations that is over \$1,000,000,” for TYs beginning on or after 1/1/2018.
- A.B. 2731 (Introduced February 15, 2018) – would impose a 17% “carried interest” tax on an individual’s taxable income derived from an investment management business held by that individual where she/he actively engages in the business’ investment activities
- S.B. 1398 (Introduced February 16, 2018) - a 17% “carried interest” tax on an individual’s taxable income derived from an investment management business held by that individual where she/he actively engages in the business’ investment activities

# California Administrative Developments

- Preliminary Reports on Specific Provisions of the Federal Tax Cuts and Jobs Act – starting on February 12, 2018, the FTB began issuing preliminary reports to the California Legislature on how the recently enacted federal tax reform provisions may impact California's tax system given that it is based, in part, on specified date conformity to provisions of federal tax law.
- FTB Regulatory Activity during 2017 and 2018:
  - Cal. Code Regs. tit. 18, §§ 25137-1 & 17951-4 – Apportionment and Allocation of Partnership Income
  - Cal. Code Regs. tit. 18, § 23663 et al. – Assignment of Credits to Combined Group Members
  - Cal. Code Regs. tit. 18, § 25136-2 – Market-Based Rules for Sales of Other than TPP
  - Cal. Code Regs. tit. 18, § 25137 – Alternative Apportionment Method Petition Procedures
  - Cal. Code Regs. tit. 18, § 18662-7 – Withholding on Domestic Pass-Through Entities
  - Cal. Code Regs. tit. 18, §§ 25137-4.2 & 25137-10 – Mixed Financial and Non-Financial Combined Groups
  - Cal. Code Regs. tit. 18, § 25137-15 – Space Transportation Industry Apportionment Regulations

## California Administrative Developments (Continued)

- FTB Chief Counsel Rulings
  - CCR 2017-01 – Application of market-based sourcing rules to “non-marketing” services
  - CCR 2017-02 – Acquisition goodwill included in deemed water’s-edge election business asset test
  - CCR 2017-03 – “occasional sales rule”
- Technical Advice Memorandum 2017-03 – provides guidance regarding the application of IRC §§ 382, 383, and 384 for California tax purposes to apportioning taxpayers.
- Technical Advice Memorandum 2017-04 – provides guidance on eligibility for “other state tax credit” when filing a composite return in a reverse credit state.
- Proposed Emergency Amendments to Cal. Code Regs. tit. 18, §§ 30100 et al. – the OTA has issued amended proposed emergency regulations regarding appeals and petitions for rehearing submitted with or subject to the jurisdiction of the OTA, which was created pursuant to A.B. 102.
- FTB Notice 2017-05 – states that the FTB will allow taxpayers and representatives to request permission to make oral presentations to FTB staff in connection with Cal. Rev. & Tax. Code § 25137 petitions.

## California Administrative Developments (Continued)

- Resolution Regarding Ex Parte Communications and Consideration of Petitions Made Pursuant to Section 25137 of the Revenue and Taxation Code – explains the FTB’s policy that, beginning on January 1, 2018, while a 25137 petition is pending, "there shall be no communication, direct or indirect, regarding any substantive issue related to the petition, to or from any Board member or his/her staff/representatives, to or from the petitioner or an employee/representative of the petitioner, or Franchise Tax Board staff without notice and opportunity for all parties to participate in the communication."

# Some Colorado Developments

# Colorado

## Combined Returns: Includible Corporations

- Case No. 2017COA152, Colo. Ct. App. (11/30/17)
  - A corporation without property or payroll factors of its own cannot have 20% or more of its factors assigned to locations in the United States and therefore cannot be included in a combined report.
  - The Court rejected the Department's alternative assertion that it could require the taxpayer to include this subsidiary or otherwise tax a portion of the subsidiary's income under Colorado law to prevent tax abuse.
- Case No. 16CA0849, Colo. Ct. App. (11/2/17)
  - A corporation without property or payroll factors of its own cannot have 20% or more of its factors assigned to locations in the United States and therefore cannot be included in a combined report.
  - For purposes of determining whether eighty percent or more of a C corporation's property and payroll are outside the United States for purposes of exclusion from Colorado's combined report, the property and payroll of federally disregarded foreign corporate subsidiaries should be excluded from the calculation.

# Colorado

- Market Sourcing Bill (HB18-1185)
  - For income tax years commencing on and after January 1, 2019, the bill generally replaces the method for sourcing of sales for purposes of apportioning the income of a taxpayer that has income from the sale of services or from the sale, lease, license, or rental of intangible property in both Colorado and other states from the cost-of-performance test in the case of services and the commercial domicile test in the case of intangible property to a market-based sourcing system.
- Non-Collecting Retailers: Sales & Use Tax Notice & Reporting Requirements
  - Department began enforcement of the law's notice and reporting requirements with respect to transactions on or after July 1, 2017.
  - Non-Collecting Retailers Requirements
    - Transactional notice must be provided to customer with respect to each purchase
    - Annual purchase summary must be sent annually to customers by January 31<sup>st</sup>
    - Customer information report must be filed annually with DOR by March 1<sup>st</sup>

# Some Idaho Developments

# Idaho Responses to Federal Tax Reform

- HB 355, signed by Governor on February 9, 2018 [generally effective immediately and retroactively to January 1, 2018]
  - Updates Idaho conformity to IRC as amended and in effect on December 21, 2018, except that IRC Secs. 965 and 213 are applied in Idaho as in effect on December 31, 2017
  - Requires add-back of IRC Sec. 965(c) deduction
  - Applies for the 2017 taxable year
- HB 463, signed by Governor on March 12, 2018, and immediately effective, applies retroactively to January 1, 2018
  - Updates conformity to IRC for select provisions as amended and in effect on January 1, 2018
  - Requires add-back of deductions under IRC Secs. 965(c), 245A, and 250
  - Lowers state corporate tax rate from 7.4% to 6.925%
- H.B. 624, signed by Governor on March 20, 2018 [generally effective immediately and retroactively to January 1, 2018]
  - Confirms the Idaho income tax code to changes Congress made to the IRC that affect the 2017 taxable year with the Bipartisan Budget Act of 2018, which was signed into law on February 9, 2018
  - Adds this language, "Internal Revenue Code sections 108, 163, 168(e), 168(i), 179D, 179E, 181, 199, 222 and 451 are applied as in effect on February 9, 2018."
  - Applies for the 2017 taxable year
- Idaho State Tax Commission informally advised no updates to forms or instructions following IRS guidance regarding reporting of IRC Sec. 965 income on federal return.

# Some Montana Developments

# Montana

- Market Sourcing Bill (H.B. 511, signed by gov. 5/3/17)
  - Effective January 1, 2018 and applicable to tax years beginning after December 31, 2017, new law revises Montana's adopted version of the Multistate Tax Compact, as recommended by the Multistate Tax Commission, by implementing market-based sourcing of certain sales of other than tangible personal property for state income tax apportionment purposes.
  - Applicable to apportionment for corporations and pass-through entities
  - The legislation adopts a "throwout" rule
- Revised Corporate NOL Carryforward Period & Carryback Limitation NOL (H.B. 550, signed by gov. 5/22/17)
  - Applicable to tax years beginning after December 31, 2017, NOL carryforward period increases from seven to ten years. NOL carryback period remains three years, but the new law limits the amount to \$500,000 per carryback period.
- Amended and New Regulations Based on New Market-Sourcing
  - Adopts Multistate Tax Commission's model market sourcing regulations
  - Replaces the "Joyce Rule" with the "Finnigan Rule" for purposes of combined reporting and throwback

# Some New Mexico Developments

## New Mexico Developments

- S.B. 391 (Signed April 6, 2017) – requires NM corporate income taxpayers to add-back the amount of any deduction claimed in calculating federal taxable income for all expenses and costs directly or indirectly paid, accrued or incurred to a captive REIT in computing their state corporate income tax bases.
- N.M. Tax & Rev. Dept., Decision No. 17-39 (Sept. 15, 2017) – an administrative hearings officer within the New Mexico Taxation and Revenue Department held in favor of the taxpayer that interest income it earned from certain payment-in-kind notes constituted nonbusiness income allocable to its out-of-state commercial domicile for New Mexico corporate income tax purposes under the transactional, functional, and disposition tests.

# Some Oregon Developments

# Oregon Responses to Federal Tax Reform

SB 1528 (as of 3/20/2018, passed by Oregon Legislature; awaiting Governor's signature)

- Requires add-back of amounts deducted under IRC Section 199A, effective for tax years beginning on or after 1/1/2018.
- Creates new credit for income taxes imposed by ORS chapters 316, 317, and 318, starting in 2018 tax year:
  - Oregon DOR shall coordinate with Higher Education Coordinating Commission to auction \$14 million of non-refundable\* tax credits, with a reserve amount of no less than 95% of the total tax credit
  - Taxpayers shall make contributions to Opportunity Grant Fund
  - Upon receipt of a contribution, the commission will issue the taxpayer a certificate for the tax credit
    - \*If the commission cannot certify that the contribution will generate a tax credit, the taxpayer may request a refund
    - Credit may be carried forward for three years
    - If the amount of the contribution for which the credit was certified is allowed as a federal income tax deduction, the amount of the contribution shall be added to federal taxable income for Oregon purposes
    - Various administrative details also included in SB 1528

# Oregon Responses to Federal Tax Reform

SB 1529 (as of 3/20/2018, passed by Oregon Legislature; awaiting Governor's signature)

- Updates various 'static conformity' provisions of Oregon law to the IRC as amended and in effect on 12/31/2017 from 12/31/2016.
- Amends ORS 317.267(1) to require add-back of "amounts deducted for income repatriated, deemed or otherwise, under An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018 (P.L. 115-97)," effective for tax years beginning on or after 1/1/2017.
- Repeals Oregon tax haven law, effective for years beginning on or after 1/1/2017.
- Creates new tax credit for "Oregon tax attributable to income reported under [IRC] Section 965" for 2017 tax year that cannot exceed the lesser of:
  - Oregon tax attributable to deemed repatriation under IRC Section 965; or
  - Oregon tax attributable to Oregon tax haven law for tax years beginning on or after 1/1/2014 and before 1/1/2017
- New tax credit is non-refundable and has a five-year carryforward
- Before 7/21/2021, the Oregon DOR must estimate the increase of corporate tax revenue received pursuant to Oregon's conformity to IRC Section 965 (to be used to allocate funds)
- By 12/1/2020, the Oregon DOR must report to a legislative committee on the "relative efficacy" of Oregon's tax haven law to the provisions of IRC Section 951A

## Other Oregon Developments

### Oregon enacts market-sourcing and adopts market-sourcing rules effective 2018

- Or. Rev. Stat. 314.665(4): Sales of items other than TPP are sourced to Oregon if the taxpayer's market is in Oregon
- Or. Rev. Stat. 314.666:
  - Market for sales of services is in Oregon if the service is delivered in Oregon;
  - Market for intangible is in Oregon varies depending on nature of intangible; exclusion of sales may apply
- Or. Admin. R. 150-314-0435: Extensive rules following MTC model rule

### Oregon extends special industry rules for interstate broadcasters (as of 3/20/2018, passed by Legislature and awaiting Governor's signature)

- SB 1523 extends 2014-2016 temporary special industry regime through 2018; no substantive changes

### Oregon Tax Court Analyzes Costs of Performance for Online Education

- Oregon Tax Court (Magistrate Division) holds that online university's only "direct costs" of performance of operating online university are faculty costs; all other costs excluded from cost-of-performance calculation (August 24, 2017)

### City of Portland Imposes Surtax for Highly Compensated CEOs of Publicly Traded Companies

- BTAR 500.17-1 implements City ordinance imposing surtax on publicly traded companies with CEO-to-median-worker compensation ratios meeting/exceeding certain ratios (as published pursuant to SEC regulations):
  - 100:1 ratio = 10% surtax
  - 250:1 ratio = 25% surtax

# Some Utah Developments

# Utah

- Single Sales Factor (HB 293)
  - Single sales factor already required for most industries; applicable to industries not currently using SSF
  - Phase-in of single sales factor weighting for certain industries over next 4 years
  - Optional Apportionment Taxpayers: several industries can choose three factor weighting or elect permanent single sales factor election
  - More related changes contained within SB 72
- State Income Tax Rate Reduction (HB 293)
  - 5% to 4.95% for Corporations and Individuals
- Corporations May Pay Tax on IRC Sec. 965 Deferred Foreign Income in Installments (SB 244)
- Sales and Use Tax Exemption Amendments
  - Resale Exemption: removal of requirement that product purchased for resale be resold within UT to qualify for exemption (SB 37)
  - Manufacturing Exemption: removal of the three-year useful life requirement for manufacturing and mining equipment (contingent on *Quill* being overturned this summer) (SB233)

# Some Washington State Developments

# Washington Developments

## Select updates to nexus for Business & Occupation Tax

### –Excise Tax Advisory No 3195.2017 (December 28, 2017):

- Economic nexus annual apportionable receipts threshold for calendar year 2018 to \$285,000 from \$267,000
- Property and payroll nexus thresholds increased to \$57,000 from \$53,000

### –Wa. Admin. Code 458-20-193 and 458-20-19401:

- Extends economic nexus to interstate retail sales of tangible personal property established by Rev. Wash. Code 82.04.067
- Wholesale sales of tangible personal property remain subject to physical presence standards
- Attendance at a single trade convention per calendar year does not constitute a physical presence for B&O nexus purposes

# Washington Developments

## City of Seattle Income Tax on High-Income Individuals

- Washington trial court held that City of Seattle ordinance imposing income tax on high-income individual and trust income received after January 1, 2018, was not authorized by state law (November 22, 2017)
  - Washington Constitution vests taxing power in the state legislature; legislature may delegate taxing authority to municipalities
  - Washington Supreme Court has held that municipalities must have express authority to levy taxes
  - Court rejected City's argument that income tax was an excise tax on the 'privileges' exercised by those subject to the tax (cities may impose a tax on the right to do business, but not the right to exist).
  - Case under appeal.

## US Supreme Court denied review of taxpayer's petition challenging retroactive application of statutory that limited B&O tax exemption (cert. denied May 22, 2017)

- No review of WA Supreme Court decision affirming retroactive application of 2010 statutory amendments that narrowed B&O tax exemption did not violate Due Process; WA S. Ct. had upheld retroactive B&O legislation citing *United States v. Carlton* (512 U.S. 26 (1994)) that the Due Process standard is satisfied if the retroactive legislation is:
  - Supported by legitimate legislative purpose;
  - Furthered by rational means; and
  - Retroactive application of the legislation is justified by a rational legislative purpose.

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