CCH
a Wolters Kluwer business

All States

U.S. Supreme Court Declines to Review *Gillette*

The U.S. Supreme Court denied a petition to review a California Supreme Court decision holding that multistate corporate taxpayers may no longer elect to use the Multistate Tax Compact's equally-weighted three-factor formula to apportion net income for California corporation franchise and income tax purposes. The California Supreme Court concluded that taxpayers must use the apportionment formula required under California law (i.e., a double-weighted sales factor formula for tax years beginning before 2013, or a single-sales factor formula for tax years beginning after 2012). In so holding, the court determined that (1) the Compact was not a binding contract between the signatory states, (2) the California Legislature had the authority to repeal the Compact's election provision, (3) the California Legislature intended to repeal the election provision, and (4) the legislation repealing the election provision did not violate the state's reenactment rule. The taxpayers specifically asked the U.S. Supreme Court to decide whether the Compact has the status of a contract that binds its signatory states.

The California Franchise Tax Board is developing guidance for taxpayers affected by the U.S. Supreme Court's decision not to review the case.

Similar lawsuits dealing with the Compact's apportionment method election provision have been brought in Michigan, Minnesota, Oregon, and Texas.

The Gillette Co. v. California Franchise Tax Board, U.S. Supreme Court, Dkt. 15-1442, petition for certiorari denied October 11, 2016

U.S. House Passes Mobile Workforce State Income Tax Simplification Bill

On September 21, 2016, the U.S. House passed the Mobile Workforce State Income Tax Simplification Act of 2015, which would limit states' authority to impose personal income taxes on nonresident employees for work performed in other states. If enacted, the bill would preclude an employee's income earned in more than one state from being taxed in any state other than the employee's state of residence and the state where the employee is present and performing employment duties for more than 30 days in the calendar year.

The bill would also exempt employers from withholding and information reporting requirements for employees not subject to income tax under this law. The bill would allow employers to rely on the employee's annual determination of the time expected to be spent working in a state, absent fraud or collusion

The definition of "employee" would not include professional athletes and entertainers and prominent public figures performing for wages or other remuneration on a per-event basis.

H.R. 2315, as passed by the U.S. House of Representatives on September 21, 2016

California

Amendments to Market-Base Sourcing Regulations Adopted

The California Franchise Tax Board has amended its corporation franchise and income tax regulation concerning market-based sourcing for sales other than sales of tangible personal property to add definitions, guidelines, and examples relating to marketable securities, asset management fees, dividends, goodwill, and interest. The amended regulation also instructs multistate taxpayers on how to assign sales of intangible personal property based on the location of the taxpayer's market. The amendments are generally applicable for taxable years beginning on or after January 1, 2015. In addition, any taxpayer may elect to have the amendments apply retroactively to taxable years beginning on or after January 1, 2012, if those taxable years are open to adjustment under applicable statutes of limitation.

Reg. 25136-2, California Franchise Tax Board, effective January 1, 2017, applicable as noted

Florida

Payments Made by Lessee to Lessor in Addition to Rent are Subject to Tax

Payments made by the lessee to the lessor in addition to rent are payments for the right to occupy and use the leased premises (real property) and are subject to Florida sales tax as part of the total rental consideration. Sales tax is imposed on the general privilege of engaging in the business of renting, leasing, letting, or granting a license for the use of any real property. The tax is imposed on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rental or license fee includes all considerations due and payable by the tenant to the landlord.

Technical Assistance Advisement, No. 16A-008, Florida Department of Revenue, June 24, 2016, released September 21, 2016

Indiana

Taxpayer Assessed as "Unitary Business"

For corporate income tax purposes, an Indiana taxpayer was not allowed to apportion its partnership income at the individual partnership level because its relationship with its various limited partnerships (LPs) and limited liability companies (LLCs) constituted a unitary business.

The taxpayer was a multi-state company that provides communication services including phone, cell phone, cable television, internet access, and other related services. Since 1985, the taxpayer, and its affiliates, had been filing combined returns as an organization conducting a unitary business. For 2009, 2010, and 2011 the taxpayer treated its interest in various LPs and LLCs as non-unitary. The Department of Revenue conducted an audit and found that the entities were functionally a unitary business sharing attributes of common ownership, common function, and interdependence. Thus, the partners' income and apportionment factors properly flowed through to the corporate partner. The taxpayer protested the assessment, arguing that a limited partner did not have a legal right to exercise control over an underlying partnership and as such, its relationship with the underlying LPs and LLCs did not constitute a unitary business. However, the department noted that as set out in the prior audits, the current audit, and previous administrative decisions, the limited partners shared common attributes of management, ownership, and business functions entitling the department to require the limited partners' income and apportionment factors to "flow up" to the corporate partner.

The taxpayer also argued that the department erred in adjusting its net operating loss utilization and carryforward for 2007. According to the taxpayer a settlement agreement it entered into with the department allowed a NOL carryforward of approximately $231 million for tax years after 2007. The taxpayer explained that the carryforward amount consisted to two segments, and that under IRC § 382 limitations, the amount that could be claimed in a tax year from each segment was limited. According to the taxpayer, the audit applied approximately $220 million of the NOL carryforward to 2008 but only approximately $114 million was available. The taxpayer raised a reasonable question and the department ordered a supplemental audit.

Revenue Ruling No.02-20150653, Indiana Department of Revenue, September 28, 2016

Oregon

Amount Borrowed from S Corporation Held to Be Distribution, Not a Loan

The amount borrowed by an Oregon personal income taxpayer in 2012 from an S corporation (of which he was the sole shareholder) was held to be a distribution because the repayment of the loan was made by a partnership entity. The loan was used to cover purchases made by the taxpayer using the S corporation’s credit cards at grocery stores, clothing retailers, hotels, and other vendors. The taxpayer argued that, in the S corporation’s 2012 books and returns, the nondeductible personal expenses attributable to him were separated and the credit and debit charges for personal items were reported as loans to him. The taxpayer raised funds by refinancing a property owned by the partnership to repay his loan to the S corporation. The Department of Revenue's auditor noted that these funds came from the partnership and not the taxpayer, and that any repayment would have covered the older loans first because the taxpayer already owed money to the S corporation at the beginning of the 2012 tax year. Moreover, the transfer of funds by the partnership to the S corporation may have been with the intention to repay the taxpayer’s earlier loans from the S corporation or to contribute funds to the S corporation. Further, the taxpayer took no steps to document the claimed loan or establish its terms, such as interest rate, security given and maturity date and, therefore, the amount from the S corporation constituted a distribution, not a loan.

Stark Fris Management Inc v. Department of Revenue, Oregon Tax Court, No. TC-MD 150474N, September 29, 2016

{State & Local Tax Advisor}

Pennsylvania

End of Reciprocity With New Jersey, Tobacco Taxes, ACH Debit Blocks, and More Discussed

A Pennsylvania Department of Revenue newsletter discusses the end of Pennsylvania's personal income tax reciprocity agreement with New Jersey; the tax amnesty program; tobacco taxes; how to prevent late tax payments due to ACH debit blocks; and other matters.

Reciprocity

The Department of Revenue discusses New Jersey's decision to end the 40 year old tax reciprocal agreement with Pennsylvania beginning January 1, 2017. The agreement allows taxpayers to pay state income tax in the state where they live, rather than the state where they work. Pennsylvania's governor has urged New Jersey's governor to reverse his decision. The department will provide more information regarding the change in the future.

Tax Amnesty Program

As previously reported, Pennsylvania will have a tax amnesty program that will run from April 21, 2017, through June 19, 2017. The newsletter notes that the program will allow taxpayers with eligible periods to pay the tax and half of the interest due, and the remaining interest, penalties, and fees will be waived. Eligible periods are the periods with known or unknown delinquencies as of December 31, 2015. Taxpayers who participated in the 2010 tax amnesty program are not eligible to participate in the current amnesty program. Failure to pay taxes eligible for amnesty will result in a 5% penalty to nonparticipants.

Tobacco Taxes

As previously reported, Pennsylvania's new tax on other tobacco products is generally effective October 1, 2016. The other tobacco products tax effective October 1, 2016, applies to e-cigarettes, pipe tobacco, chewing tobacco, snuff, and any other tobacco products for chewing, ingesting or smoking, except cigars. For roll-your-own tobacco, the tax effective date is 60 days after the Pennsylvania Attorney General publishes a notice in the *Pennsylvania Bulletin* announcing that an agreement has been reached with participating manufacturers under the Master Settlement Agreement.

Cigarette dealer floor tax returns and payments are due by October 31, 2016. Other tobacco products floor tax returns and payments are due by December 29, 2016.

The newsletter provides additional guidance regarding tax rates, return filing, licensing, and reporting requirements.

ACH Debit Blocks

The Department of Revenue has experienced an increase in rejected electronic tax payments due to ACH debit blocks, which prevent the department from debiting an intended tax payment. Taxpayers whose financial institutions block their ACH debit transaction will receive a notice of assessment along with additional fees for the blocked payment. The department advises taxpayers to contact their financial institutions to authorize the Pennsylvania Department of Revenue for ACH debit transactions.

Tax Update 186, Pennsylvania Department of Revenue, August/September 2016

{State & Local Tax Advisor}

Tennessee

New Rule on Registration and Collection Requirements for Out-of-State Dealers Adopted

The Tennessee Department of Revenue has adopted a new sales and use tax rule regarding registration and collection requirements for out-of-state dealers who regularly and systematically solicit business in Tennessee. The rule provides that out-of-state dealers who engage in the regular or systematic solicitation of consumers in Tennessee through any means and make sales to Tennessee consumers that exceed $500,000 during the previous 12-month period have substantial nexus with Tennessee.

Such dealers are required to register, if they have not already done so, by March 1, 2017, with the department for sales and use tax purposes and affirmatively acknowledge that they will collect and remit sales and use taxes to the department beginning July 1, 2017. Beginning July 1, 2017, unless a later date is established by the department by notice, these dealers will report and pay the appropriate tax to the department on sales of tangible personal property and other taxable items delivered to Tennessee consumers.

Dealers who meet the $500,000 threshold after March 1, 2017, are required to register with the department and begin to collect and remit Tennessee sales and use tax by the first day of the third calendar month following the month in which the dealer met the threshold. In no case will such dealers be required to collect and remit sales and use taxes to the department for periods before July 1, 2017.

Persons who purchase tangible personal property or other taxable items from any dealer that is registered with the department must pay Tennessee sales and use tax to the dealer unless the sale is otherwise exempt. Persons who import tangible personal property or other taxable items into Tennessee and have not paid sales and use tax to the dealer must report and pay use tax directly to the department unless the sale is otherwise exempt.

In addition, an existing rule regarding registration certificates is amended by moving certain content to the new rule for clarity and taxpayer convenience.

Rules 1320-05-01-.63 and 1320-05-01-.129, Tennessee Department of Revenue, effective January 1, 2017

If you have any questions, please contact your tax advisor or:

Curtis Ruppal
877.622.2257, Ext. 34069
curtis.ruppal@plantemoran.com

Mike Merkel
877.622.2257, Ext. 33264
michael.merkel@plantemoran.com

Julie Corrigan
877.622.2257, Ext. 26509
julie.corrigan@plantemoran.com

Ron Cook
877.622.2257, Ext. 3211
ron.cook@plantemoran.com