State & Local Tax Advisor

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Colorado

Sales and Use Tax Emergency Nexus and Sourcing Regulations Readopted

The Colorado Department of Revenue has readopted temporary emergency regulations to provide guidance to retailers and consumers in light of the Wayfair v. South Dakota decision. The regulations are necessary so retailers can understand what modifications they may need to make to their existing processes and systems. Any retailer that is "doing business in Colorado" and has "substantial nexus" with the state is required to collect Colorado sales or use tax, as applicable. The Department also adopted an emergency rule prescribing the sourcing of retail sales in Colorado to determine which jurisdictions may impose tax on the sale. While these regulations, which apply to both in-state and out-of-state retailers, took effect on December 1, 2018 (TAXDAY 2018/10/24, S.3), the Department is providing a grace period through May 31, 2019. This will provide businesses with additional time to comply with these changes. Businesses will automatically be granted a waiver from compliance with the regulations. A previous story discussed the grace period for nexus and sourcing requirements. (TAXDAY 2018/12/10, S.7) Nothing in the readoption of the regulations modifies the previously announced grace period.

Emergency Regulations §§39-26-102(1.3), 39-26-102(9), 39-26-103.5, 39-26-104(1)(b)(I), 39-26-105, 39-26-204(2), and 39-26-704(2), Colorado Department of Revenue, effective December 18, 2018

Illinois

Bulletin Informing About Fast Track Resolution (FTR) Pilot Program Issued

The Illinois Department of Revenue (department) has issued an informational bulletin informing taxpayers and tax professionals that the Fast Track Resolution (FTR) is a pilot project created by the department to provide a forum for the prompt resolution of disputed audit issues while the case is still under the jurisdiction of the department's Audit Bureau (bureau). Further, the bulletin informs that an FTR conference, held with an FTR facilitator, allows the taxpayer the option to settle or mediate issues prior to the issuance of a notice of proposed liability from the bureau.

Furthermore, the bulletin informs that an FTR conference is not a right but is granted at the discretion of the department. However, if a resolution cannot be reached between the taxpayer and the department through the FTR conference, the taxpayer will still retain statutory review, protest, or appeal rights. Additionally, the bulletin discusses, among other things, FTR eligibility; FTR advantages; FTR process; role of the FTR facilitator; FTR conference; statutory rights; and withdrawal.

Informational Bulletin FY 2019-16, Illinois Department of Revenue, December 2018

Louisiana

Sales and Use Tax Bulletin Providing Definition of and Guidance to Remote Sellers Issued

For sales and use tax purposes, the Louisiana Department of Revenue has released an information bulletin providing guidance to remote sellers. The bulletin defines "remote seller" as a seller who sells for sale at retail, use, consumption, distribution, or for storage to be used for consumption or distribution any taxable tangible personal property, products transferred electronically, or services for delivery within Louisiana but does not have physical presence in Louisiana. Further, the bulletin informs that a remote seller with cumulative annual gross receipts in excess of $50,000, including those gross receipts of its affiliates, per calendar year must comply with the dual reporting requirements as a remote retailer. Additionally, the bulletin covers, among other things, collection and remittance requirements for remote sellers; timeline of registration; applicability of reporting requirements subsequent to collection and remittance; marketplace facilitators; and enforcement of Act 5 of the 2018 Second Extraordinary Session.

Revenue Information Bulletin No. 18-002, Louisiana Department of Revenue, December 18, 2018

Michigan

Alternative Apportionment Procedures Explained

Certain procedures and standards must be used in requesting an alternative apportionment method under the Michigan Business Tax (MBT), Corporate Income Tax (CIT), and Michigan Income Tax Act (MITA).

Filing Procedures

A request for alternative apportionment must be filed at least 90 days before the due date of the return or amended return. The request must be in writing and include the following:

- the tax type and period covered by the request;
- a statement of reasons supporting why the taxpayer believes the statutory method does not fairly represent the taxpayer's activities in Michigan;
- a proposed alternative apportionment method and why it is a reasonable alternative;
- documentation describing the nature of the taxpayer's business and justifying the figures in the proposal for alternative apportionment; and
- disclosure of whether the proposed method is being used or requested from other states.

Burden of Proof

The burden of proof lies on the party seeking the alternative apportionment formula. The taxpayer must show that the statutory formula is unfair and that the proposed alternative is reasonable. To overcome the presumption of the statutory formula, a party must demonstrate (i) the business activity attributed to the taxpayer in the state is out of appropriate proportion to the actual business activity and leads to a grossly distorted result or (ii) the statutory formula would operate unconstitutionally to tax the taxpayer's extraterritorial activity.

The following factors are considered in evaluating the reasonableness of the taxpayer's alternative apportionment method:

- the requests for alternative apportionment the taxpayer has made in other jurisdictions;
- whether the proposed method completely removes the income from taxation by any jurisdiction; and
- whether the proposed method reflects the economic reality of the taxpayer's business activity in Michigan.

Filing Instructions

A taxpayer filing a return using an alternative apportionment method must attach the Department's approval letter and a schedule showing how the apportionment percentage was calculated.

Imposition of Alternative Formula by Department

The Department may impose an alternative apportionment method if it decides that the business activity attributed to the taxpayer in Michigan is out of appropriate proportion to the actual business activity and leads to grossly distorted results, and if the Department's proposed alternative is reasonable.

Revenue Administrative Bulletin 2018-28, Michigan Department of Treasury, December 19, 2018

Michigan

Department Authorized to Apply State Refunds to City Income Tax Liabilities

A Michigan taxpayer's refund may be diverted to cover the taxpayer's city income tax liability in certain circumstances. The Department of Treasury must apply a taxpayer's refund to a known city income tax liability for a tax administered by the Department, through an agreement between the Department and a city to administer, enforce, and collect the city's income tax.

Act 553 (H.B. 5025), Laws 2018, effective December 28, 2018

Nebraska

Nebraska Issues IRC Sec. 965 Transition Tax Guidance

Nebraska has issued guidance on the treatment of foreign earnings subject to the federal IRC Sec. 965 repatriation transition tax enacted by the Tax Cuts and Jobs Act (P.L. 115-97). Under IRC Sec. 965, certain taxpayers must include untaxed foreign earnings and profits from post-1986 tax years. A deduction is allowed that reduces the tax rate on those earnings.

Nebraska conforms to the IRC Sec. 965 provisions, with the exception of the election to pay the tax in installments or to defer the tax.

Reporting IRC Sec. 965(a) Income on Nebraska Returns

IRC Sec. 965(a) income included on a taxpayer's federal return must also be included on their Nebraska return. The income should be reported as follows:

- Line 8, Nebraska Schedule A, Form 1120N, *Corporation Income Tax Return*
- Line 6, Nebraska Schedule A, Form 1120-SN, *S Corporation Income Tax Return*
- Line 7, Nebraska Schedule A, Form 1065N, *Return of Partnership Income*

Reporting IRC Sec. 965(c) Deduction on Nebraska Returns

An IRC Sec. 965(c) deduction allowed on a taxpayer's federal return must also be deduction on their Nebraska return. A copy of the IRC 965 Transition Tax Statement must be attached to the Nebraska return. The deduction should reported as follows:

- Line 18, Nebraska Schedule A, Form 1120N, *Corporation Income Tax Return*
- Line 16, Nebraska Schedule A, Form 1120-SN, *S Corporation Income Tax Return*
- Line 17, Nebraska Schedule A, Form 1065N, *Return of Partnership Income*

Installment Payments

Federal law permits a taxpayer receiving IRC Sec. 965 income to elect to pay the liability in installments over eight years. However, Nebraska does not allow taxpayers an election to defer payment of any portion of the tax.

Nebraska Foreign Dividends Deduction

The department has concluded that the net IRC Sec. 965 inclusion income is not a foreign dividend. As such, the income does not qualify for a Nebraska foreign dividends deduction.

GIL 24-18-1, Nebraska Department of Revenue, December 21, 2018

New Jersey

Guidance Issued on Treatment of Foreign Income

The New Jersey Division of Taxation has issued guidance on the application of IRC Sec. 951A and IRC Sec. 250, enacted as part of the Tax Cuts and Jobs Act (TCJA), to state corporation business taxes.

IRC Sec. 951A (GILTI) and IRC Sec. 250 (FDII)

Under the TCJA, two new categories of gross income were created for federal tax purposes:

- Global Intangible Low-Taxed Income (GILTI), under IRC Sec. 951A; and
- Foreign Derived Intangible Income (FDII), under IRC. Sec. 250.

Neither GILTI nor FDII are treated as dividends or deemed dividends for federal purposes. However, there is a corresponding deduction for both GILTI and FDII in IRC Sec. 250(a). For federal purposes, these deductions are intended to reduce the effective tax rate for the GILTI and FDII amounts.

Treatment of IRC Sec. 951A (GILTI) and IRC Sec. 250 (FDII) for New Jersey Corporate Business Taxes

For New Jersey corporation business tax purposes, the starting point for calculating entire net income is the amount of income reported for federal income tax purposes before the net operating loss deduction and special deductions. Therefore, GILTI and FDII are included in entire net income. Additionally, GILTI and FDII are not treated as dividends or deemed dividend income for purposes of the state corporation business tax.

Recent legislation enacted a provision allowing the federal deductions under IRC Sec. 250(a) for New Jersey corporation business tax purposes; however, such deductions are allowed only to the specific taxpayer that included the respective GILTI and FDII income on its federal and state corporation business tax returns, and that actually took the deductions for federal tax purposes. If a taxpayer was not allowed the IRC Sec. 250(a) deduction for federal tax purposes, the deduction will not be allowed for New Jersey.

Sourcing of GILTI and FDII

GILTI and FDII are sourced under the category of "all other business receipts." As such, taxpayers may not look through to underlying sales when determining how to allocate GILTI and FDII, because they represent items of receipt to the taxpayer.

In order to prevent distortion to the allocation factor, the Division has determined that all corporation business taxpayers filing a CBT-100 or BFC-1 must calculate the portion of GILTI and FDII that is subject to New Jersey tax based on a separate special accounting method. The relevant allocation factor for computing the tax on net GILTI and net FDII amounts will be equal to the ratio of New Jersey's gross domestic product (GDP) over the total GDP of every U.S. state (and the District of Columbia) in which the taxpayer has economic nexus.

Technical Bulletin TB-85(R), New Jersey Division of Taxation, December 24, 2018

New Jersey

Personal Income Tax Q&A Issued on Application of IRC Secs. 965 and 951A to State Gross Income

A New Jersey Questions and Answers document explains how changes under the Tax Cuts and Jobs Act applies to state gross (personal) income tax. The document primarily focuses on deemed repatriation dividends under IRC Sec. 965 and global intangible low-taxed income (GILTI) under IRC Sec. 951A.

IRC Sec. 965 (Deemed Repatriation Dividends)

Deemed repatriation dividends reported under IRC Sec. 965 must be included in New Jersey gross income in the same tax year and in the same amount as reported for federal purposes. Taxpayers are required to pay their state tax liability at the same time that the IRC Sec. 965 income is included in New Jersey gross income. New Jersey does not provide for any deferment of payment or the installment payment method.

Reporting and deduction information is also provided for partnerships, sole proprietors, and corporation shareholders.

IRC Sec. 951A (GILTI)

GILTI is reported by a shareholder in an S corporation in the same tax year and in the same amount as for federal purposes. For all other taxpayers, GILTI should be reported when the income is actually distributed from earnings and profits in the category Dividend Income.

Questions and Answers on New Jersey Gross Income Tax Federal Tax Cuts and Jobs Act (TCJA), New Jersey Division of Taxation, January 16, 2019

New Jersey

Included and Excluded Business Entities in Combined Groups Discussed

The New Jersey Division of Taxation (division) has issued a technical bulletin that explains what business entities are included and what business entities are not included in a combined group for the purposes of imposing corporation business tax. The bulletin provides the statutory definition of a combined group, along with lists of included and statutorily excluded entities and the minimum tax to be paid by taxpayers who are members of a combined group. Every member of a combined group who, either as part of the unitary business of the combined group or independent of the combined group and has nexus with New Jersey, is subject to a $2,000 minimum tax. Businesses treated as disregarded entities for federal income tax purposes are also treated as such for New Jersey corporation business tax purposes and are not subject to the minimum tax as a member of a combined group, because a disregarded entity is not a member of a combined group. However, if a disregarded entity is part of a unitary business of a combined group, the owner of the disregarded entity will be considered a member of the combined group and must be included as part of the group. Additionally, although partnerships, limited partnerships, and limited liability companies that are treated as partnerships for federal income tax purposes are not members of a combined group, they are still required to file Form NJ-CBT-1065 and Part-100.

Further, statutorily excluded entities are not subject to the minimum $2,000 tax; however, if they have nexus with New Jersey and are not exempt, they may be subject to a normal minimum tax. If a statutorily excluded entity is part of an affiliated group or controlled group that has a total payroll of $5 million, it is subject to the minimum $2,000 tax. Furthermore, New Jersey S corporations and qualified subchapter S subsidiaries that do not elect inclusion in the combined group, but are part of an affiliated group or controlled group that has a total payroll of $5 million, are subject to the $2,000 minimum tax. Lastly, certain other entities under review for inclusion or exclusion to a combined group are subject to the statutory minimum tax if they have a nexus with New Jersey, however, if the division determines that these entities be included as a member of a combined group, they will be subject to the $2000 minimum tax.

Technical Bulletin TB-86, New Jersey Division of Taxation, January 3, 2019

New York

State Decouples from Certain Personal Income Tax Internal Revenue Code Changes

The New York Department of Taxation issued a technical memorandum explaining that, for tax years 2018 and after, the State has decoupled from certain personal income tax Internal Revenue Code changes that were made pursuant to the federal Tax Cuts and Jobs Act (TCJA) of 2017. The memorandum addresses the following areas where New York's tax treatment of certain federal items of income and deductions will now differ.

Itemized Deductions

Taxpayers are permitted to itemize their deductions for New York State income tax purposes for tax years 2018 and after, even if they did not itemize it on their federal income tax return. Since New York has opted not to follow the changes made by the TCJA, taxpayers may claim deductions on their New York personal income tax returns which they are otherwise not permitted to claim for federal income tax purposes. For example, taxpayers can claim deductions for:

- State and local real estate taxes paid, including amounts over the $10,000 federal limit;
- Casualty and theft losses including those incurred outside a federally declared disaster area;
- Unreimbursed employee business expenses; and
- Certain other miscellaneous deductions that taxpayers are no longer allowed to claim federally (e.g., tax preparation fees, investment expenses, and safe deposit box fees).

Alimony or Separate Maintenance Payments

New York opted not to follow changes made by the TCJA to the treatment of alimony or separate maintenance payments made under an alimony or separation agreement that was executed or modified after December 31, 2018. Taxpayers, when calculating their New York adjusted gross income (NYAGI), are required to (1) subtract from their federal adjusted gross income (FAGI) any applicable alimony or separate maintenance payments they made in a tax year, and (2) add to FAGI any applicable alimony or separate maintenance payments they received in the tax year.

Qualified Moving Expenses Reimbursement and Moving Expenses

New York opted not to follow changes made by the TCJA to the deduction for moving expenses and to the exclusion from gross income (wages) for moving expenses reimbursement for tax years 2018 through 2025. Further, New York will continue to allow taxpayers to exclude qualified moving expenses reimbursement and moving expenses from their NYAGI.

Empire State Child Tax Credit

For computing the Empire State child tax credit for New York, taxpayers are not permitted to use their current tax year's federal child tax credit or additional child tax credit. Instead, the credit will now be based on the 2017 federal credits and income.

529 College Savings Account

New York opted not to follow changes made by the TCJA to the types of withdrawals that are allowed from a Qualified Tuition Program (QTP) account. Accordingly, the withdrawals for kindergarten through 12th grade school tuition are not qualified withdrawals under the New York 529 college savings account program. Further, withdrawals dispersed in cash or in kind, from college saving accounts and not used for the higher education of the designated beneficiary are considered nonqualified withdrawals.

TSB-M-18(6)I, New York Department of Taxation and Finance, December 28, 2018

New York

New York Economic Nexus Provisions Effective

New York announced that existing economic nexus provisions became effective June 21, 2018, as a result of the U.S. Supreme Court's decision in *South Dakota v. Wayfair*. Due to this ruling, certain existing provisions in the New York Tax Law that define a sales tax vendor immediately became effective. Businesses that fall within this definition and make taxable sales in New York are required to collect and remit New York state and local sales tax.

Economic Nexus Threshold

A business that has no physical presence in New York, but meets the following requirements in the immediately preceding four sales tax quarters, is required to register and collect/remit sales tax:

- makes more than $300,000 in sales of tangible personal property delivered in New York, and
- makes more than 100 sales of tangible personal property delivered in New York.

Sales Tax Quarters

The sales tax quarters in New York are:

- March 1 through May 31,
- June 1 through August 31,
- September 1 through November 30, and
- December 1 through February 28/29.

Additional information on the economic nexus provisions is available on the Department of Taxation and Finance's website.

Important Notice N-19-1, New York Department of Taxation and Finance, January 15, 2019

Pennsylvania

Pennsylvania Adopts Sales Tax Economic Nexus Standard

Pennsylvania adopted a sales and use tax economic nexus standard in light of the U.S. Supreme Court's *Wayfair* decision.

$100,000 Sales Threshold

Beginning July 1, 2019, persons making more than $100,000 in Pennsylvania sales in the previous 12 months must:

- register for a license; and
- collect, report, and remit sales tax.

Marketplace Facilitators. A marketplace facilitator with no physical presence in Pennsylvania should determine whether it has exceeded the threshold by using both:

- facilitated sales, and
- direct sales.

A marketplace facilitator that meets the $100,000 economic nexus threshold must collect tax on all Pennsylvania sales. This applies even if the sale is on behalf of a marketplace seller that does not have any nexus with Pennsylvania.

Marketplace Sellers. A marketplace seller with no physical presence in Pennsylvania should determine whether it has exceeded the threshold by using only:

- its direct sales, and
- sales made through a marketplace facilitator that does not collect sales tax on its behalf.

The $100,000 nexus standard does not affect marketplace sellers for whom marketplace facilitators collect and remit tax on their behalf.

Pennsylvania's Election Requirement

Pennsylvania currently gives certain marketplace facilitators, remote sellers, and referrers the option to elect to either:

- collect and remit Pennsylvania sales tax, or
- comply with certain notice and reporting requirements.

$10,000 Sales Threshold. Certain entities making taxable sales in Pennsylvania worth at least $10,000 in the prior 12 months must file the election. The election requirement applies to marketplace facilitators, remote sellers, and referrers that do not maintain a Pennsylvania place of business.

Election Due Dates. The initial election had to be filed by March 1, 2018. Subsequent elections are due by June 1 of each year.

Election Requirement Not Replaced by $100,000 Economic Nexus Standard

The $100,000 economic nexus standard does not replace or provide an alternative to the election requirement and related provisions. The election and related provisions remain valid and apply to vendors who do not:

- have a physical presence in Pennsylvania, or
- meet Pennsylvania's $100,000 economic nexus threshold.

However, the election is not available to marketplace facilitators and remote sellers that meet the $100,000 threshold.

Certified Service Providers

The Department of Revenue plans to certify service providers. They will offer software and services that, when relied upon by a vendor, will relieve the vendor of liability upon audit.

Certified service providers will also help in the registration, collection, reporting, and remittance of sales tax.

Sales and Use Tax Bulletin 2019-01, Pennsylvania Department of Revenue, January 11, 2019

Pennsylvania

Pennsylvania Measures Sales and Use Tax Economic Nexus Sales Threshold by Calendar Year

Pennsylvania measures its sales and use tax economic nexus $100,000 sales threshold by calendar year sales preceding the collection period. Also, after the first year, collection begins in the second quarter, allowing taxpayers time to compile their calendar year sales.

$100,000 Sales Threshold

Persons making more than $100,000 in Pennsylvania sales in the previous 12 months must:

- register for a license; and
- collect, report, and remit sales tax.

Registration and collection begin July 1, 2019. The registration and collection requirement under this previously announced economic nexus policy begins July 1, 2019.

July 1, 2019—March 31, 2020 Collection Period

For the July 1, 2019—March 31, 2020 collection period, taxpayers should use calendar year 2018 sales to determine nexus.

April 1, 2020—March 31, 2021 Collection Period

For the April 1, 2020—March 31, 2021 collection period, taxpayers should use calendar year 2019 sales to determine nexus.

Subsequent Years. Collection periods for subsequent years will follow the same pattern as the April 1, 2020—March 31, 2021 collection period.

Pennsylvania Sales Tax and Economic Nexus—South Dakota v. Wayfair, Pennsylvania Department of Revenue, January 2019

Tennessee

Taxpayer Allowed to Apportion Tax Liability as It Was Incorporated in Another State

A corporate income taxpayer was entitled to apportion its Tennessee tax liability for the 2006 and 2007 tax years because the taxpayer established "substantial nexus" with another state (Florida) apart from Tennessee. In this matter, the trial court was determined that the taxpayer’s incorporation in the state of Florida did not afford it the right to apportionment for tax purposes. However, the taxpayer argued that it was entitled to apportionment based

on its incorporation in Florida and its activities in other states. Generally, "substantial nexus" means any direct or indirect connection of a taxpayer to a state such that the taxpayer can be required under the U.S. Constitution to remit the tax imposed. Further, as per the applicable laws, states have the jurisdiction to impose an income tax on any corporation that incorporates within their state and this is true regardless of whether the corporation exists or conducts business within their state. In the instant matter, it was noted that although the taxpayer had a corporate office in Florida, such factual details were not necessary to establish "substantial nexus" for apportionment purposes. However, the fact that the taxpayer was incorporated in Florida afforded "substantial nexus" for income tax purposes and consequently for apportionment purposes. Accordingly, the taxpayer's appeal was sustained.

Popularcategories.com, Inc. v. Commissioner of Revenue, Tennessee Court of Appeals, No. M2017-01382-COA-R3-CV, December 20, 2018

Texas

Sales and Use Tax Economic Nexus Rules for Remote Sellers Issued

Out-of-state retailers who have annual sales of $500,000 or more in sales to Texas residents will soon be required to collect and remit Texas sales tax.

Requirements for Certain Out-of-State Retailers

For out-of-state retailers, the new collection requirement applies if a retailer exceeds the safe harbor amount during the preceding 12 calendar months. The safe harbor amount is $500,000 or more in sales into Texas. Retailers exceeding the safe harbor amount are required to get a Texas sales tax permit and beginning collecting. Collection must begin by the first day of the fourth month after the seller meets the threshold.

For example, a remote seller's sales into Texas exceeds $500,000 during the period July 1, 2018, through June 30, 2019. By October 1, 2019, the remote seller must:

- obtain a permit; and
- begin collecting tax.

The initial 12 calendar months for calculating a remote seller's Texas revenues will be July 1, 2018, through June 30, 2019. Retailers with Texas sales below the safe harbor amount do not have to register and collect.

34 TAC §3.286, Texas Comptroller of Public Accounts, effective January 1, 2019

Washington

Economic Nexus Thresholds Announced

For 2019, the Washington economic nexus thresholds applicable to apportionable activities for business and occupation (B&O) tax purposes will be:

- receipts threshold, $285,000;
- property threshold, $57,000; and
- payroll threshold, $57,000.

Excise Tax Advisory No. 3195.2018, Washington Department of Revenue, December 20, 2018

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

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