

# Top Trends in State Income and Indirect Taxes

**TEI Atlanta Chapter Lunch Meeting**  
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# Agenda

- TCJA Update
- *Wayfair* Update
- New Jersey Tax Reform Update
- Sales Tax – States Continue to Broadly Define Tangible Personal Property
- Trends in Alternative Apportionment / IRC 482-Type Adjustments

# TCJA Update

- The state impact of nearly all TCJA provisions is conformity dependent
- Transition Tax (IRC § 965)/Repatriation
- Global Intangible Low Taxed Income (IRC §§ 951A, 250)
- FDII (IRC § 250)
- Interest Limitation (IRC § 163(j))
- Bonus Depreciation (IRC § 168(k))

# Wayfair Update

- On June 21, 2018, the U.S. Supreme Court overturned the *Quill* physical presence standard.
- 10 states have fully adopted the factors provided in *Wayfair* through SSUTA membership.
- 13 states have partially adopted the *Wayfair* factors.
- 21 states require legislation to be compliant with the *Wayfair* factors.
- State taxing authorities aggressive nexus policies regarding physical presence
  - Cookie/software nexus
  - Content Distribution Network nexus
  - Online marketplace (*Amazon v. South Carolina*)
- Open questions →
  - Potential challenges to state collection systems for taxpayers with *de minimis* activities?
  - Potential increase in False Claims Act / class action lawsuits for under/over-collection of tax?
  - Amnesty/voluntary disclosure?
  - Impact on other taxes (e.g., income/franchise/local taxes)?
  - Federal legislation?

# New Jersey Tax Reform

- New Jersey A. 4495, signed into law on October 4, 2018, amends the state's Corporation Business Tax law
  - Many changes are technical corrections in response to the tax reform legislation (A.B. 4202), enacted on July 1, 2018
- Law addresses: (1) TCJA; (2) Combined reporting; (3) Market-based sourcing; and (4) Surtax on corporation.
- Effective January 1, 2018, NJ taxes GILTI (IRC §951A).
  - NJ coupled to the federal treatment of GILTI and the FDII deduction.
  - Open question → Apportionment *i.e.*, how much GILTI is subject to NJ taxation.
- Effective for TYE on or after July 31, 2019, NJ adopts combined reporting and market-based sourcing.
  - Require members of unitary business groups to file water's-edge combined reports (with election to file using worldwide income)
- Trend towards combined reporting continues



# Sales Tax – States Continue to Broadly Define Tangible Personal Property

- *Downs Racing, LP v. Commonwealth of Pennsylvania* (Oct. 25, 2018)
  - The Department unsuccessfully tried to extend the definition of “tangible personal property” to include IP for purposes of Pennsylvania sales tax.
  - Taxpayer argued that royalty fees, billed separately from the purchase of poker machines, applied to the right to use IP in the form of trademarks, copyrights, and patented methods of play owned by third parties (not to the machines or software).
  - Pennsylvania Supreme Court held the royalty fees did not involve, nor were they ancillary to, the transfer of TPP and therefore were not subject to Pennsylvania sales or use tax.
- *Netflix, Inc. v. Arizona Department of Revenue* (April 17, 2018)
  - Arizona Office of Administrative Hearings ALJ held Netflix’s subscription activity, which delivered content through “packets of digital data,” constituted the renting of TPP, a taxable activity.
  - Netflix has appealed the decision. The case is currently pending before the Arizona Tax Court.

# Trends in Alternative Apportionment / §482-Type Adjustments

- California FTB is currently undergoing rulemaking process for alternative apportionment petitions.
  - Focuses on appeals to the FTB three-member board after FTB staff denies a 25137 petition.
  - Adds a provision allowing the FTB three-member board to elect to hear an initial 25137 petition.
  - Fails to fix the lack of confidentiality provided to taxpayers in front of the three-member board.
- *Utah State Tax Commission v. See's Candies, Inc.*
  - The Utah Supreme Court affirmed the trial court's decision to seek interpretive guidance from IRC 482 and the accompanying federal regulations and to employ the federal arm's-length transaction standard in determining whether See's income was clearly reflected on its returns.



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