Top Trends in State Income and Indirect Taxes

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Carley A. Roberts
Partner

Nicole D. Boutros Senior Associate



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
- 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?
- o Amnesty/voluntary disclosure?
- Impact on other taxes (e.g., income/franchise/local taxes)?
- Federal legislation?

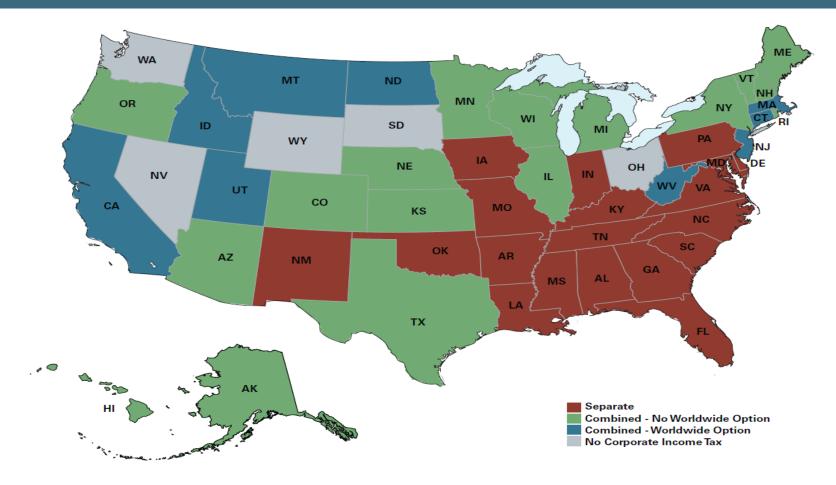


New Jersey Tax Reform

- 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.
 - \circ Open question \rightarrow 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



Combined Reporting v. Separate Reporting States





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 threemember 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.

Contact Us

Carley A. Roberts

Partner
Pillsbury Winthrop Shaw Pittman LLP
916.329.4766
carley.roberts@pillsburylaw.com

Nicole D. Boutros

Senior Associate Pillsbury Winthrop Shaw Pittman LLP 212.858.1105 nicole.boutros@pillsburylaw.com

