

STATE & LOCAL TAX UPDATE



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2022-2023 NY Tax Update

NYS Budget, Other Legislation, and New Enforcement Strategies

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Topics Discussed

1. 2022-2023 Budget and Other Legislation
2. Nexus and Public Law 86-272
3. New Resident and Nonresident Allocation Audits/Telecommuting
4. New York UBT Issues/Opportunity
5. Sales Tax Hot Topics
6. NYS Abandoned Property

Section 1: New Legislation

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2022-2023 Budget Legislation

- PTET Election Extension
- Following the budget (on May 3, 2022), NYS made a change to its 2022 PTET election filing deadline.
- For 2022 only, the election date was moved from March 15 to September 15.
- For entities electing after March 15, a portion of the estimated payments that would have been due earlier in the year had the election been timely will have to be paid with the election.

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2022-2023 Budget Legislation

▪ State PTET Changes for S Corps

- Under the original law, the tax base for S corporations included only New York source income, which for many New York-based businesses is low, due to New York's market-sourcing apportionment rules. The same source-limitation applied to partnerships subject to the PTET, but only with respect to their nonresident partners.
- From what we understand, the reason for the source-limitation was the Tax Department's concern that, for federal tax purposes, S corporations could not specially allocate the deduction for the PTET among resident and nonresident shareholders without putting the entity's S corporation status in jeopardy.
- To eliminate this perceived problem, the original New York PTET regime put all S corporation shareholders on the same footing by limiting the PTET to New York sourced-income only. Unfortunately, this also limited the PTET benefit for S corporations with only New York resident shareholders, all of whom paid tax on the share of their corporation's un-apportioned income.
- With this new legislation, and effective for this tax year (2022), the source-limitation will go away for S corporations with ONLY resident shareholders. To qualify for this benefit, the PTET will have to file a certification (with its PTET filing for 2022; then with its PTET election for post-2022 tax years) that all shareholders are residents. So S corporations with only New York resident shareholders get to pay more tax and give their shareholders bigger federal tax deductions and bigger state tax credits.

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2022-2023 Budget Legislation

▪ New York City PTET ("CPTET"):

- City residents will be able to enjoy the same federal tax benefits for the City taxes paid on flow-through income that are available for the State taxes paid on flow-through income. See TSB-M-22(1)C.
- The new tax was originally scheduled to go into effect in 2023, but recent legislation enacted in May 2022 made the CPTET retroactive to January 1, 2022. To qualify for the 2022 CPTET, the taxpayer must have a State election in place by the September 15, 2022 due date and must make the City election by March 15, 2023. The new legislation indicates that taxpayers do not need to make estimated tax payments to the City for 2022. However, owners of an electing PTE must calculate their required City personal income tax estimated tax payments as if they were not entitled to the CPTET credit.
- Going forward, the CPTET is available only through an annual election, and the election deadline is March 15 of the year for which CPTET is going to apply. Elections may be made by authorized members of eligible tax-partnerships and authorized officers of eligible S corporations.
- The election is available for partnerships required to file a New York State tax return (that includes any partnership with a New York State resident partner), and New York S corporations with ONLY New York City resident shareholders. Notable: The partnerships and S corporations for which CPTET elections may be made don't need to be doing any business in New York City!

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2022-2023 Budget Legislation

- New York City PTET continued:

- The CPTET tax base for partnerships is the sum of the un-apportioned and un-allocated pro rata shares of the partnership's income flowed through to partners who are individual residents of New York City. Absent special allocations of the CPTET deductions to the City resident partners, all of an electing partnership's partners (including corporate partners and nonresident partners) will bear their pro rata share of the economic burden (and thus the federal tax benefit) of the CPTET even though only the City resident partners will receive the CPTET credits (per below).
- Because only those S corporations with only City resident shareholders are eligible for the CPTET, the tax base for S corporations is all of the income of the S corporation, un-apportioned.
- The CPTET tax rate is 3.876%.
- CPTET estimates are due on March 15, June 15, September 15 and December 15. And the tax return is due March 15 of the year after the tax year closes. Estimated taxes are payable for the calendar year during which the tax year ends, and the tax is due on March 15 of the year following the calendar year in which the tax year ends.
- City resident owners (and only City resident owners) of electing entities are entitled to a credit against their City personal income tax. The credit is equal to their direct share of the entity's CPTET.
- State personal income tax payers are required to add-back any CPTET credit they receive when calculating their state income.

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New York City PTET Example #1

- A is a NYC resident
- B is a Westchester resident
- Each owns 50% of a partnership

- Income - \$100,000
- NYC PTET income - \$50,000
- NYC PTET (4%) - \$2,000

- Cost to each partner - \$1,000
 - Even though only NYC partner gets the credit
 - Get ready to make some special allocations to avoid this result.

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New York City PTET Issues

▪ State PTET Tax Implications

- Due to the rate differential between the NYS PTET, calculated on the pass-through entity's income, versus the lower NYS personal income tax rates for most taxpayers, calculated on one's pro rata share of income, there is a strong likelihood that many NYC resident partners will have excess NYS PTET credits which can be applied against their NYC tax liability.
- If they also elect into NYC PTET, this would generate more credits that will ultimately be refunded to them unless they have other sufficient unsheltered income. Such refunds would be subject to federal income tax as an "accession to wealth" negating any real benefit of opting into the NYC PTET.

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New York City PTET Example #2

- LLC A, which has 25 equal NYC resident partners, has \$25 million of taxable income and elects NYS PTET.
- Using the state's highest rate of 10.9%, the PTET liability will be \$2,725,000 or a \$109,000 credit per partner.
- Assuming the partners have no additional income aside from their pro rata share of income from LLC A, namely \$1,000,000, their NYS tax bracket is 6.85% or approximately \$65,760 in tax liability.
- After applying the PTET credit, each partner is left with an excess credit of \$43,240 (\$109,000 - \$65,760) to be applied against their NYC tax liability of \$38,535 resulting in a net refund of \$5,705.
- If LLC A elects into the NYC PTET, each partner would receive an additional NYC credit of \$38,760 all of which would be refunded and subject to federal income tax when received.
- Therefore, the only benefit received will be a timing difference of a deduction in the current year versus a taxable refund in the next year.
- Note, that electing into the NYC PTET does not negate the requirement for a partnership or LLC to file a UBT return. In fact, opting into the NYC PTET will actually result in more taxes owed to NYC by the pass-through entity, specifically the 4% UBT plus the 3.876% PTET (7.876% combined!). Furthermore, after claiming the resident UBT credit, NYC residents have a lower tax exposure, leading to an even bigger excess PTET credit which will be taxed when refunded in the following year.

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Other PTET Issues

- How are wages and salaries disallowed federally due to the Employer Retention Credit treated?
 - The state has indicated that they can be subtracted using modification code S-205 on Form CT-225.
 - We're not so sure this is the correct result legally, but we're not going to look a gift horse in the mouth.
- Does the PTET work for investment income/entities?
 - No definitive guidance, but we think so.
- How are 754/743(b) adjustments treated for PTET purposes?
 - Informal advice from the Tax Department indicates that adjustments reflecting a 754 election (basis adjustments) would NOT be taken into account in calculating the PTET taxable income.

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2022-2023 Budget Legislation

- New York State and City PTET Add-backs:
 - In calculating income subject to the City's General Corporation Tax and Banking Corporation Tax, the State and City PTETs are required to be added back in computing City taxable income (Part MM, Subpart B, §§ 9 and 10).
 - These addbacks are retroactively effective for tax years beginning on and after January 1, 2021.
 - Note: At the original due date of Form NYC-3L, March 15, 2022, the statute did not require adding back the NY PTET in arriving at entire net income. If a return was filed before the change in the law, and the resulting additional tax is significant, filing an amended return to pay the additional tax is required.
 - While additional interest will likely be due, we have informally heard from NYC that no penalties will be imposed if the additional tax on the addback is paid by June.

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2022-2023 Budget Legislation

▪ Low and Middle Income Tax Reductions

- Modest rate reductions for married-filing-jointly taxpayers earning less than \$323,200 previously scheduled for tax years beginning after 2024 will now begin after the 2022 tax year.
- The Budget also addresses a few unintended glitches resulting from the tax table benefit recapture language added last year.
- Beginning this year, any student loan forgiveness award included in federal AGI will be subtracted when calculating New York AGI.

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2022-2023 Budget Legislation

▪ Increase to the Small Business Subtraction Modification

- The Budget increases the small business subtraction modification percentage in both the State and City personal income taxes, and expands the modification—previously available only to proprietorships with at least one employee and net business income or farm income of less than \$250,000—to include members of certain flow-through entities that are small businesses or farm businesses.
- Beginning in 2022, the subtraction modification will be increased from 5% to 15%, and expands the modification to new members, including certain flow through entities. The modification will now be available to: (a) sole proprietors with one or more employees and less than \$250,000 of net business income or net farm income; (b) owners of New York S corporations and tax-partnerships with one or more employees and net farm income of less than \$250,000; and (c) owners of New York S corporations and tax-partnerships with one or more employees and less than \$1.5 million of “New York gross business income” attributable to a non-farm business.
- Non-farm flow-through entity owners otherwise entitled to the small business subtraction modification will be disqualified if the sum of their income from such entities exceeds \$250,000.

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2022-2023 Budget Legislation

▪ Credits, Credits, and More Credits!

- The Budget was notably filled with credits. Below is a lengthy list of credits that were created, extended, or modified by this election-year Budget:

New Credits:

- Farm Employer Overtime Credit;
- COVID-19 Capital Costs Credit;
- Conversion from Grade No. 6 Heating Oil Usage to Biodiesel Heating Oil and Geothermal Systems Credit;
- Geothermal Energy Systems Credit;
- NYC Child Care Credit (Part II).
- Video Game Production Credit

Extended/Modified Credits:

- Investment Tax Credit for Farmers;
- Farm Workforce Retention Credit;
- NYC Musical & Theatrical Production Credit;
- Hire-a-Vet Credit;
- Low Income Housing Credit;
- Clean Heating Fuel Credit;
- Transportation for Persons with Disabilities Credit;
- Empire State Film Production and Post-Production Credit;
- Youth Jobs Program Credit;
- Empire State Apprenticeship Credit;
- Alternative Fuels and Electric Vehicle Recharging Property Credit;
- Workers with Disabilities Credit;
- Earned Income Credit;
- Restaurant Return To Work Credit;
- Supplemental Empire State Child Credit, Earned Income Tax Credit, and Enhanced Earned Income Tax Credit.

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2022-2023 Budget Legislation

▪ Credit Benefits Not Impacted by COVID Remote Working

- During the state of emergency employees forced to work outside of New York during COVID still count as New York employees for certain tax credit and incentive programs.
- New York allowed this treatment for 2021, and we've heard the state has extended the treatment to include 2022 as well. But for 2023, watch out!
- Also, there is some authority indicating that if you use remote workers for credit calculation purposes, you have to treat them consistently for other tax purposes such as UBT calculation. See, June 9, 2021 NYC Department of Finance Letter Ruling, available at:
 - <https://www1.nyc.gov/assets/finance/downloads/pdf/redacted-letter-rulings/ubt/redacted-21-5012-ubt.pdf>

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2022-2023 Budget Legislation

- Extension and Expansion of Brownfield Cleanup Program (“BCP”)
 - One credit program deserves special comment – consistently the 2nd most costly program in the NYS budget each year.
 - The Brownfield Cleanup Program seeks to incentivize the remediation and development of urban brownfields.
 - In exchange for working with NYS DEC to remediate a contaminated property, participants in the program receive the following benefits:
 1. Up to 50% of their remediation costs back in the form of a refundable tax credit; and
 2. Up to 24% of their development costs back in the form of a refundable tax credit (subject to an applicable cap).

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2022-2023 Budget Legislation

- Extension and Expansion of Brownfield Cleanup Program (“BCP”)
 - Here is a recap of the changes to the Brownfield Cleanup Program:
 - The Budget extends the BCP, which was set to expire at the end of this year, for an additional ten years to 2032. Projects can submit applications to participate in the program through December 31, 2032. Projects must receive a Certificate of Completion (“CoC”) by December 31, 2036.
 - Projects that received a CoC between July 1, 2015 and June 24, 2021 may now claim additional remediation credits for seven years following the issuance of the CoC. Previously the credits had to be claimed within five years of the issuance of the CoC.
 - For sites that received a CoC between March 20, 2010 and December 31, 2015, development credits will be allowed for 180 months after the issuance of the CoC. Previously such credits were required to be claimed within either 120 months or 144 months of the issuance of the CoC.
 - Unlike BCP sites located elsewhere in the state, BCP sites located in New York City are not entitled to development credits unless they satisfy additional requirements or “gates.” The Budget adds two new gates: (1) projects satisfying applicable conformance requirements in disadvantaged communities within designated Brownfield Opportunity Areas, and (2) projects being developed as renewable energy facility sites.

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2022-2023 Budget Legislation

- Extension and Expansion of Brownfield Cleanup Program (“BCP”)

- Under the current BCP, the applicable percentage for calculating development credits starts at 10%. However, this percentage can be increased (but not to exceed 24%) by various factors. The Budget adds the following new factors that may increase the applicable percentage by 5 percentage points for projects accepted into the BCP after January 1, 2023: (1) sites in a disadvantaged community, and (2) sites developed as renewable energy facilities.
- The Budget also clarifies that, beginning in 2022, for sites remediated to Track 1 (the highest standard), the TPC calculation can include costs paid for stadiums (Go Bills!), baseball parks, basketball courts, and other athletic facilities including sports field turf, site lighting, sidewalks, access and entry ways, and other improvements.
- The Budget institutes a new program fee of \$50,000 payable once the project is admitted into the BCP. The fee may be waived upon a showing of financial hardship by the applicant. The new program fee cannot be used to calculate tax credits under the program.

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New Excelsior CHIP Tax Credit Program

- On June 2 New York legislators created one of the biggest tax credit programs in the state’s history.
- The bill, A. 10507/S. 9467, allows for eligibility of Green Chips projects in the Excelsior jobs tax credit program, which encourages businesses to relocate to or expand in New York.
- Through the program, New York is seeking to significantly expand its semiconductor and microchip manufacturing sectors.
- Tax credits total \$500 million per year from 2022 to 2041. That’s a \$10 Billion investment in tax dollars.

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New Excelsior CHIP Tax Credit Program

- On its face, the legislation provides incentives for computer chip manufacturers to build new factories in New York by creating a subset of tax incentives through the Excelsior business tax credit program that the manufactures can use.
- The bill defines a Green Chips project as one that:
 - is within the sector of semiconductor manufacturing and related equipment and material suppliers;
 - includes sustainability measures to mitigate the project's greenhouse gas emissions impact over the lifetime of the project;
 - pays at least federal prevailing wage rates for its construction;
 - commits to worker and community investment;
 - creates at least 500 new jobs and makes at least \$3 billion in qualified investments; and
 - maintains a Green Chips benefit-cost ratio of at least 15 to 1.

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New Excelsior CHIP Tax Credit Program

- Under the legislation, a Green Chips benefit-cost ratio is defined as one in which the numerator is the sum of: (a) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program; (b) the value of all capital investments to be made by the business enterprise during the period of participation in the program; and (c) all research and development expenditures by the participant in New York during the period of participation in the program.
- The denominator is the amount of total tax benefits under the program that will be used and refunded (more on these benefits later), as well as any state grants provided to the participant.

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New Excelsior CHIP Tax Credit Program

- Projects meeting the criteria may enter into a 10-year benefit term, dubbed phase 1. Eligible projects that remain in good standing will be able to enter phase two of the Green Chips project, and therefore to initiate a new and separate 10-year project benefit schedule if the participant creates 500 new jobs beyond those created in phase 1, and if the participant makes at least an additional \$3 billion investment.
- Phase 1 and 2 can overlap, but it basically means 20 years worth of tax benefits.
- So what are those benefits?

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New Excelsior CHIP Tax Credit Program

- The Green Chips program offers three primary tax benefits:
 1. a credit based on employment,
 2. a credit based on capital investment, and
 3. a credit based on R&D activities.
- A participating project is eligible to claim a credit for each net new job it creates in New York. In a Green Chips project, the amount of the credit per job is equal to the product of the gross wages paid and up to 7.5 percent. However, only the first \$200,000 of gross annual wages per job for Green Chips projects will be eligible for the credit, adjusted for inflation annually.
- Next, participating projects can claim a credit on qualified investments. The investment credit can be up to 5 percent of the costs — or other basis for federal income tax purposes — of the qualified investment in the Green Chips project.
- Finally, a project is eligible to claim a credit of 50% of the portion of the federal Research and Development tax credit that relates to expenditures in NYS up to 8% of research expenditures attributable to activities conducted in NYS.
- And the best part is that these tax credits are refundable!

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2022-2023 Budget Legislation

▪ Real Property Tax-Related Amendments

- The following real property tax laws are extended, modified and/or enhanced:
 - amends the procedures for an owner of local public utility mass real property to challenge an assessed value;
 - provides a good cause extension to the filing deadline on an application for the enhanced STAR exemption; clarifies the applicable income tax year for the basic STAR credit; allows the name of STAR credit recipients to be shared with assessors outside of New York State; permits certain information pertaining to a decedent to be shared with assessors of the assessing unit in which the address reported on the decedent's real property tax return is located. Reminder – states share info – see more in our residency section later;
 - amends provisions in the real property tax law related to the assessment grievance process for owners of solar and wind energy systems;
 - expands the Homeowner Tax Rebate Credit into 2022; and
 - creates the Childcare Center Tax Abatement for Certain Properties in New York City. The abatement applies to eligible buildings in which construction, conversion, alteration, or improvement completed on or after April 1, 2022, has resulted in the creation of a childcare center or the expansion of an existing childcare center. The abatement is up to seven dollars for each square foot of the premises, but shall not exceed \$20,000.

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2022-2023 Budget Legislation

▪ Misc. Provisions:

- Cannabis trade or business expense deductions denied under IRC § 280E will, effective this year, be subtraction modifications for the income tax bases of both the State corporate franchise and personal income taxes (Part PP).
- From June 1, 2022 to December 31, 2022, certain fuel and sales taxes will be suspended (Part RR).
- NYS and NYC have both announced that they will allow a deduction for wages paid to employees that were disallowed for federal tax purposes under The Employee Retention Credit.

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Other Legislation

- New York Gov. Hochul signed a measure changing the state's tax law to allow the Commissioner to match any deadline extensions by the IRS for those affected by a presidentially declared disaster or by a disaster emergency declared by the governor.
- The bill (S. 8398B/A9461) is intended to allow the state's tax authorities to match any postponements of deadlines by the federal government to provide residents with additional time to file.
- After the destruction of records by Hurricane Ida, the Internal Revenue Service granted an extension to file tax returns originally due on Oct. 15 to Jan. 3. New York granted the same state tax extension. When the IRS later shut down its e-filing system in November to update its yearly systems, it granted yet another extension, to Feb. 15. But this time the New York Department of Tax and Finance said it wouldn't offer a similar postponement, citing a 90-day limit for extensions in state tax law, leaving taxpayers scrambling.
- New York residents were required to then submit paper filings, while nearby hurricane-affected states like New Jersey and Pennsylvania extended their own deadline for taxpayers.

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Other Legislation

- Effective for tax years beginning on or after Jan. 1, 2022, NYC recently amended the City Code to make the following changes:
 1. Impose the city's business corporation tax ("BCT") on a corporation that has receipts from sales into the city that total \$1 million or more in a tax year, or
 2. Receipts totaling \$10,000 or more in a tax year and is a member of a unitary group is also subject to BCT if that corporation and the other unitary group members with at least \$10,000 in City receipts meet the \$1 million threshold in the aggregate.
 3. Partnerships meeting the above receipts thresholds will establish economic nexus for any of its corporate partners.
- The amendments align the city's economic nexus thresholds with those established by the state in 2014. But the economic nexus provisions do not apply to the City unincorporated business tax (UBT) or to S corporations subject to the City general corporation tax (GCT).
- The bill also conforms the city's code with the state's code by allowing the city's finance commissioner to credit business tax overpayments against a greater range of tax liabilities, including sales and excise taxes. Credits for overpayment of UBT or city business taxes (GCT, Bank Tax and BCT) are applied to any City tax liability of the person making the overpayment.
- Amounts received through the COVID-19 pandemic small business recovery grant program or the small business resilience grant program are excluded from entire net income for purposes of the UBT, GCT, BCT and City banking corporation tax (Bank Tax), to the extent those amounts were included in federal taxable income, retroactive to tax years beginning on or after Jan. 1, 2021.
- Elective NYS and City PTETs paid are included in entire net income for BCT purposes, effective for tax years beginning on or after Jan. 1, 2022.

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Other Legislation

▪ What's the Latest on NY's New Mandatory Auto-IRA Law?

- On October 21, 2021, New York joined the ranks of states mandating that certain employers either offer a qualified retirement plan or join a state-facilitated retirement savings program. Earlier this year, NYC became just the second city to enact a mandatory auto-IRA law.
- This Secure Choice Savings plan applies to for-profit and non-profit employers in New York state that meet the following requirements:
 1. the employer had at all times during the previous calendar year at least ten employees in the state,
 2. the employer has been in business for at least two years, and
 3. the employer does not offer a "qualified retirement plan" such as a 401(k) or 403(b) (though the definition includes other types of retirement plans too).
- All three of these requirements have to be met in order for an employer's participation in the program to be mandatory.
- The legislation became effective immediately, but it calls for enrollment of employees to begin no later than December 31, 2021. Additionally, participating employers must setup their payroll deposit arrangements within 9 months of the program opening for enrollment. However, the New York Secure Choice Savings Program Board may delay implementation of the program by up to 12 months if they determine it is necessary. All of this is to say that it's currently unclear exactly when employers will have to enter the program.

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Other Legislation

▪ NY's New Mandatory Auto-IRA Law (continued)

- What must participating employers do?
 - A participating employer's duties under the program are designed to be purely administrative. As such, participating employers must:
 1. set up a payroll deposit retirement savings arrangement,
 2. automatically enroll each employee who does not opt out of the program,
 3. withhold and remit employee contributions to the program, and
 4. disseminate the state's employee informational materials.
- This program is designed with the intention of not creating an employer-sponsored retirement plan subject to ERISA.
- The legislation itself does not identify a penalty for noncompliance. Nonetheless, regulations will be issued to implement this program and it is likely these regulations will address penalties for noncompliance.

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Other Legislation

- NY's New Mandatory Auto-IRA Law (continued)
 - What's the latest?
 - The New York Secure Choice Savings Program Board held its first board meeting on Wednesday, January 26, 2022. The only other meeting occurred on September 21, 2022 where the Board reviewed a presentation from AKF Consulting to help administer the program and passed a critical resolution!
 - To date there are no regulations or other published guidance on the operation of the law.
 - For more information see:
 1. <https://www.securechoice.ny.gov/>
 2. <https://www.hodgsonruss.com/newsroom-publications-13585.html>

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Legislation to Watch!

- New bills (S.8815/A.9975) that have passed the Assembly and Senate would expand New York's False Claims Act to include individuals and corporations that knowingly fail to file tax returns.
- The bills would extend False Claims Act liability to individuals and corporations that knowingly fail to file state and local tax returns. The nonfilers would be held liable if the losses of state or local revenue from nonfiling amount to more than \$350,000 and the net income or sales of the individuals or corporations exceed \$1 million.
- Hochul vetoed a similar bill (S. 4730) in 2021, saying in her veto letter that the bill's language would broaden the scope of cases that would fall under the False Claims Act and that its reach could extend beyond nonfiling cases. "This would be incongruent with the way other states and the federal government pursue False Claims Act violations, and could have the effect of incentivizing private parties to bring unjustified claims under the law," the governor continued.
- Let's hope another veto is coming.....

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What Didn't Pass?

- A provision requiring all Federal S-corporations doing business in New York to also be treated as S-corporations for New York tax purposes
- A tax on VRBO-type rentals, including a requirement for marketplace-provider collection
- An update or replacement of the current 421-a affordable housing program
- Elimination of the ITC for “master tapes” of audio or visual recordings

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Section 2: Nexus and Public Law 86-272

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Nexus Generally

➤ This section is designed to answer two basic questions:

1. When am I subject to a state's tax laws?
2. Which state gets to tax the income or sales?



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Nexus Generally

➤ First question: Nexus, what is it?

- A. Nexus is a fancy word for "connection." In order for a state to impose its income or sales taxes on an out-of-state business, there must be a requisite level of connection between the state and the business.
- B. Fundamental requirement of both the Due Process and Commerce Clauses of the U.S. Constitution that there be:
 - "Some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax"
 - 1. *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777, 112 S. Ct. 2251 (1992)
 - 2. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945) (in-state salesmen triggers Washington unemployment insurance tax levy)

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Income Tax Nexus

➤ Income Taxes

- A. Income tax nexus had been generally considered to be broader than sales tax nexus, but this likely changed with the recent Wayfair case
- B. States are moving to an “Economic Nexus” approach.
- C. Is this Constitutional???
- D. Nexus can create filing obligations across multiple tax-types.



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Economic Nexus

- Do efforts target customers in state?
- Are intangibles used in state?
- Are financial or other thresholds met?
- Factor presence nexus applied by the Multistate Tax Commission (“MTC”):
 - Property of \$50,000, or
 - Payroll of \$50,000, or
 - Sales of \$500,000, or
 - 25% of total property, total payroll, or sales
- Tax Haven Legislation



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Economic Nexus and Factor Presence Business Taxes

<u>State</u>	<u>Economic Presence</u>
Connecticut	\$500,000 in annual gross receipts
Massachusetts	Presumption that the state corporate excise tax applies if in state sales exceed \$500,000 annually
Washington (B&O)	\$100,000 in annual gross receipts
NYS/NYC	\$1,000,000 in annual gross receipts
Michigan	\$350,000 in annual gross receipts
Maine	\$250,000 of property; \$250,000 of payroll; \$500,000 of sales, or 25% of total property, payroll, or sales.
Oregon	\$750,000 in annual gross receipts
Hawaii	\$100,000 in gross receipts or at least 200 transactions
Pennsylvania	\$500,000 of receipts (codified for years after 12/31/22)
Texas (franchise tax)	\$500,000 in annual gross receipts
<u>State</u>	<u>Factor Presence</u>
Alabama (beginning 2015)	MTC Factors (adjusted)
California	MTC Factors (adjusted for inflation)
Colorado	MTC Factors
Ohio	MTC Factors
Tennessee	MTC Factors

Note: 28 states and D.C. have adopted market-based sourcing to date

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Special Covid-19 Nexus Issues

- A handful of states have released guidance providing that the presence of remote employees due to COVID-19 will not alone cause a taxpayer to establish nexus in the state. In certain cases, nexus relief is only available during the official state of emergency period.

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Nexus Due to Telecommuting Employees?

State	Corporate Income Tax Nexus*	Sales Tax Nexus*
Alabama	No, if employee is telecommuting due to COVID-19	No guidance
Alaska	Yes, an employee whose compensation is assignable to Alaska will create nexus	No statewide sales tax
Arizona	No, if employee is telecommuting due to COVID-19	Maybe, for TPT nexus, the physical presence standards are not affected, but the in state activities may not establish nexus
Arkansas	No official guidance – but informally has said yes	No guidance
California	No, if an employee is working in CA due to Gov.'s "stay at home order" – until June 11, 2021	No guidance
Colorado	Yes, there are no executive order or emergency rules in effect	Yes, there are no executive order or emergency rules in effect
Connecticut	No, if employee is telecommuting due to COVID-19, but only for 2020 tax year	No, if employee is telecommuting due to COVID-19, but only for 2020 tax year

* Compiled from state issued guidance and Checkpoint Catalyst Survey

Nexus Due to Telecommuting Employees?

State	Corporate Income Tax Nexus	Sales Tax Nexus
Delaware	Yes - unofficially	No sales tax
D.C.	No, if employee is telecommuting due to COVID-19 during public health emergency	No guidance
Florida	No guidance but FL has been aggressive	No guidance
Georgia	No, if employee is telecommuting due to COVID-19 during an official work from home order	No guidance
Hawaii	No official guidance	No guidance
Idaho	Yes, there have been no changes to existing statutes or policies	Yes, there have been no changes to existing statutes or policies
Illinois	No official guidance	No guidance
Indiana	No, if employee is telecommuting due to COVID-19 until June 30, 2021	Yes, no relief from physical presence standard
Iowa	No, if employee is telecommuting due to COVID-19 during the state of emergency	No guidance
Kansas	No guidance	No guidance
Kentucky	No guidance	No guidance

Nexus Due to Telecommuting Employees?

State	Corporate Income Tax Nexus	Sales Tax Nexus
Louisiana	No, if employee is telecommuting due to COVID-19	No guidance
Maine	No, if employee is telecommuting due to COVID-19 until June 2021	No, if employee is telecommuting due to COVID-19 for sales occurring through 2021
Maryland	No, if employee is telecommuting due to COVID-19 until Jul 1, 2021	No, if only presence is employee telecommuting due to COVID-19 and under statutory threshold
Massachusetts	No, if employee is telecommuting due to COVID-19 until 90 after end of state of emergency – September 13, 2021	No, if employee is telecommuting due to COVID-19 until 90 after end of state of emergency
Michigan	Yes, the state is not waiving nexus requirements	Yes, the state is not waiving nexus requirements
Minnesota	No, if employee is telecommuting due to COVID-19	No, if employee is telecommuting due to COVID-19
Mississippi	No, if employee is telecommuting due to COVID-19	No guidance
Missouri	No guidance	No guidance

Nexus Due to Telecommuting Employees?

State	Corporate Income Tax Nexus	Sales Tax Nexus
Montana	Yes, there are no changes due to COVID-19	No sales tax
Nebraska	Yes, there are no changes due to COVID-19	Yes, there are no changes due to COVID-19
Nevada	No guidance	No guidance
New Hampshire	No guidance	No sales tax
New Jersey	No, if employee is telecommuting due to COVID-19	No, if only presence is employee telecommuting due to COVID-19 and under statutory threshold
New Mexico	No guidance	No guidance
New York	No guidance	No guidance
North Carolina	No guidance	No guidance
North Dakota	No, if employee is telecommuting due to COVID-19 and the telecommuting is intended to be temporary	No guidance

Nexus Due to Telecommuting Employees?

State	Corporate Income Tax Nexus	Sales Tax Nexus
Ohio	Yes	Yes, there is no current provision for waiving nexus
Oklahoma	No, if employee is telecommuting due to COVID-19, while the usual workplace is closed	No, if employee is telecommuting due to COVID-19
Oregon	No, if employee is telecommuting due to COVID-19 until Nov. 1, 2020	No sales tax
Pennsylvania	No, if employee is telecommuting due to COVID-19 until June 30, 2021	No, if employee is telecommuting due to COVID-19 during state of emergency
Rhode Island	No, if employee is telecommuting due to COVID-19 during state of emergency	No, if employee is telecommuting due to COVID-19 during state of emergency
South Carolina	No, if employee is telecommuting due to COVID-19 until September 30, 2021	No, if employee is telecommuting due to COVID-19 until September 30, 2021

Nexus Due to Telecommuting Employees?

State	Corporate Income Tax Nexus	Sales Tax Nexus
South Dakota	No corporate income tax	Yes, there is no blanket waiver of physical presence nexus due to telecommuting employees
Tennessee	No guidance	No guidance
Texas	No guidance	No guidance
Utah	Yes, unless wages are de minimis	Yes, there is no current policy for waiving nexus
Vermont	No guidance	No guidance
Virginia	Yes, there is no current policy for waiving nexus	Yes, there is no current policy for waiving nexus
Washington	No guidance	No guidance
West Virginia	No guidance	No guidance
Wisconsin	No, if telecommuting due to COVID-19	No, due to COVID-19
Wyoming	No corporate income tax	No guidance

Public Law (P.L.) 86-272

- In order to minimize the potential income tax burden of operating in numerous states, the federal government passed Public Law 86-272
 - This law can prevent a state from taxing businesses that operate within the state so long as the business satisfies certain strict requirements.



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Public Law (P.L.) 86-272

- Public Law 86-272 prevents states from imposing income taxes on businesses whose only activities in the state are restricted to the "mere solicitation" of sales of tangible personal property.
- So the law only applies to:
 1. Net income taxes
 - It does not apply to gross receipts taxes (e.g. Ohio commercial activity tax, Texas margin tax, Washington B&O tax).
 - No application to withholding or other taxes
 - Does not affect an employer's responsibility to withhold income tax, pay unemployment tax and disability insurance, and cover workers' compensation. See e.g. VA Public Document 94-192
 2. Sales of tangible personal property approved out of state
 - Sales of services and digital products are typically not covered
 3. Limited to "mere solicitation" Wisconsin Dept. of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214 (1992)

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Public Law (P.L.) 86-272

➤ “Mere Solicitation” – Protected Activities

- Soliciting of orders for sales by any type of advertising
- Soliciting of orders by an in-state resident employee or representative of the company, as long as such person uses an entirely non-public “in-home” office
- Carrying samples and promotional materials only for display or distribution without charge
- Setting up display racks and advising customers on the display of the company's products without charge
- Providing automobiles to sales personnel for their use in conducting protected activities
- Passing orders, inquiries and complaints on to the home office
- Solicitation of indirect customers for the company's goods. For example, a manufacturer soliciting retailers to buy the manufacturer's goods from the manufacturer's wholesale customers
- Coordinating shipment or delivery without charge and providing information relating thereto either prior or subsequent to the placement of an order
- Checking of customers' inventories without a charge therefore (for re-order, but not for other purposes such as quality control)
- Maintaining a sample or display room for 14 days or less at a single location during the tax year
- Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel
- Mediating direct customer complaints if the purpose is solely for ingratiating the sales personnel with the customer and facilitating requests for orders
- Owning, leasing, using or maintaining personal property for use in the employee or representative's “in-home” office or automobile that is solely limited to the conducting of protected activities

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Public Law (P.L.) 86-272

➤ “Mere Solicitation” – Unprotected Activities

- Making repairs or providing maintenance or service to the property sold or to be sold
- Collecting current or delinquent accounts, whether directly, by third parties, assignment or otherwise
- Investigating credit worthiness
- Installation or supervision of installation at or after shipment or delivery
- Conducting training, seminars or lectures for personnel other than personnel involved only in solicitation
- Investigating, handling, or assisting in resolving customer complaints, other than mediating customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer
- Picking up or replacing damaged or returned property
- Hiring, training, or supervising personnel, other than personnel involved only in solicitation
- Using agency stock checks or any other instrument/process by which in-state sales are made by salespeople
- Maintaining a sample or display room in excess of 14 days at a location within the state during the tax year
- Carrying samples for sale, exchange or distribution in any manner for consideration or other value
- Maintaining, by any employee or other representative, an office or place of business of any kind. This does not include an “in-home office” that is located within the residence of the employee or representative that (1) is not publicly attributed to the company, and (2) is used by the employee/representative solely for soliciting and receiving orders from customers that are transmitted outside the state for acceptance or rejection, or for such other activities that are protected under Public Law 86-272.
- Any activity not listed which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

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Public Law (P.L.) 86-272

➤ Traps with P.L. 86-272

- A. Business can still be subject to minimum taxes or alternative base taxes
 - 1. Ohio Commercial Activities Tax
 - 2. Oregon Commercial Activities Tax
 - 3. Texas Franchise Tax
 - 4. Tennessee Franchise Tax
 - 5. Washington Business & Occupations Tax
 - 6. Kentucky Limited Liability Entity Tax
 - 7. Alabama's "business privilege tax" (min. \$100, max. \$15,000)
 - 8. California \$800 fixed minimum tax
 - 9. Vermont imposes a gross receipts tax on C-corporations
 - 10. Georgia imposes an annual net-worth tax (\$10-\$5,000)
 - 11. Massachusetts imposes an excise base tax
 - 12. New Hampshire imposes a business enterprise tax.
 - 13. New Jersey fixed dollar minimum (\$500 to \$2000)
 - 14. Nevada Commerce Tax
 - 15. North Carolina's "franchise tax"
- B. Though these liabilities are small, they can add up if not addressed; especially once the states add penalties and interest.

Public Law (P.L.) 86-272: Recent MTC Restrictions

➤ In August, 2021, the Multistate Tax Commission ("MTC") issued revised guidance further limiting the protections of PL 86-272 in the following circumstances:

- 1. Post-sale assistance to in-state customers via either electronic chat or email that customers initiate by clicking on an icon on the business's website. For example, the business regularly advises customers on how to use products after they have been delivered.
- 2. The business solicits and receives on-line applications for its branded credit card via the business's website. The issued cards will generate interest income and fees for the business.
- 3. The business's website invites viewers in a customer's state to apply for non-sales positions with the business. The website enables viewers to fill out and submit an electronic application, as well as to upload a cover letter and resume.
- 4. The business places Internet "cookies" onto the computers or other electronic devices of in-state customers. These cookies gather customer search information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer for sale.
- 5. The business remotely fixes or upgrades products previously purchased by its in-state customers by transmitting code or other electronic instructions to those products via the Internet.
- 6. The business offers and sells extended warranty plans via its website to in-state customers who purchase the business's products.
- 7. The business contracts with a marketplace facilitator that facilitates the sale of the business's products on the facilitator's on-line marketplace. The marketplace facilitator maintains inventory, including some of the business's products, at fulfillment centers in various states where the business's customers are located.
- 8. The business contracts with in-state customers to stream videos and music to electronic devices for a charge.

P.L. 86-272: NYS Update

- NYS issued new corporate draft regulations to limit the limit P.L. 86-272's protections for online activities.
- NY released guidance on 4/29/22 that would disqualify many internet activities from the protections of P.L. 86-272, conforming with the previous MTC statement.
- NY proposes that any activities, including those conducted over the internet, would escape the P.L. 86-272 shield, unless they consist only of solicitation of orders for TPP, or are de minimis.

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P.L. 86-272: NYS Update

- For example, “interacting with customers or potential customers through the corporation’s website or computer application” would not be shielded by P.L. 86-272.
- Additionally, any business that uses internet “cookies” will not be shielded from taxation in NY. According to NY, the cookies generally gather information that the business will use in ways that are not entirely ancillary to solicitation or orders for TPP.
- But in conformity with MTC, just placing static text or images on a website does not trigger taxation.

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P.L. 86-272: NYS Update

If enacted, the regulations will effectively create a path for NY to tax certain companies, with no in-state activity, simply because NY residents are engaging with the corporation's website.

For more information see:

<https://www.hodgsonruss.com/assets/html/documents/2022tns22-3%20Endres%20Doyle%20Reilly.pdf>.

Section 3: New Resident and Nonresident Allocation Audits/Telecommuting



Background

- While New York saw an exodus of residents who reported \$21 billion in total income on their 2019 federal returns, according to the IRS, Florida saw an influx of residents who reported \$41 billion in income, the most any state received. And that was before COVID!! https://www.wsj.com/articles/miamis-gold-rush-finance-firms-and-crypto-suarez-rents-development-boom-11657317076?reflink=share_mobilewebshare.
- The COVID-driven rush of New Yorkers into Florida has turned into a stampede — with no end in sight. A record-breaking number of Empire State residents switched their driver's licenses to the Sunshine State version in August according to a NY Post analysis of Florida Department of Highway Safety and Motor Vehicles data. A total of 5,838 New Yorkers made the switch — the highest recorded number for a single month in history, the numbers show. Year to date, 41,885 New Yorkers have handed over their licenses after moving south, a torrid pace that's pointing to a new annual record. <https://nypost.com/2022/09/20/record-number-of-new-yorkers-swap-to-florida-licenses/>.

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New York Audit Initiatives

Tax Audit Report - Personal Income Tax (Article 22 and 23) Desk Audits

Fiscal Year	Number of FTE Auditors	Number of Audits
2018	203	647,566
2019	217	616,572
2020	220	548,183
2021	216	494,341
2022	201	771,104

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Residency Basics

▪ The Two Residency Tests (in most states)

1. Domicile

- One permanent, primary home.
- The “Leave and Land” Rule
- Burden of proof on you (clear and convincing)
- People generally don’t change their permanent home lightly/often
- Looking for a “Lifestyle Change” (e.g. retirement, huge change in time patterns, upsizing/downsizing, health issues)
- The 5 Factors



2. “Statutory” Residency

- Previously 183 days + a Permanent Place of Abode.
- A minute in the state counts as a day in state.
- Few exceptions to day count rules.



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New York Residency Update

- In *Matter of Nelson Obus et al., v New York State Tax Appeals Tribunal*, the court ruled that a seldom-used vacation home in New York cannot be considered a “permanent place of abode” for statutory residency purposes.
- Mr. Obus lived in New Jersey but worked in New York City and maintained a vacation home upstate. And while he spent more than 183 days in New York City for work, he only used his vacation home for 3 weeks a year, it was four hours from where he worked, and he and his wife didn’t keep things there.
- And even though the place was large and definitely suitable for year-round use, the court discarded any sort of objective test to determine whether the place was a permanent place of abode for the taxpayer.
- Instead, since the case involved something so fact-specific as residency, an inquiry into the subjective aspects of the taxpayer’s use of the abode was required: “[t]he taxpayer must have utilized the dwelling as his or her residence; maintaining a dwelling that could be a permanent place of abode is not enough to establish status as a statutory resident.”

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New York Residency Update

- The Obus court's focus on the subjective aspects of a taxpayer's abode and the purpose of the statutory residence test in the first place — to tax people who really are residents — is a major development, and will definitely have an impact not only on how vacation-home cases are handled, but on any statutory residency case where the subjective facts may suggest the taxpayer really isn't living their life as New York resident.
- Now the question will have to be, as the Obus court directed, whether a taxpayer falls within “the purview of the target class of taxpayers who were intended to qualify as statutory residents.” And who is that? In Gaied court told us that the test is designed to capture people who are, for all intents and purposes, residents of the state, i.e., people who really live in New York.
- Several questions now arise. The statutory residency test was a more mechanical test, but the new ruling injects a level of subjectivity. For example:
 - The apartment is not regularly used as a residence, but it happens to be close to the taxpayer's office?
 - How much use transforms an apartment into a PPA?

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New York Residency Update

- The New York State Department of Taxation and Finance released a new version of its audit guidelines for nonresidents.
- Given that the last update was in 2014, we were interested to see what had changed.
- But when we dug into the new guidelines, we really only found one significant substantive change:
- The “11-Month Rule” is now the “10-Month Rule”!!!

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Statutory Residency/Presumptions

State	Presumption/Rule
Alabama	Either maintain a place of abode in-state or spend more than a total of seven months in the year within Alabama - presumed to be residents.
Arkansas	Maintains a permanent place of abode within Arkansas and spends in the aggregate more than six months of the year
Arizona	Spends in the aggregate more than 9 months of the taxable year in Arizona is presumed to be a resident
California	Spends in the aggregate more than 9 months of the taxable year in California is presumed to be a resident
Colorado	Maintains a permanent place of abode within Colorado and who spends in the aggregate more than six months of the taxable year in Colorado
Connecticut	Maintains a permanent place of abode in the state and is in the state for an aggregate of more than 183 days during the taxable year.
D.C.	Maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year
Delaware	Maintains a place of abode in Delaware and spends in the aggregate more than 183 days of the tax year in Delaware
Georgia	Residing within Georgia for 183 days or part-days, in the aggregate, of the immediately preceding 365 day period.
Hawaii	Persons who spend more than 200 days of the tax year in Hawaii are presumed to be residents
Iowa	Presumption applies if an individual maintains a place of abode in Iowa and spends more than 183 days of the tax year in Iowa
Idaho	Maintain a place of abode in Idaho for the entire tax year and spend more than 270 days of the tax year in Idaho – some safe harbors available
Illinois	Prior year resident presumed to be a resident if present in Illinois more days than in any other state during year
Indiana	Maintains a permanent place of residence in Indiana and spends more than 183 days of the taxable year within Indiana
Kansas	Spends an aggregate amount of more than six months of a taxable year within Kansas in the absence of proof to the contrary.
Kentucky	Spends, in the aggregate, more than 183 days of the tax year in the state and who maintains a place of abode in the state during that period
Louisiana	Maintains a permanent place of abode within the state or who spends in the aggregate more than six months of the taxable year within the state
Massachusetts	Maintains a permanent place of abode in Massachusetts and spends more than 183 days of the taxable year in Massachusetts
Maryland	For more than six months of the taxable year, maintained a place of abode in Maryland.
Maine	Maintains a permanent place of abode in Maine and spends in the aggregate more than 183 days of the taxable year in Maine
Michigan	Deemed a resident if lives in the state at least 183 days during the tax year or more than half the days during a tax year of less than 12 months.

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Statutory Residency/Presumptions

State	Presumption/Rule
Minnesota	Spends at least 183 days in Minnesota and the taxpayer or spouse own, rent, maintain, or occupy a residence in Minnesota
Missouri	Maintain a permanent place of abode in-state and spend more than 183 days of the taxable period in Missouri.
Mississippi	Individuals who maintain homes, apartments, or other places of abodes in Mississippi or who meet the requirements of a Mississippi voter or enjoy a Mississippi homestead exemption are legal Mississippi residents
Montana	Maintaining a "permanent place of abode," in Montana and not establishing residency elsewhere.
North Carolina	In the absence of convincing proof to the contrary, being present within the state for more than 183 days of an income year constitutes residence.
North Dakota	Maintains a permanent place of abode within the state and spends more than seven months (210 days) of the year within the state
Nebraska	For an aggregate of more than 6 months, both maintains a permanent place of abode within Nebraska and is present in Nebraska
New Jersey	Maintains a permanent place of abode in the state and spends in the aggregate more than 183 days of the taxable year in this State
New Mexico	Physically present in New Mexico for 185 days or more during the taxable year regardless of domicile
New York	More than 183 days in New York combined with a permanent place of abode.
Ohio	An individual who has at least 213 "contact periods" with the state is presumed to be domiciled for the entire taxable year.
Oklahoma	Spends more than seven months of the taxable year in Oklahoma is presumed to be a resident in absence of proof to the contrary.
Oregon	Maintains a permanent place of abode in Oregon and spends more than 200 days, in the aggregate, of the taxable year.
Pennsylvania	Maintains a permanent place of abode in Pennsylvania and spends, in the aggregate, more than 183 days there.
Rhode Island	Maintains a permanent place of abode in Rhode Island and is present in the state for an aggregate of more than 183 days during the tax year
Tennessee	Maintaining a place of residence for more than six months will cause a person to be liable for tax
Utah	Has an abode in the state and spends at least 183 days in the state during the tax year (recently changed to be a factor for domicile)
Virginia	Maintains a place of abode in Virginia for more than 183 days during the tax year.
Vermont	Those who maintain a Vermont permanent residence and are in Vermont for over 183 days of the tax year are considered residents.
West Virginia	Maintains a permanent place of abode in-state and spends in the aggregate more than 183 days of the taxable year in-state

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Nonresident Comp. Allocation

- If employee is a resident of the state where they work, then 100% of their compensation income is subject to that state's tax, and employer must withhold 100% state tax.
- If employee is a nonresident of the state where they work, then state tax still due to the extent of the taxpayer's workdays in the state.
- Formula: $[\text{In-State Workdays}] \div [\text{Total Workdays}] = [\text{Workday Percentage}]$
 - Employer must withhold state tax based on that workday percentage
 - Employee reports allocable income based on that workday percentage

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The Basics of Allocating Compensation

- What counts as a workday?
 - Typical workdays (Monday-Friday)
 - Weekends? Holidays? Travel days?
- Where is the workday spent?
 - Pre-Covid: Most states using "physical presence" to determine location
 - Easy: Days spent in the state by the nonresident employee on company business
 - Not so easy: Telecommuting and remote work

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Allocating “Regular” Wages/Salary

- Allocation is required when a nonresident’s in-state workdays/compensation exceeds the applicable threshold (if any)
- Allocation formula:

$$\frac{\text{In-State Workdays}}{\text{Total Workdays}} \times \text{Total Wages}$$

- “Workday” typically **includes** travel days, days worked from home, days worked on weekends
- “Workday” typically **excludes** holidays, vacations, sick days, weekends

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Counting Workdays

Total Days in Year		365
Nonworking days:		
Saturdays/Sundays	104	
Holidays	10	
Vacation Days	14	
Sick Days	5	
Other Nonworking Days	2	
Total Nonworking Days		135
Total Days Worked in Year		230
Total Days Worked Out-of-State		55
Total Days Worked In-State		175

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State Responses to Telecommuting and COVID-19

State	Sourced to Employer's Home State	Sourced to Employee's Home State
Alabama	X	
Arkansas	X (until 12/1/20)	X (as of 1/1/21)
California		X
Colorado		X
Connecticut		X (2020 only)
Delaware		X
Georgia	X	
Illinois*		X
Iowa		X
Kansas	X (both until 12/31/20)	X (only as of 1/1/21)
Kentucky		X
Maine	X (until 6/30/21)	
Maryland		X
Massachusetts	X (until 9/13/21)	
Minnesota		X
Mississippi	X	

* Withholding required for more than 30 days

*Withholding required if employee is telecommuting from IL for more than 30 days

State	Sourced to Employer's Home State	Sourced to Employee's Home State
Missouri	X (for some employers if elected until 7/19/21)	X
Montana		X
Nebraska	X (until 7/30/21)	
New Jersey**	X	X
New York	X	
North Carolina		X
Ohio (municipal income tax)	X (until 12/31/21)	
Oregon		X
Pennsylvania		X (until 6/20/21)
Rhode Island	X	
South Carolina	X (until 9/30/21)	
Vermont		X
Wisconsin		X

Rules of Employer's home state dictate which state gets the tax

**Rules of Employer's home state dictate which state gets the tax

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Telecommuting Post-COVID

So Now What?

- Telecommuting is not going away.
- And while states were willing to change rules during the emergency of COVID, now what happens?
- Enter the Convenience Rule and NY's new enforcement initiatives.

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2020/2021 Requests for Information – Excerpts

We need more information by June 15, 2021 about your 2020 New York State income tax return.

Why did you get this letter?

We need to verify the amount of income you allocated to New York State, as reported in the *New York State amount* column of your return.

If you are a nonresident or part-year resident whose assigned primary work location is in New York State, days you worked at a location outside New York State may be considered New York State work days. In particular, days you telecommuted from a location outside New York State are considered New York State work days unless your employer has established a bona fide employer office at your telecommuting location.

Additional information about residency and telecommuting can be found on our website at www.tax.ny.gov (search: telecommuting).

What must you do?

1. You must verify your income allocation by providing the following (for each taxpayer if a joint return):
 - A copy of your federal W-2, *Wage and Tax Statement*, for each employer;
 - A completed *Income Allocation Questionnaire* (Form AU-262.55, enclosed) for each employer; and
 - A full description of the composition of your wages (base compensation, bonuses, stock options, sick pay, vacation pay, severance pay, gambling income, unemployment compensation, etc.).

How do you send this back to us?

The best way is online. It is easy to start an account at www.tax.ny.gov/online. From there, you can attach images and files of supporting documentation. Please include an image of this letter in your response. Responding online is also:

- Safe, secure, and confidential. Your information and privacy are protected.
- Quick. Your information will be instantly delivered to us.
- User-friendly. It is easy to navigate.
- Economical. It is the least expensive way to respond.

2020/2021 Requests for Information – Excerpts

X- [REDACTED]

What if you cannot get online?

You can also send us the information by fax, U.S. Mail, or by a private delivery service (see Publication 55, *Designated Private Delivery Services*). Please include a copy of this letter in your response.

- Fax: 518-435-8518
- U.S. Mail: NYS Tax Department, Audit Division-Income/Franchise Desk, P.O. Box 15270, Albany, NY 12212-5270
- Private delivery service: NYS Tax Department, RPC-PIT, 90 Cohoes Avenue, Green Island, NY 12183.

What happens after you send in the required information?

We will attach the information you provide to the return you already submitted, then we will continue processing your return. There may still be other changes to your return. If we need additional information to continue processing your return, would you like us to contact you by phone? If so, please include a daytime phone number:

Daytime phone number _____ Taxpayer name _____

What happens if you do not send all the information we need by [REDACTED] 2021?

We will process your return without this information. That may reduce your refund or increase the amount of tax you owe.


Who do you contact if you have questions?

You may call us at 518-457-2255.

Your rights as a taxpayer

See Publication 130-D, *The New York State Tax Audit - Your Rights and Responsibilities*, available on our website.

2020/2021 Requests for Information – Excerpts


**Department of
Taxation and Finance**
 Audit Division-Income/Franchise Desk
 W A Harriman Campus, Albany NY 12227-9995

X-999999999

Income Allocation Questionnaire

Tax year	Taxpayer name	Audit case ID
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You must verify the amount of income you allocated to New York State as reported in the *New York State* amount column of your income tax return. If you are a nonresident or part-year resident whose assigned primary work location is in New York State, days you worked at a location outside New York State may be considered New York workdays. In particular, days you telecommuted from a location outside New York State are considered days worked in the state, unless your employer has established a bona fide employer office at your telecommuting location.

Complete this questionnaire for **each** employer (for each taxpayer if a joint return). Attach additional sheets if necessary.

Employer name and address: _____

Job title: _____

Period of employment (full year or specific dates): _____

Assigned primary work location: _____

If your assigned primary work location changed during the tax year, provide proof of this change.

Total compensation for the period of employment (from federal Forms W-2): _____

Provide a full description of the composition of your wages (base compensation, bonuses, stock options, sick pay, vacation pay, severance pay, gambling income, unemployment compensation, etc.)

Total number of days in the employment period: _____

Total number of non-working days (weekends, holidays, vacation, sick leave, etc.): _____

Total number of working days: _____

Total days worked at home: _____

2020/2021 Requests for Information – Excerpts

Location of working days:

Address	Type of work location (office, home, client site, etc.)	Number of days worked at location	Nature of duties performed (in-person business meetings, telecommuting, client visit, etc.)

You must be prepared to provide documentation substantiating the above day counts upon request.

If you telecommuted from a location or locations outside New York State, please specify whether any such location constituted a bona fide employer office, and provide proof of actions taken by the employer, if any, to establish a bona fide employer office at that location. For more information on the factors used to determine whether a telecommuting location is a bona fide employer office, see www.tax.ny.gov (search: *telecommuting*).

I certify that the information given herein is true and correct.

Date	Taxpayer's signature	Taxpayer's Social Security number
Date	Spouse's signature (if joint return)	Spouse's Social Security number (if joint return)



Pre-Pandemic Desk Audit Notices

 **Department of
Taxation and Finance**
Audit Division-Income/Franchise Desk-AGS
W A Harriman Campus, Albany NY 12227-9996

August 14, 2019

Case ID: [REDACTED]
DLN: [REDACTED]
Tax year: 2016

190800234700-AD00

[REDACTED]

We need more information about your New York State income tax return.

We need additional information about the capital gains reported on your return for the tax year above.
If you do not respond to this letter within **30 days**, we will consider all your capital gains to be New York source income, which may result in a bill.

Send us:

- The date you moved out of New York State: _____
- A copy of the federal Schedule D, *Capital Gains and Losses*, and Form(s) 8949, *Sales and Other Dispositions of Capital Assets*.
- For each capital gain or loss, provide the date of sale.
- If any of the gains or losses were from a partnership, S corporation, trust, or estate, provide an explanation of how you allocated the gains or losses to your New York State residency period.
- If you sold property, provide the address of the property and the date it was sold: _____
- If the capital gain is the result of an installment sale, provide a copy of federal Form 6252, *Installment Sale Income*, with Part 1 completed from the year of the sale.
- A daytime phone number so we may contact you if we need more information: _____

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The “Convenience of the Employer” Rule

The Basic Rule

- In general, if the employee works from home for their own convenience, broadly defined, the workdays at home will be treated as days worked at their assigned work location.
- Applications:
 - Nonresident income allocation
 - Withholding
 - Resident credits

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The “Convenience of the Employer” Rule

- 5 states (NY, CT, PA, DE, NE) have a “Convenience Rule.”
- Nuances:
 - CT’s rule only applies if the other state is a “Convenience State.”
 - Several states (GA, MA, ME, MS, NE, NY, PA, RI, SC) issued guidance or temporary legislation during pandemic requiring that days worked at home continue to be treated as if worked the employee’s regular place of work.

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Convenience Rule States

Connecticut Conn. Gen. Stat. § 12-711(b)(2)(C)	“For purposes of determining the compensation derived from or connected with sources within this state, a nonresident . . . shall include income from days worked outside this state for such person’s convenience <u>if such person’s state of domicile uses a similar test.</u> ”
Delaware 2020 Schedule W 30 Del. C. § 1124(b).	For nonresidents, non-Delaware workdays “must be based on necessity of work outside . . . Delaware in performance of duties for the employer, as opposed to solely for the convenience of the employee. Working from [a home office] does not satisfy the requirements of ‘necessity’ of duties for your employer and is considered for the convenience of the employee <u>unless working from home is a requirement of employment with your employer.</u> ”

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Convenience Rule States - *continued*

Nebraska 316 Neb. Admin. Code 22-003.01C(1)	“If the nonresident's service is performed without Nebraska for his or her convenience, but the service is directly related to a business, trade, or profession carried on within Nebraska and except for the nonresident's convenience, the service could have been performed within Nebraska, the compensation for such services shall be Nebraska source income.”
New York 20 NYCRR 132.18(a) TSB-M-06(5)I	“Any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.”
Pennsylvania 61 Pa. Code § 109.8	If a nonresident employee (including corporate officers but generally excluding salesmen) performs services both within and without PA, their PA-sourced income includes the ratio of PA workdays over total workdays. For this ratio, Non-PA workdays include days worked out-of-state performing services “which, of necessity, obligate the [employee] to perform out-of-State duties in the service of his employer.”

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NY’s “Convenience of the Employer” Rule

- New York continues to send desk audit notices to taxpayers who previously allocated all of their W-2 income to New York or whose allocation percentage decreased from 2019-2020 or from 2020-2021.

- Some of the 2020/2021 notices stated:

“We have determined that you were unable to access your office located in New York due to a temporary office closure resulting from Covid-19. If an employee’s assigned or primary work location was New York prior to Covid-19 temporary office closure, and the employer continues to maintain the New York office for the employee, the employer’s assigned and primary work location is still New York. The fact that the New York office is not used during the Covid-19 office closure does not affect the conclusion.”

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NY Example: July 2020 NYS FAQ on COVID Telecommuting

My primary office is inside New York State, but I am telecommuting from outside of the state due to the COVID-19 pandemic. Do I owe New York taxes on the income I earn while telecommuting?

If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location.

There are a number of factors that determine whether your employer has established a bona fide employer office at your telecommuting location. In general, unless your employer specifically acted to establish a bona fide employer office at your telecommuting location, you will continue to owe New York State income tax on income earned while telecommuting.

<https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting>

The “Convenience of the Employer” Rule After COVID-19

- Telecommuting is likely here to stay and may become even more prevalent.
- Convenience Rule issues will take center stage.
- What happens if an employer no longer has a physical office?
- Employers need to be careful about nexus and Convenience Rule issues if they continue to allow employees to work from home.

Options to Avoid New York's Convenience Rule

- **Option #1: Assign to Non-NY Office**
 - But be careful that this assignment is real! (see next slides)
 - Should be used regularly, paid for by employer, etc.
- **Option #2: Bona-Fide Home Office**
 - TSB-M Factors
- **Option #3: No NY Workdays**
 - Year-by-year test - *Hayes v. State Tax Comm.*, 401 N.Y.S.2d 876 (N.Y. App. Div. 1978): Nonresident, who under his agreement to provide consultant services could have been required to work in New York **but who did not work in New York at all**, was not subject to New York state personal income tax liability no matter for whose convenience or necessity he performed the work.
 - Even a few New York workdays, probably too many (See *Matter of Huckaby*)
 - Should be in writing (employee told that they are not required to come to the NY office and employee indicates that they are not planning to come to NY during the calendar year)
 - Should be documented (for withholding purposes, T&E should reflect that no travel to NY)
- **Watch out for changes**
 - More states may adopt convenience rules
 - Congress could step-in

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Reassignment to a Non-New York Office

- No written guidance as to what constitutes an individual's primary office.
- On Audit, NY has looked at facts, such as:
 - Office that individual visits more than any other
 - Where is employee's administrative support?
 - Where does the employee's supervisor, managers, or "team" sit?
 - Does the employee still have designated office space in NY?
 - What do employer HR records designate as primary office?
- There must be evidence other than geographical proximity to reassign an employee to another office.

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The TSB-M Factors

Step 1: Primary Factor: Employee's duties require the use of special facilities that cannot be made available at the employer's place of business, but those facilities are available at or near the employee's home

If the home office does NOT satisfy the primary factor, proceed to Step 2

Step 2: The Secondary and "Other" Factors: The home office may still qualify as a "bona fide employer office" if it meets four out of the six Secondary Factors **PLUS** three out of the ten "Other" Factors

Secondary Factors (4 out of 6)

1. Home office is a requirement or condition of employment
2. Employer has a bona fide business purpose for the employee's home office location.
3. Employee performs some core duties at the home office.
4. Employee meets with clients, patients, or customers at the home office.
5. Employer does not provide the employee with office space or regular work accommodations.
6. Employer reimburses expenses for the home office.

"Other" Factors (3 out of 10)

1. Employer maintains a separate telephone line and listing for the home office.
2. Employee's home office address and phone number are on the employer's business letterhead and/or cards.
3. Employee uses a specific area of the home exclusively for the employer's business.
4. Employee keeps inventory of products or samples in the home office.
5. Employer's business records are stored at the home office.
6. Employer signage at the home office.
7. Home office is advertised as employer's place of business.
8. Home office covered by a business-related insurance policy.
9. Employee properly claims a deduction for home office expenses for federal income tax purposes.
10. Employee is not an officer of the company.

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Tricky Problems and Practical Solutions

- How do you count a "day"?
- What is the proper denominator?
- Bonuses
- Severance (for past or future services?)
- Stock options
 - New York: Grant to vest
 - California: Grant to exercise
 - Connecticut: Grant to exercise
 - Credits for taxes paid to other states may not sync
- Retirement income – Public Law 104-95
- Special rules for professional athletes, entertainers, public figures & employers involved in the business of interstate transportation
- Rewards for whistleblowers
- IRS information sharing

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Section 4: New York City's Unincorporated Business Tax (Remote Work Planning Opportunity)

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NYC's UBT: In General

- Entity-level tax on partnerships, LLCs, and other unincorporated businesses
- Imposed at entity level at 4% rate
- A few special exemptions
 - Purchase and sale for own account
 - Holding, leasing or managing real property
 - Entities engaged primarily with qualifying investment activities are partially exempt

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NYC's UBT: Sourcing

- Rules do NOT require a non-NYC office to apportion
- Special rules for registered broker-dealers, mutual fund companies: sourcing is based on customer-location
 - NYS and NYC have migrated to customer-sourcing too, for corporations only though
- Apportionment: NOT based on Three-Factor Formula
 - Single Factor, Receipts-based formula
- For service providers: based on where services are performed:
 - “Charges for services performed shall be allocated to the city to the extent that the services are performed within the city.” NYC Admin. Code § 11-508(c)(3)(C)

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NYC's UBT: Sourcing Rule

Finance Letter Ruling #18-4986 (August 2018)

- Taxpayer, SMLLC, provided IT maintenance and consulting from Long Island, but sometimes came to NYC
- Ruling: “If work for a particular client is split between the City and outside the City, you should allocate the receipts for that client based on the proportion of time spent in the City.”

Takeaways:

- Focus on the location where the services generating the *charges* are performed.
- In other words, look to the location where income generating employees are
- But no “convenience rule”
- And no “main office” rule like the NYS “gross income” factor
So how do you do the math?

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Unincorporated Business Tax – Income Generators?

From Finance Letter Ruling #18-4986:

- “If different tasks performed by the same LLC are billed at different rates, the amount to be allocated to the City can be calculated separately, based on the time spent in the City to accomplish the various tasks.”

GCT Rule:

- “Where a lump sum is received by the taxpayer in payment for services within and without New York City, the amount attributable to services within New York City is to be determined on the basis of the relative values of, or amounts of time spent in performance of, such services within and without New York City...”

Unincorporated Business Tax – Income Generators? (cont.)

- The GCT provision was interpreted by the NY Tax Appeals Tribunal in *Matter of Gerson Lehrman Group, Inc.*
 - The customers in *Gerson*, paid a lump-sum fee to the taxpayer for a package of investment advisory services that included consultation with and advice from experts in a particular field known as Council Members who were independent contractors.
- The case ultimately turned on whose efforts generated the taxpayer’s receipts for allocation purposes.
- The Tribunal came up with its own sourcing approach, deciding that the taxpayer’s receipts were generated by the efforts of Council Members (non-employees), research managers, sales people, and certain IT specialists — in other words, the individuals whose efforts went into the service that customers chose to purchase from the taxpayer.
- Thus, the receipts factor was determined by looking at the compensation of these individuals in NYC versus everywhere; back office and administrative staff were not included.

Unincorporated Business Tax – Income Generators? (cont.)

There are several takeaways from *Gerson*. Some of the key takeaways are:

- Place of performance rules may in fact look to the location of the individuals generating the charges for services.
- These individuals may include independent contractors and other third party, nonemployees.
- Back office personnel who do not generate income may be excluded from the apportionment factor.

UBT and GCT rules also suggest that there may be a disproportionate weighting between individuals based on their degree of income generation.

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EXAMPLE #1: Hedge Fund Management Co.

Scenario:

- 2 partners, 4 analysts and 8 back-office people; minimal travel
- Historically one NYC office; Closed between March-Dec 2020
- 1 partner in CT, 1 in FL, 2 analysts in NJ, 2 in Brooklyn apartments
- \$20 Million in management fee revenue
- \$10 Million in taxable income for UBT purposes

2019 UBT

- All services performed in NYC: 100% apportionment percentage
- \$400K in UBT

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EXAMPLE #1: Hedge Fund Management Co. The Math in 2020

Partner Computation: 50% Weight

Generator	Total Days Worked	Total NYC Days	NYC %
Partner #1	260	60	23%
Partner #2	260	60	23%
Average			23%

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EXAMPLE #1: Hedge Fund Management Co. The Math in 2020 (cont.)

Analyst Computation: 50%

Generator	Total Days Worked	Total NYC Days	NYC %
Analyst #1	240	60	25%
Analyst #2	240	60	25%
Analyst #3	240	240	100%
Analyst #4	240	240	100%
Average			63%

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EXAMPLE #1: Hedge Fund Management Co. The Math in 2020 (cont.)

Weighted Average of
Partner and Analyst
Computation: **43%**

Estimated UBT Due:
\$171,154

Generator	Total Days Worked	Total NYC Days	NYC %
Partner #1	260	60	23%
Partner #2	260	60	23%
Average			23%

Generator	Total Days Worked	Total NYC Days	NYC %
Analyst #1	240	60	25%
Analyst #2	240	60	25%
Analyst #3	240	240	100%
Analyst #4	240	240	100%
Average			63%

Combined Apportionment <i>Weighted 50/50</i>	43%
UBT Due <i>(43% of \$10m at 4% tax)</i>	\$171,154

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Example #2: A Law Firm and a City

- Or how about law firm with 20 partners and 30 associates and \$10 million of taxable income.
 - For this example, let's assume that the partners and associates generate equal amounts of service receipts (wishful thinking!)
 - Lets also assume that 20 of those lawyers are in Buffalo, and the other 30 are in NYC.
- Pre-pandemic, the law firm would have a 60% apportionment for UBT purposes – 20 out of 50 lawyers work outside of NYC – resulting in \$6 million of income subject to UBT.
- But since March, 25 of the 30 NYC attorneys have been working from home outside of the City.
- Now 45 of the 50 attorneys work outside of NYC, meaning the firm will only have a 10% UBT apportionment, and only \$1 million of income subject to UBT.
- \$200K savings...their own PPP!

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Caveats

- No specific guidance on telecommuting for UBT Purposes, though some auditors have pushed back initially.
- But see: June 9, 2021 NYC Department of Finance Letter Ruling concluding that taxpayers can receive REAP tax credit benefits even if workers are working remotely, "...provided that the Taxpayer treats those employees as working at the eligible premises for all purposes related to taxes imposed by New York City. Available at: <https://www1.nyc.gov/assets/finance/downloads/pdf/redacted-letter-rulings/ubt/redacted-21-5012-ubt.pdf>
- Beware of legislative fix...or administrative fix...or audit fix (there has been some informal indication that NYC auditors will contest the position).
- But in the meantime...if no compromised tax credit...give it a go?

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Section 5: Sales Tax Hot Topics

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Sales and Use Tax: A High-Stakes Gamble

Sales and Use Tax Characteristics:

1. Ubiquity
2. Onerous Record Keeping
3. Aggressive Audit Methodologies
4. Pyramiding of Tax Liabilities
5. Burdensome Penalties and Interest
6. Personal Liability
7. Advanced Audit Targeting
8. Confusion!



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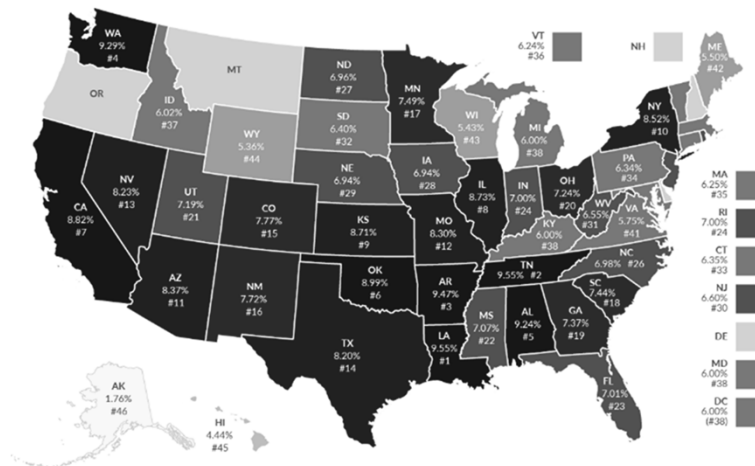
Four Examples of Sales Tax Fun

- Don't cut that bagel!
- Is that a headband or a sweatband?
- Home inspections
- Pumpkins



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Sales and Use Tax Rates



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Sales Tax: Enforcement / Audit Issues

■ How does a business get chosen for audit?

1. Audits of other taxpayers

2. NY's CISS program

- Corporate tax return sales v. sales tax return sales
- Consistent taxable percentage
- Cash-to-credit card ratio out of sync with similar businesses
 - Dine-in restaurants supposedly have a 35%/33%/18% credit card/debit card/cash ratio. Coffee shops have 28% cash
- Drastic changes in filing pattern
- New "self-audit" letters based on "typical" use tax liabilities.
- Information from more sources (franchisers, insurance companies, liquor distributors, and financial institutions)
- Compare returns of similar businesses operating within the same geographic areas
- lottery traffic vs. low sales

3. Whistleblowers – B&H Photo, Sprint (paid \$330M settlement in December 2018), Campagna v. Post Integrations (1st Dept. 2019)(failure to file can be a false claim).



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Sales Tax Hot Topics

1. Software-as-a-Service and Digital / Technology Transactions
2. Protective / Detective Services
3. Use Tax for Professional Services Businesses
4. Information / Advertising Services
5. Artwork / Collectibles

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Section 6: Abandoned Property: A Possible Budgetary Balm

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Abandoned Property: General Rules

▪ General Information

1. All 50 states, the District of Columbia and 3 Canadian provinces (Alberta, British Columbia, and Quebec) have enacted unclaimed property laws. Ontario proposed unclaimed property legislation in its 2012 budget.
2. Unclaimed property laws are intended to safeguard the property of a state's citizens, while utilizing the escheated property for the benefit of all citizens.
3. States have increasingly turned to their unclaimed property laws to increase revenue without raising or extending taxes, which is politically unpopular.
4. States' Unclaimed property laws apply to all entity types, including:
 - Corporations;
 - S Corporations;
 - Partnerships; and
 - Limited Liability Companies



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Abandoned Property: General Rules (cont.)

▪ General Information

1. As you might expect, NYS is known as one of the more aggressive states for abandoned property purposes.
2. In fact, the Council on State Taxation ("COST") recently gave NY its lowest grade when comparing the aggressiveness of the abandoned property laws across the 50 states. Only NY, DE and MS received a grade of "D-".
3. Here is a sampling of some of the states in the Northeast:
 - CT : B-
 - MA: A
 - MD: B+
 - NH: D
 - NJ: D
 - PA: D
 - VT: C-

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General Rules: Definitions

“Unclaimed Property”

- Unclaimed property generally includes property for which there has been no contact between the owner and holder for a statutorily prescribed period of time (“dormancy period”).
- Common categories include:
 - Wages, payroll, salaries, commissions, pension payments
 - Uncashed payable/vendor checks
 - Gift certificates/gift cards/stored value cards
 - Customer credits, deposits, refunds or rebates
 - Overpayments/unidentified balances
 - Cash and stock dividends
 - Merger redemption proceeds
 - Underlying and unexchanged shares
 - Bond principal and interest
 - Mutual fund and dividend reinvestment plan book shares, physical shares, and associated distributions

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Compliance: Sourcing Rules

The Supreme Court of the United States in *Texas v. New Jersey*, established the following two-pronged unclaimed property sourcing rule:

- The state in which the owner’s last known address is located has the power to escheat the unclaimed property, but;
- If that state does not have a law covering the property or if there is no record of the last known address, then the state in which the holder is incorporated has the power to escheat the unclaimed property.



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Compliance: Sourcing Rules (cont.)

- Reporting organizations incorporated, chartered, organized, or domiciled (in the case of a federally-chartered bank) in New York are required to report all amounts and securities held for:
 1. New York residents,
 2. foreign owners, and
 3. unknowns.
- New York incorporated life insurance companies are required to report amounts payable to New York residents and unknowns.
- All other reporting organizations are required to report amounts held for New York residents only.



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Compliance: Reporting

➤ Aggregate Reporting

- Many states allow holders to report smaller amounts of unclaimed property in the aggregate in order to ease compliance burdens.
- In NY, all amounts are reportable (there is no minimum threshold). However, holders may report certain property valued at \$20 or less per owner in aggregate. If detailed information is available for aggregate accounts, holders are asked to attach it to the report to better serve claimants with small values.

➤ Negative Reporting

- States may require holders of unclaimed property to file a negative report to confirm that they do not have any unclaimed property on their books and records.
- Be cautious of not engaging in negative reporting - it can keep statutes of limitations open. Consequently, some businesses choose to file a zero report.
- The NYS Abandoned Property Law does not require organizations to file negative reports.

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Compliance: NY Due Diligence

- New York requires holders to attempt to contact owners prior to remitting the property to the state.
- This is known as “due diligence.”
- NY due diligence requires:
 1. First mailing for all property regardless of value at least 90 days before reporting.
 2. Second mailing via certified letter for all property of \$1,000 or more at least 60 days prior to reporting.

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Compliance: Reporting

- For Traditional Business Corporations
- Filing Date: 3/10
- Covers Property Abandoned as of: 12/31 of the preceding year
- Due Diligence:
 - First Mailing: 12/10 of the preceding year
 - Second Mailing: 1/10 (for accounts over \$1,000)
- Penalties : Willful failure to report penalty is \$100 a day for every day the report is late
- Interest: 10% simple interest
- No COVID update or change from usual filing extension procedures

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Voluntary Disclosure

🌍 New York offers a voluntary disclosure program that allows holders to come forward (anonymously at first) and remit unclaimed property. However, participants usually have to satisfy the following requirements:

- Holder has not been previously contacted by the state regarding unclaimed property audit;
- The applicant is a first time filer and has not participated in a voluntary disclosure previously (In some cases those who filed in the past may once again apply through this program if they failed to report a particular type of property and want to voluntarily correct the error);
- Holder comes forward (often times anonymously in the beginning) in good faith to report unclaimed property liabilities.

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Voluntary Disclosure (cont.)

🌍 Advantages

- Limited lookback of 10 years of liability;
- Eliminates penalty and interest (10% per annum in NYS);
- The holder gets to take a "first crack" at fixing the liability;
- Indemnification from owners and states; and
- Ability to re-evaluate or even release reserves.

🌍 Disadvantages

- Though the lookback is limited, it still reaches back a significant number of years.
- Pandora's Box: The state may not agree with the holder's liability calculation.
- Coming forward will likely put the state on notice about other related entities.



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Thank You

Call or email with questions!



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