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STATE & LOCAL TAX UPDATE



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2023-2024 NY Tax Update

NYS Budget, Other Legislation, Hot Topics and New Enforcement Strategies

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Topics Discussed

- 2023-2024 Budget, Corporate Tax Regs, and Other Hot Topics
- New Resident and Nonresident Allocation
Audits/Telecommuting
- Sales Tax Hot Topics
- NYS Abandoned Property
- Game Time!

New Legislation and Corresponding Issues

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What's In

- Expanded Appeal Rights
- Business Income Tax Rate Extensions
- Enhanced False Claim Options
- PTET Updates
- MCTMT Updates
- Modified Tax Credits

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Tax Appeals Tribunal Appeal Rights

- Taxpayers have always had the right to appeal adverse Tribunal decisions; but until now, the Tax Department was not permitted appeal rights.
- The Budget allows the Tax Department to appeal Tax Appeals Tribunal decisions to the Appellate Division of the Supreme Court, Third Department.
- For the Department to appeal a decision, the review must be “premised on interpretation of the state or federal constitution, international law, federal law, the law of other states, or other legal matters that are beyond the purview of the state legislature.” What does this mean?
- Pause on accrual of interest and penalty.
- What is the standard of review?

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Business Income Tax Rate Extension

- The Budget extends through tax year 2026 the temporary 7.25% business income tax rate, for corporate taxpayers with business income bases in excess of \$5 million, and the temporary 0.1875% capital base tax rate.
- The income tax rate increase and the capital base tax were scheduled to sunset at the end of 2023.

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False Claims Act

- The Budget amends the New York False Claims Act (the “NYFCA”) to permit actions in cases where the taxpayer is alleged to have “knowingly concealed or knowingly and improperly avoided an obligation to pay taxes to the state or local government.”
- The expansion of the NYFCA takes effect immediately and in “any pending case” applies to any tax obligations knowingly concealed or knowingly avoided on or after the effective date.
- For actions filed after the effective date, this act only applies to such tax obligations knowingly concealed or avoided on or after May 1, 2020.
- Intended to close a perceived loophole that arguably avoided whistleblower complaints when no tax return was filed by the taxpayer and there was thus no “false statement” by the taxpayer upon which a whistleblower complaint might be premised.
- Big, new universe of potential non-filers!

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Pass-Through Entity Tax

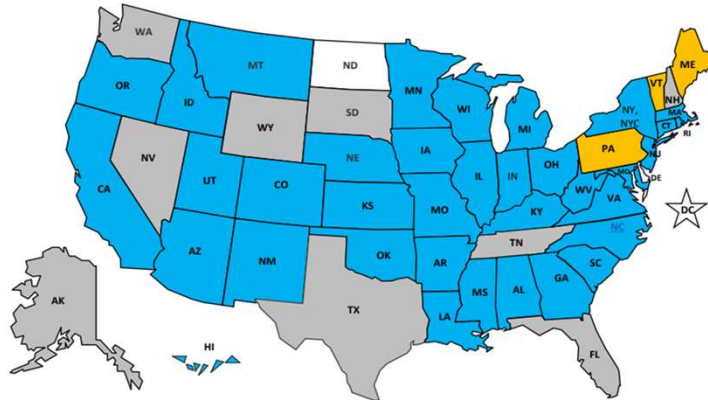
- The Budget amends the State Pass-Through Entity Tax (PTET) and the City PTET. The definitions of “pass-through entity taxable income” and “city pass-through entity taxable income” in Tax Law § 860(h) and 867(b) are amended to require entities to exclude deductions for PTET taxes paid when computing their state and city pass-through entity taxable incomes.
- This change corrects an unintended “circular” mathematical computation requiring entities to deduct PTET taxes from their pass-through entity taxable income that forms the basis for the PTET tax being deducted.
- In addition, the Budget amends the definition of “city taxpayer” to correct the unintentional omission of city resident trusts and estates from participating in the NYC PTET.
- The Budget also clarifies when an entity must elect into/revoke their election into the PTET and NYC PTET. Participation elections must be made “on or before” the due date of the first estimated payment and “after” such due date elections are irrevocable.

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Pass-Through Entity Tax

States with Enacted or Proposed Pass-Through Entity (PTE) Level Tax

As of July 10, 2023



- 36 states (& 1 locality) that enacted a PTE tax since TCJA SALT deduction limitation, effective for 2021 (or earlier) unless noted:
[AL](#), [AR](#)¹, [AZ](#)¹, [CA](#), [CO](#)³, [CT](#)⁴, [HI](#)², [GA](#)¹, [IA](#)¹, [ID](#), [IL](#), [IN](#)¹, [KS](#)¹, [KY](#)¹ (& [KY](#)), [LA](#), [MA](#), [MI](#), [MD](#), [MN](#), [MO](#)¹, [MS](#)¹, [MT](#), [NC](#)¹, [NE](#)³, [NJ](#), [NM](#)¹, [NY](#), [OH](#)¹, [OK](#), [OR](#)¹, [RI](#), [SC](#), [UT](#)¹, [VA](#), [WI](#), [WV](#)¹, and [NYC](#)¹
¹ Effective in 2022
² Effective in 2023 or later
³ Retroactive to 2018
⁴ Mandatory 2018-2023, elective starting 2024
- 3 states with proposed PTE tax bills:
 ME - [LD 1891](#) introduced
 PA - [SB 659](#) referred to Finance
 VT - [SB45](#) passed Senate, in House
- 9 states with no owner-level personal income tax on PTE income:
 AK, FL, NH, NV, SD, TN, TX, WA, WY
- 3 states with an owner-level personal income tax on PTE income that have not yet proposed or enacted PTE taxes:
 DC, DE, and ND

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MTA Mobility Tax Applicability

- The MCTMT has been a tax imposed on certain employers and self-employed individuals engaging in business within the MCTD.
- Prior to the Budget, the MCTMT applied to employers paying wages to employees working in the MCTD and to self-employed individuals (including non-limited partners) with net earnings from self-employment within the MCTD that exceed \$50,000.
- The Budget amends the definition of “net earnings from self-employment” in the Tax Law so that limited partners who are actively engaged in the operations of their partnerships are now deemed to have net earnings from self-employment subject to the MCTMT.
- Decouples from the Internal Revenue Code (“IRC”) definition, which excludes amounts earned by limited partners.
- This change takes effect immediately.
- See new MCTMT Publication 420 recently issued by the Tax Department.
- Retroactive application?

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MTA Mobility Tax Rate

- A Budget-related enactment (2023 NY Laws Ch. 58, Part Q) increased the top MCTMT rate from 0.34% to 0.60% for employers with quarterly payrolls over \$437,500 in the counties of Bronx, Kings, New York, Queens, and Richmond (effective July 1, 2023).
- For taxpayers with MCTD-source earnings from self-employment, the MCTMT rate increased from 0.34% to 0.47% in the 2023 tax year (effective July 1), and to 0.60% for the 2024 tax year, for MCTD income attributable to the counties of Bronx, Kings, New York, Queens, and Richmond.
- So, now there are different rates of tax depending on where in the MCTD your business is located.
- For self-employed individuals that have multiple offices with one in, for example, Manhattan and another within White Plains, the calculation may be complicated.

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MTA Corporate Tax Surcharge

- The Budget establishes the rate of the Metropolitan Transportation Authority (“MTA”) surcharge on corporate franchise tax liability at 30% of the state tax paid on income corporations earn within the metropolitan commuter transportation district (the “MCTD”).

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Credits

- Empire State Child Tax Credit Expansion:
 - The definition of qualifying child was amended to include those under the age of 4.
 - The state credit was previously limited to children ages 4 through 16.
 - See Form IT-213-I for more information.

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Credits

- The Budget offers substantial modifications to various New York tax credits:
 - Extends the New York City Musical and Theatrical Production Tax Credit, allowing it to be claimed through tax year 2025, and establishes a \$350,000 maximum credit amount for each “qualified New York city musical and theatrical production in a level two qualified New York city production facility.”
 - Amends the Film Production Tax Credit, primarily by increasing the credit rate to 30 percent, increasing the annual credit cap to \$700 million, extending the program’s duration to 2034, and allowing an additional credit for non-wage production costs.
 - Amends the Investment Tax Credit to make it refundable for eligible farmers, through tax year 2027.
 - Expands the period in which the Brownfield Tax Credit can be claimed for certain projects, based on the location of the project and when the taxpayer purchased the project site.

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Credits (continued)

- The Budget offers substantial modifications to various New York tax credits and a few new credits:
 - Creates the Child Care Creation and Expansion Tax Credit Program Act for businesses creating or expanding their childcare capacity for the children of their employees, whether directly or via a third party. Businesses may claim a credit equal to 20 percent of the costs of creating or expanding their program's available infant and toddler seats, capped at 25 seats. The aggregate amount of credit available is \$25 million each year, from 2023 through 2025, which will be allocated on a pro rata basis.
 - New Farm Employer Overtime Credit - This is a new credit for Article 9-A and Article 22 taxpayers for eligible farmers who pay overtime wages after January 1, 2024, based on the phase in of an OT threshold. The credit is equal to 118% of the overtime differential paid to eligible farm employees between the OT threshold and 60 hours per week. See Forms CT or IT-661 for more information.
 - Allows New York City to adopt a biotechnology credit, beginning in tax year 2023. Governor Hochul's original budget proposal allowed the credit to be claimed under the New York City general corporation tax, unincorporated business tax, and banking corporation tax. The Budget, however, limits the credit to the New York City general corporation tax and the unincorporated business tax.
 - Repeals a provision of the Corporate Franchise Tax that previously allowed for the transfer of unused investment tax credits in "qualified transactions" (i.e. IRC § 351/355 reorganizations).
- Additionally, the Budget extends or slightly modifies the following credits: the COVID-19 Capital Costs Tax Credit Program (Part F); the Rehabilitation of Historic Properties Tax Credit (Part I); the Empire State Commercial Production Tax Credit (Part I); and the No. 6 Heating Oil Conversion Tax Credit (Part I).

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Disaster Relief

- The Budget gives the Commissioner of the Tax Department the discretion to award new disaster relief to taxpayers on multiple fronts.
- New interest abatement options for taxpayers affected by a presidentially-declared disaster or by a disaster emergency declared by the Governor.
- The Budget allows the Commissioner to abate the penalty for a corporation's underpayment of estimated tax, where the corporation was impacted by casualty, disaster, or other unusual circumstances and "the imposition of such addition to tax would be against equity and good conscience." Notably, the Commissioner already had this power with respect to personal income tax filers.

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Motor Fuel Tax Reporting

- The Budget requires distributors of motor fuel and diesel motor fuel to collect, report, and remit taxes to the Tax Department on the sale of any gallon of fuel, including additional gallons resulting from temperature fluctuations that cause the product to expand in volume.
- Fun fact: X gallons of fuel purchased by a distributor during cold weather turns in to X + Y gallons as the weather gets warmer. So, distributors can end up purchasing less fuel than they sell!
- In the past, distributors could collect additional tax on the sold fuel due to such temperature fluctuations and subsequent expansions, but were arguably not required to remit additional tax on the expansion gallons.

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REITs

- The Budget extends reduced rates for conveyances to real estate investment trusts under the New York State real estate transfer tax and the New York City real property transfer tax until September 1, 2026.

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What's Out

- PIT Tax Rate Increases
- Mandatory NYS S Elections
- New Taxes on Digital Products

No Personal Income Tax Rate Changes

- The Senate and Assembly's respective Budget proposals included increased New York personal income tax rates, including a 10.8% tax rate for income levels between \$5 million and \$25 million and an 11.4% tax rate for income levels over \$25 million.
- Governor Hochul was vocally opposed to these increased rates.
- Tax flight?

S-Corp Elections

- Governor Hochul's original budget proposal included an amendment so that all federal S corporations would be automatically treated as S corporations for New York tax purposes, unless the corporation was a qualified New York manufacturer under Tax Law § 210(1)(a)(vi) and elected New York C corporation status on its tax return. This provision was omitted from the Budget.
- In January, we saw a similar bill passed in New Jersey (P.L. 2022, c. 133), which eliminated the requirement for federal S corporations to affirmatively elect New Jersey S corporation status and included an opt-out provision.
- As of January 1, 2023, unless an S corporation in New Jersey takes affirmative steps to opt out (which requires the consent of 100% of the shareholders), the corporation is automatically treated as a New Jersey S corporation.

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Sales Tax on Digital Products

- The Assembly's budget proposal (A.3009-B, Part EE) included a new sales tax on streaming entertainment and digital products, to fund MTA transportation systems.
- The proposal, if included in the Budget, would have imposed a 4% sales tax on digital products, including certain popular streaming services, apps, games, music, podcasts, and audiobooks. The Assembly's proposal, however, was omitted from the final Budget. Concerns were raised over the proposal's constitutionality and its conformity with the Internet Tax Freedom Act.
- A court challenge of Maryland's version of the digital products tax is ongoing.

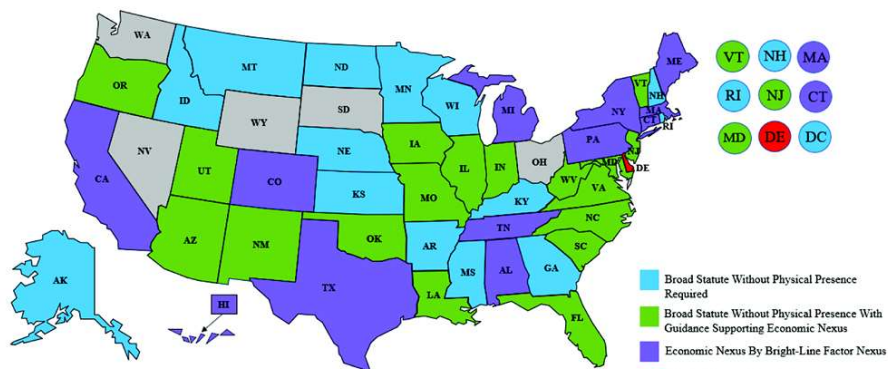
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Hot Topics for 2023-2024

- New Corporate Regulations
- NOLS and EBLs
- New DTF Outreach

Expanded Nexus – More States to Consider

Figure 5.
State Corporate Income Tax Economic Nexus Standard



Disclaimer: This information should be used for general guidance and not relied upon for compliance.
Source: Council On State Taxation.

Hot Topics: New Corporate Tax Regulations

- NYS has been working on draft regulations on nexus, apportionment, combined reporting, and discretionary adjustments since 2015
- Final regulations were at long last formally proposed under the Administrative Procedure Act. Comment period closed 10/10/23.
- Available at:
https://www.tax.ny.gov/bus/ct/corp_tax_reform_draft_regs.htm
- Detailed rules for apportioning categories of receipts, along with different rules for business vs. individual customers
- Proposed Regulations indicate that they will be applied retroactively

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Hot Topics: New Corporate Tax Regulations

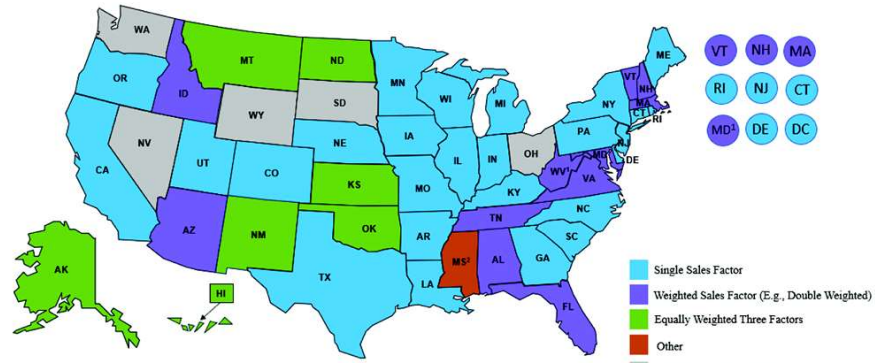
- Key apportionment issues/changes:
 - No category of “unusual events” is included in the final regs.
 - The regulations overall have sought to reduce categories of income that are excluded from the receipts factor
 - Sales of intangible property sourced to the location where the value accumulated. Goodwill would be apportioned based on an average three-year Business Allocation Factor (BAF) unless facts and circumstances suggest another sourcing period
 - Cryptocurrency and other digital currencies were removed from the definition of a digital product
 - The final regulations remain silent on how income from these assets would be apportioned

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Single Sales Factor

Figure 3.
2021 State Corporate Income Tax Apportionment Formula



Disclaimer: This information should be used for general guidance and not relied upon for compliance.

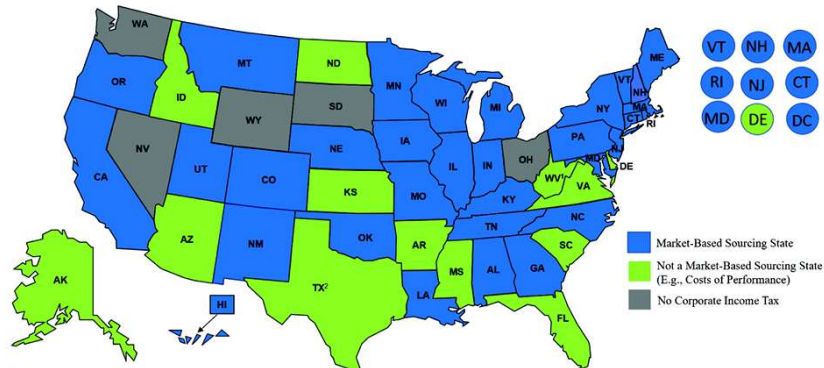
Source: Council On State Taxation.

¹Maryland & West Virginia: single sales factor for tax years after 2022.

²Mississippi: industry-specific formulas, with single sales factor if no specific formula is specified.

Market Based Sourcing

Figure 4.
2021 Market-Based Sourcing for Services



Disclaimer: This information should be used for general guidance and not relied upon for compliance.

Source: Council On State Taxation.

¹West Virginia: Market-based sourcing for tax years after 2022.

²Texas: Receipts from the sale of services are sourced to Texas if the service is performed in Texas. If the service is performed outside of Texas, the receipts are sourced to Texas based on the fair value of services rendered for the state.

Hot Topics: New Corporate Tax Regulations

- The regulations acknowledge Public Law 86-272 protections for corporations whose activities in the state are limited to mere solicitation for the sale of TPP.
- But the proposed regulations would drastically limit the scope of the protections of P.L. 86-272.
- The proposed regulations and examples are largely consistent with MTC amended application of P.L. 86-272 to internet sales (issued August 2021).

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Hot Topics: New Corporate Tax Regulations

- 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 86-272

- 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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Public Law 86-272

- 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/htmldocuments/2022tns2-3%20Endres%20Doyle%20Reilly.pdf>.

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Contract Manufacturing

- A Qualified New York Manufacturer (QNYM) is eligible for a zero tax rate
- The regulations limit the application for corporations that contract out manufacturing so that it can only consider the assets it owns and its own employees in determining whether it is a QNYM
- Receipts by the contract manufacturer are not eligible QNYM receipts
- Each member of a combined group must qualify on a separate basis. *Matter of Raytheon Company*, DTA No. 829740, ALJ, Mar. 16, 2023.

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Hot Topics: NOLs and EBLs

- NY's decoupling and re-coupling with the IRC has created unintended consequences, particularly for NOLs and the EBL limitation.
- Prior to 2018, the Code permitted NOLs to be carried back for two years and forward for twenty years, and New York followed this rule for individuals.
- Under the Federal Tax Cut and Jobs Act (TCJA), federal NOLs generated after 2017 were permitted to be carried forward only, and not back, and they could be carried forward indefinitely. But the amount of the deduction for NOLs carried forward was limited to 80% of the taxpayer's taxable income.
- For individuals, New York's conformity to the Code resulted in this change being automatically applicable to non-corporate taxpayers

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Hot Topics: NOLs and EBLs

- The FTCJA also created an excess business loss limitation (“EBL”).
- As originally enacted in the FTCJA, the EBL was intended to apply for the 2018 through 2025 tax years and allowed non-corporate taxpayers to use no more than \$250,000 for separate return filers (\$500,000 for joint return filers) of business losses as an offset against nonbusiness income (e.g., compensation).
- A business loss in excess of the limit converted to an additional net operating loss that could be claimed in future years, although still limited by the 80% of taxable income cap.

Hot Topics: NOLs and EBLs

- Then came the pandemic, and with it the CARES Act, which modified the NOL deduction for taxable years beginning in 2018 through 2020.
- NOLs from 2018, 2019 and 2020 were permitted to be carried back for five years and the NOLs could offset 100% of taxable income for the respective years.
- By temporarily eliminating both the carry-back prohibition and the 80% of taxable income cap that was part of the FTCJA NOL regime, the relaxed NOL rules created significant refund opportunities for many taxpayers.

Hot Topics: NOLs and EBLs

- Similarly, the CARES Act retroactively eliminated the EBL limitation for tax years 2018 and 2019, by retroactively deferring the effective date for the EBL to tax years beginning after December 31, 2020.
- So the first year the EBL was in effect was the 2021 tax year and it was extended an additional year through 2026.
- Thus for 2018-2020, non-corporate taxpayers could deduct excess business losses without limitation until 2021.

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Hot Topics: NOLs and EBLs

- For the years prior to 2022, changes to the Code made after March 1, 2020 were ignored for New York personal income tax purposes.
- But, critically, the “it’s-as-if-the-CARES-Act-never-happened” fiction wasn’t a forever thing.
- The fiction applied in New York only until 2022, at which time New York reverted to the Code, as written.
- The NYS tax return forms for the 2022 tax year indicate that the Department of Taxation and Finance is adhering to the view that The CARES Act changes are to be ignored by individual taxpayers in New York only until 2022. And that’s a problem...

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Hot Topics: NOLs and EBLs

- Terry Taxpayer incurs an NOL of \$500,000 in 2019. For federal income tax purposes, she can carry back the loss to 2018 (or another open prior year). In this example she fully utilizes the NOL to offset most of her 2018 income. For federal income tax purposes, Terry files an amended return claiming a refund of most of the tax she paid for the 2018 tax year.
- For New York purposes, however, she is prohibited from carrying back the NOL to 2018 because New York decoupled from the CARES Act. Instead, for New York purposes she can carry the loss forward to 2020 and 2021.

Hot Topics: NOLs and EBLs

- Let's assume that in the no-CARES Act alternative universe, Terry has pre-NOL deduction income of only \$100,000 in 2020 and \$150,000 in 2021.
- In 2020, she can use the 2019 NOL carry forward to offset \$80,000 (i.e. 80% of \$100,000) of her income.
- And in 2021, she can use the remaining 2019 NOL carry forward to offset \$120,000 (i.e. 80% of \$150,000) of her income.
- So, as of the end of 2021, \$300,000 of Terry's 2019 NOL remains unused in New York.

Hot Topics: NOLs and EBLs

- In 2022, New York recouples to the current Code.
- The current Code permits an unlimited carry forward of NOLs. But, for federal purposes there is no NOL to be carried forward; Terry used all of her federal NOL in 2018.
- And New York's 2022 personal income tax returns won't allow Terry to claim a New York NOL if she doesn't have any federal NOL. Since Terry's NOL has already been fully consumed for federal tax purposes, i.e. the federal NOL deduction is zero, does the balance of the NOL "disappear" for New York purposes?
- It is clear from the tax returns that the Department is taking that position.

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Hot Topics: Need Help from the NYS DTF?

- You can now email the Department.
- Go to the Tax Professionals webpage on the DTF website:
<https://www.tax.ny.gov/tp/>
- Click on the "Ask a Question" link:
<https://nystax.custhelp.com/app/ask/c/143>
- "Due to high email volume, it could take up to 3 business days to respond to your e-mail question."
- Also, be sure to use the Tax Professional's hotline when calling the Department – wait times are reduced: 518-457-5451

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Hot Topics: Need Help from the NYS DTF?

- 2023 changes featured on the NY Tax Department's website:
 - <https://www.tax.ny.gov/legal/>
 - <https://www.tax.ny.gov/legal/sales-misc-changes-2023.htm>
- Tax filing calendar page available on the NY Tax Department's website: <https://www.tax.ny.gov/help/calendar/>

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New Resident and Nonresident Allocation Audits/Telecommuting



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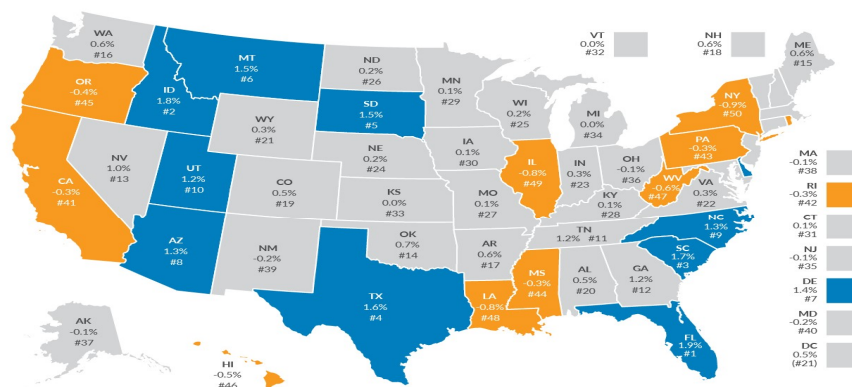
Americans Moved to Low-Tax States in 2022

- The U.S. population grew 0.4 percent between July 2021 and July 2022, an increase from the previous year's historically low rate of 0.1 percent.
- New York's population shrunk by 0.9 percent between July 2021 and July 2022.
- According to the Tax Foundation's multistate analysis, "This population shift paints a clear picture: people left high-tax, high-cost states for lower-tax, lower-cost alternatives."
- "Moving data from U-Haul and United Van Lines . . . speaks more directly to cross-border migration and is confirmatory. Both companies see states like California, Illinois, Massachusetts, and New York as the biggest losers, while states like Texas, Florida, and Tennessee are among the largest net gainers."
- <https://taxfoundation.org/state-population-change-2022/>

Americans Moved to Low-Tax States in 2022

State Population Change in 2022

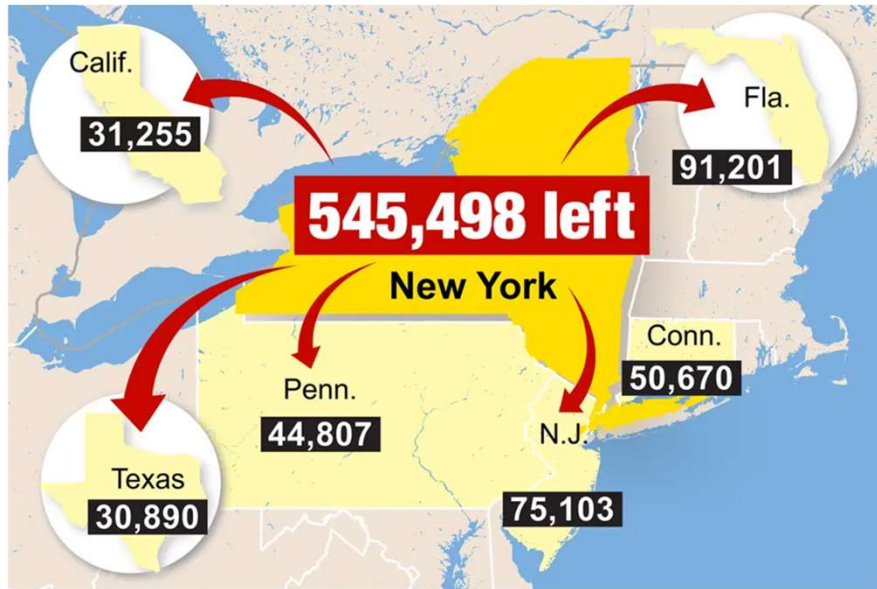
State Migration Patterns, from Most Inbound to Most Outbound, 2022



Note: D.C.'s rank does not affect states' ranks, but the figure in parentheses indicates where it would have ranked if included.
Source: U.S. Census Bureau.

- Top 10 States for Inbound Migration
- Top 10 States for Outbound Migration

Americans Moved to Low-Tax States in 2022

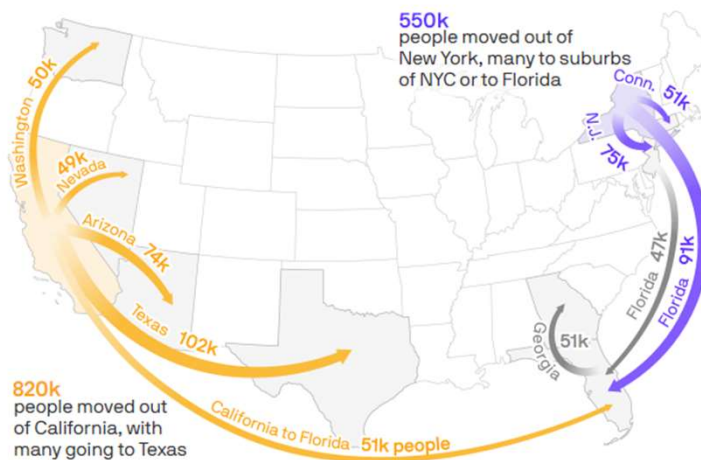


NY Post:
2023 Tristate
Population
Analysis



Americans Moved to Low-Tax States in 2022

Top ten moves between states, 2022



Data: U.S. Census American Community Survey; Chart: Erin Davis/Axios Visuals; Editor's note: This chart has been corrected to state that many Californians moved to Texas, not a majority.



Background

- The State Wealth-Tax Alliance: “The ... tax alliance emerged late last week when lawmakers from eight states unveiled plans to target wealthy residents. California, New York, Illinois, Maryland, Hawaii, Minnesota, Connecticut and Washington state are all represented, and several of the sponsors have already released bills.” Jan. 24, 2023. <https://www.wsj.com/articles/the-state-wealth-tax-alliance-progressive-states-coordinate-illinois-new-york-washington-11674600250>.
- 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/>.
- “More New Yorkers moved to Florida in 2022 than any year in history in staggering exodus.” <https://nypost.com/2023/01/19/more-new-yorkers-moved-to-florida-in-2022-than-any-year-in-history/>.

New York City Numbers

- The NYC Independent Budget Office (IBO) released some startling figures in early December 2022. See: <https://www.thecity.nyc/economy/2022/12/6/23497265/nyc-tax-data-high-earners-drop-2020>.
- The analysis revealed:
 - the number of New Yorkers making between \$150,000 and \$750,000 declined by almost 6% between 2019 and 2020
 - and the number of those making more than \$750,000 dropped by almost 10%.
- The 41,000 filers in the top 1% pay just over 40% of all income taxes.
- The 450,000 in the top 10% contribute almost exactly two-thirds of the city’s income tax revenue.
- The remaining 3.3 million taxpayers pay the final third.

Residency Basics

➤ Why do we care?

- The Importance of Residency Status
 - The “One” Thing
 - Nonresidents still pay tax on sourced income
- 17 states still impose an estate or inheritance tax
- Estate/Inheritance Taxes
 - Most States’ Top Rate: approximately 16%
 - Some go up to 20%
 - Local taxes – e.g., NYC – all or nothing!

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Residency Basics

State	Top Income Tax Rate	Estate/Inheritance Tax
California	12.3% + 1% on income over \$1 million	No
New York	10.9% NYS - 3.876% NYC (14.776% combined)	Yes
New Jersey	10.75%	Yes
D.C.	10.75%	Yes
Oregon	9.90%	Yes
Minnesota	9.85%	Yes
Massachusetts	9%	Yes
Vermont	8.75%	Yes
Wisconsin	7.65%	No
Maine	7.15%	Yes
Connecticut	6.99%	Yes

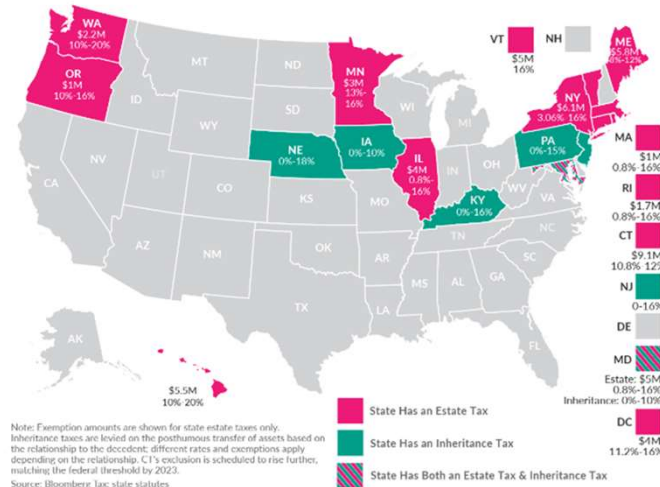
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Residency Basics

Does Your State Have an Estate or Inheritance Tax?

State Estate & Inheritance Tax Rates & Exemptions in 2022



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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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New York Residency Update

➤ Residency in a Pandemic – Three Main Issues:

1. You may have left your home during the height of the pandemic in 2020, but was that enough...?
 - The “Leave and Land” Rule is Key: must “stick the landing”
 - 20/20 hindsight on 2020 Moves – are you already back “home”
 - Residency is not just “6 months-and-a-day.”
2. Maybe you did, in fact, “stick the landing” and changed your permanent home....but when?
3. Be mindful of having spent more time than usual in another state! Dual-residency problem?
 - No easing of day-counting rules during the pandemic
 - Watch out for problems in vacation home states

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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.

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
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

New York Audit Initiatives



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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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New York Audit Initiatives

➤ NYS: Industry Leader!

- 300 Field Auditors
- 5,000+ field audits per year
- More than 100,000 “desk audits” in 2020-21 to catch Covid moves and telecommuters
- Audit Lottery? Close to 100% chance of audit at higher incomes
- 3-year SOL: so audit could come years after the move

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Audit Letters



Request for Information

Notice date: [REDACTED]/2021
Tax type: Personal Income Tax
DLN: PH [REDACTED]
Case ID: X [REDACTED]
Tax year: 2020
Form number: IT-203

We need more information by December 1, 2021 about your 2020 New York State income tax return.

Why did you get this letter?

We need to verify your residency status.

If you either: (A) are domiciled in New York State, OR (B) maintained a permanent place of abode AND spent 184 days or more in New York State, you must file a resident tax return, Form IT-201, regardless of the location where you may have been working or telecommuting from in 2020.

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).

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Audit Letters

What must you do?

1. You must complete the enclosed Nonresident Audit Questionnaire (Form AU-262.3) to explain your residency status in New York City and/or New York State.

You must support your residency status claimed on your 2020 personal income tax return by providing the following information, as applicable:

- A copy of your ending lease agreement (with lease termination letter, if applicable) or home sale documents.
- A copy of your new lease or home purchase agreement.
- Copies of any moving receipts or other records to support your move.

You must also 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.fax.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.

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 Service). 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 December 15, 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?

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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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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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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.

2022/2023 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-282.55, 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.

2022/2023 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.

2022/2023 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

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: _____

2022/2023 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)



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

The “Convenience of the Employer” Rule

- 6 states (CT, DE, NE, NJ, NY, PA) have some form of a “Convenience Rule.”
- Nuances:
 - CT’s and NJ’s rule only applies if the other state is a “Convenience State.”
 - NJ’s rule is brand new (July 1, 2023) and only applies to AR, DE, NE, and NY. It does not apply to PA due to a reciprocity agreement, and it does not apply to CT because that state’s rule only applies if the other state imposes a general convenience rule. See: <https://www.state.nj.us/treasury/taxation/newlegislation2023.shtm> and <https://www.nj.gov/treasury/taxation/conveniencerulefaq.shtm>.
 - 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.

Convenience Rule States

<p>Connecticut Conn. Gen. Stat. § 12-711(b)(2)(C)</p>	<p>“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 if such person’s state of domicile uses a similar test.”</p>
<p>Delaware 2020 Schedule W 30 Del. C. § 1124(b).</p>	<p>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>”</p>
<p>New Jersey P.L.2023, c.125 was enacted on July 21, 2023, effective Jan. 1, 2023</p>	<p>Under the convenience rule, a nonresident taxpayer’s employee compensation from a New Jersey employer for the performance of personal services is sourced to the employer’s location (New Jersey) if the employee is working from an out-of-state location (e.g. at home in their resident state) for their own convenience rather than for the necessity of their employer.</p> <p>In determining whether compensation earned by a nonresident telecommuting for a New Jersey employer will be deemed New Jersey sourced income, New Jersey will apply a similar rule which would be the same as the triggering state’s rule. For example, compensation earned by a New York resident telecommuting for a New Jersey employer will be deemed New Jersey sourced income by applying the New York “convenience of the employer” test.</p>

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

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

- Employers are going to increasingly have to deal with these convenience issues and some interesting questions are arising.
- What happens if an employer no longer has a physical office?
- Are there any nexus or tax calculation issues for allowing employees to telecommute?

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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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Sales Tax Hot Topics

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Sales and Use Tax: A High-Stakes Gamble

Sales and Use Tax Characteristics:

- Ubiquity
- Onerous Record Keeping
- Aggressive Audit Methodologies
- Pyramiding of Tax Liabilities
- Burdensome Penalties and Interest
- Personal Liability
- Advanced Audit Targeting
- Confusion!



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Four Examples of Sales Tax Fun

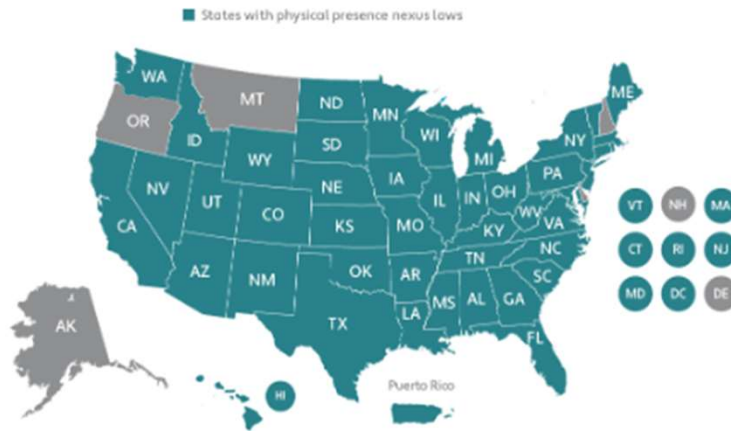
- Software maintenance contracts.
- Build-out of office space
- Medical Equipment and Supplies (bandages, splints, syringes, crutches).
- The Tax Department HATES Halloween!! Pumpkins and Costumes.



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On Top of That, Nexus Broadens

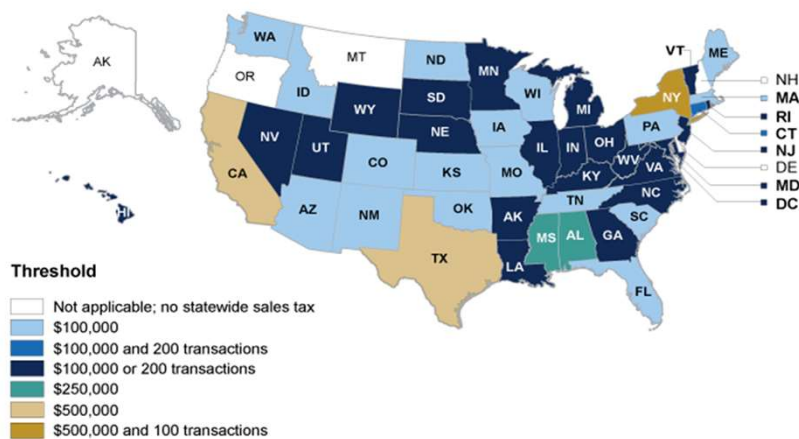
- We went from this:



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On Top of That, Nexus Broadens

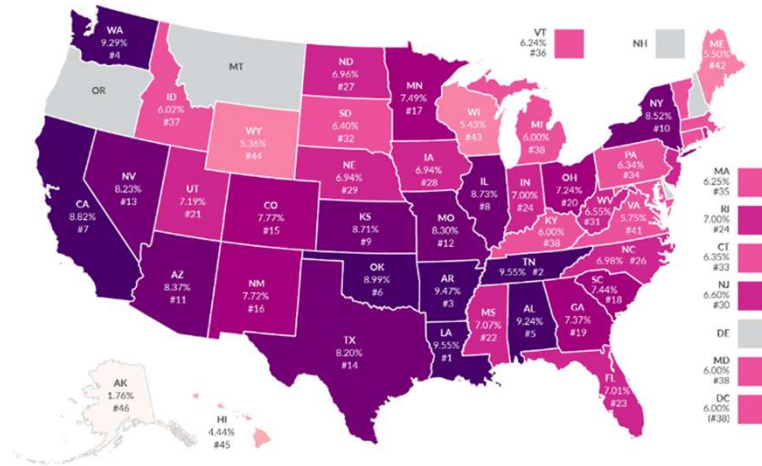
- And moved to this:



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Source: GAO analysis of state laws. | GAO-22-106016

Sales and Use Tax Rates



Is Physical Presence Dead?

- NO!!!!
- Economic presence only enters the analysis when the vendor has no physical presence in a state.
- For example, if a business has a salesperson who regularly enters state X, that business will have nexus in state X even if its sales are below state X's thresholds (e.g., sales into the state amount to only \$30K)

State Wayfair Thresholds Defined

State	Sales Measured	Transactions Measured
Alabama	Retail sales of tangible personal property, including taxable and non-taxable sales, but excluding wholesale sales, sales for resale, and sales made through a marketplace facilitator that is collecting tax on behalf of the seller.	N/A
Arizona	Gross proceeds of sales or gross income, including gross receipts from the sale of tangible personal property or service, or both, excluding sales made through a marketplace facilitator.	N/A
Arkansas	Sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas, excluding tax exempt goods and services and sales made through a marketplace facilitator.	Not defined, but excluding sales made through a marketplace facilitator.
California	Sales of tangible personal property in the state or for delivery in the state, including by sales by affiliates/ subsidiaries and nontaxable sales such as sale for resale, as well as sales made through a marketplace facilitator.	N/A
Colorado	Sales of tangible personal property, commodities or services in the state, excluding sales made through a marketplace facilitator.	N/A
Connecticut	Sales price from retail sales of tangible personal property and taxable services, including sales made through a marketplace facilitator	Not defined, but including sales made through a marketplace facilitator
District of Columbia	Gross receipts from retail sales of tangible personal property, taxable services and digital goods, including sales made through a marketplace facilitator.	The sale in any quantity or quantities of any tangible personal property or service.
Florida	Taxable sales. Marketplace sales excluded from the threshold for individual sellers.	Not defined
Georgia	Gross revenue from retail sales of tangible personal products delivered into the state electronically or physically, excluding sales for resale.	Not defined
Hawaii	Gross income or gross proceeds from sale of tangible personal property in the state, services used or consumed in the State, or intangible property used in the State. If a marketplace seller and the marketplace facilitator have economic nexus, then it is the gross income or gross proceeds from: sales of tangible personal property made directly into the State (not through a marketplace facilitator); sales of tangible personal property made through any marketplace facilitator if the marketplace seller sends the property into the State, either directly to the purchaser or to a marketplace facilitator for resale; and sales of intangible property and services that were made into the State, regardless of whether the sale was made through a marketplace facilitator, if the intangible property or services are ultimately used or consumed in the State.	Not defined

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State Wayfair Thresholds Defined (cont.)

State	Sales Measured	Transactions Measured
Idaho	\$10,000 - Total sales to Idaho buyers through referral agreements. \$100,000 - Cumulative gross receipts from sales of tangible personal property delivered into Idaho.	N/A
Illinois	Sales of tangible personal property in the state, including exempt sales, but excluding sales for resale, occasional sales, sales not subject to Retailers' Occupation Tax, and sales of tangible personal property that is required to be registered with an agency of the state that are made from locations outside Illinois to Illinois purchasers. As of 1/1/2021 it will not include sales made through a marketplace facilitator.	Transactions that are documented on separate invoices, regardless of the manner in which the tangible personal property is delivered to the purchaser. As of 1/1/2021 it will not include sales made through a marketplace facilitator.
Indiana	Gross revenue from any combination of: the sale of tangible personal property delivered into Indiana; a product transferred electronically into Indiana; or a service delivered in Indiana. Except where the marketplace facilitator has not met the thresholds, the sales of the seller made through the marketplace are not counted toward the seller.	Not defined but where the marketplace facilitator has not met the thresholds, the transactions of the seller made through the marketplace are counted toward the seller.
Iowa	All retail sales of tangible personal property, services, or specified digital products sold into Iowa or for delivery into Iowa, including taxable and exempt sales and sales made by a remote seller by any means, including sales made through a marketplace.	N/A
Kansas	Gross sales	N/A
Kentucky	Gross receipts derived from the sale of tangible personal property or digital property delivered or transferred electronically to a purchaser in the state, including sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.
Louisiana	Gross revenue of sales of tangible personal property, products transferred electronically, or services delivered into the state, including exempt sales.	Not defined
Maine	Gross revenue from sales of tangible personal property or taxable services delivered in or into the state, including sales exempt from tax.	Each invoice generated from a Maine sale is considered a separate transaction.
Maryland	Gross revenue from the sale of tangible personal property or taxable services delivered in the state, including tax-exempt transactions and Maryland tax-exempt revenue, e.g. sales for resale, sales to tax exempt entities, and sales of exempt items, as well as sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.

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State Wayfair Thresholds Defined (cont.)

State	Sales Measured	Transactions Measured
Massachusetts	Cookie: Transactions completed over the Internet and made sales resulting in a delivery into Massachusetts. 100k or 200: Gross revenue from all sales of tangible personal property or services delivered into the state, including sales exempt from tax, but excluding sales made through a marketplace facilitator.	Not defined, but including sales made through a marketplace facilitator.
Michigan	Sales of tangible personal products or services, including taxable and non-taxable and exempt, as well as sales made through a marketplace facilitator.	N/A
Minnesota	Retail taxable and non-taxable sales of tangible personal property and services, including exempt sales and sales made through any marketplace, the seller's own website, and through other sources, but excluding sales for resale.	Not defined, but including sales made through a marketplace facilitator
Mississippi	Sales into the state, including wholesales and those taxable under sales and use statutes.	A retail sale is one sales transaction. One sale into the state may contain 10 items for one customer but that transaction counts as one retail sale.
Missouri	Taxable sales	N/A
Nebraska	Total retail sales of property, excluding sales from resale, sublease, or subrent, but including sales made through a marketplace facilitator	Not defined
Nevada	Gross revenue from retail sale of tangible personal property.	Not defined
New Jersey	Gross revenue from sales of tangible personal property, specified digital products, or taxable services, including nontaxable retail sales and sales made through a marketplace facilitator, but excluding sales for resale.	Not defined, but including sales made through a marketplace facilitator.
New Mexico	Taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to the state.	N/A
New York	The amount received for all sales of tangible personal property delivered into New York, whether taxable or exempt, without any deductions for expenses, and including sales made through a marketplace facilitator.	Each invoice, sales slip, contract, or other memorandum of sale issued for the sale of tangible personal property delivered into New York State, whether taxable or exempt, including sales for resale and sales made through a marketplace facilitator.

State Wayfair Thresholds Defined (cont.)

State	Sales Measured	Transactions Measured
North Carolina	Total of the sales price of all sales of tangible personal property, digital property, and services sourced to NC including taxable sales, sales for resale, exempt sales, nontaxable sales, and marketplace-facilitated sales.	Not defined but including sales made through a marketplace facilitator.
North Dakota	Gross sales of tangible personal property and other taxable items delivered in the state.	N/A
Ohio	Gross receipts from the sale of tangible personal property for storage, use, or consumption in this state or from providing services the benefit of which is realized in this state.	Not defined
Oklahoma	Aggregate sales of tangible personal property, excluding sales made through a marketplace facilitator where the marketplace facilitator collects the tax.	N/A
Pennsylvania	Gross sales on all channels including taxable, exempt, and marketplace sales	N/A
Rhode Island	Gross revenue from the sale of tangible personal property, prewritten computer software delivered electronically or by load and leave, vendor-hosted prewritten computer software, and/or taxable services.	Not defined
South Carolina	Total gross revenue from all sales of tangible personal property delivered into South Carolina, including all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property; the total gross revenue from all sales of products transferred electronically and services delivered into South Carolina, whether or not the transfer of such product is subject to the South Carolina sales and use tax, including sales made through a marketplace facilitator	N/A
South Dakota	Gross revenue from the sale, rental or lease of tangible personal property, any product transferred electronically, or services delivered into the state.	Not defined
Tennessee	Gross retail sales of products and services, including taxable and exempt sales, but excluding sales for resale.	N/A
Texas	Gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state, including taxable, nontaxable, sales for resale and exempt sales, but excluding sales through a marketplace facilitator if it collected the tax.	N/A
Utah	Gross revenue from the sale of tangible personal property, any product transferred electronically, or services for storage, use, or consumption in the state	Not defined

State Wayfair Thresholds Defined (cont.)

<u>State</u>	<u>Sales Measured</u>	<u>Transactions Measured</u>
Vermont	All sales of tangible personal property products transferred electronically into the state including taxable and nontaxable sales and sales made through a marketplace facilitator.	A sale transaction that is documented on a unique invoice, regardless of the manner in which the tangible personal property is delivered to the purchaser, and includes sales made through a marketplace facilitator
Virginia	Gross revenue from retail sales of taxable tangible personal property or taxable services in the state, excluding sales made through a marketplace facilitator, but sales made by commonly controlled persons shall be aggregated.	Not defined but excludes sales made through a marketplace facilitator
Washington	Cumulative gross receipts of all gross income sourced to the state, including exempt sales and sales made through a marketplace facilitator.	N/A
West Virginia	Gross revenue from sale or lease of tangible personal property, custom software or a taxable service, including both taxable and non-taxable transactions.	Total transactions with West Virginia destinations regardless of whether the transaction is subject to or exempt from sales and use tax.
Wisconsin	Gross sales including taxable and nontaxable sales of tangible personal property and services, including sales made through a marketplace facilitator	Each invoice is considered a "separate sale transaction", and includes taxable and nontaxable sales, and those made through a marketplace facilitator. An invoice that has multiple products is considered one separate sale transaction. For leases and licenses, each required periodic payment is a separate sale transaction. A deposit made in advance of a sale is not a sale transaction.
Wyoming	Gross sales, which includes the total revenue in Wyoming including taxable, exempt and wholesale sales.	Each invoice is a transaction. If the sale involves a yearly subscription and the purchaser is able to make payments over time, this is one transaction.

State Wayfair Measurement Period

<u>State</u>	<u>The Measurement Period</u>
Alabama	Previous calendar year
Arizona	Previous or current calendar year
Arkansas	Previous or current calendar year
California	Previous or current calendar year
Colorado	Previous or current calendar year
Connecticut	The twelve-month period ended on the September thirtieth immediately preceding the monthly or quarterly period with respect to which such person's liability for tax
District of Columbia	Previous or current calendar year
Florida	Previous calendar year
Georgia	Previous or current calendar year
Hawaii	Current or immediately preceding calendar year
Idaho	Previous or current calendar year
Illinois	Determined on a quarterly basis, ending on the last day of March, June, September, and December, whether either threshold was met in the preceding 12-month period.
Indiana	Previous or current calendar year
Iowa	Immediately preceding or current calendar year
Kansas	Current or immediately preceding calendar year
Kentucky	Previous or current calendar year
Louisiana	Previous or current calendar year
Maine	Previous or current calendar year
Maryland	Previous or current calendar year

State Wayfair Measurement Period

<u>State</u>	<u>The Measurement Period</u>
Massachusetts	100K: For the period beginning October 1, 2019 through December 31, 2019, the preceding 12 months, October 1, 2018 to September 30, 2019. For 2020 onward, the preceding calendar year but if the remote retailer passed \$100,000 in sales after November 1 of the prior year, the requirement is for the period beginning as of the first day of the first month beginning two months after the month in which the \$100,000 threshold is exceeded. Cookie: After 2018, the preceding calendar year. For the period beginning October 1, 2017 through December 31, 2017, during the preceding 12 months, October 1, 2016 to September 30, 2017.
Michigan	Previous calendar year
Minnesota	The twelve-month period ending on the last day of the most recently completed calendar quarter
Mississippi	Prior 12 month period
Missouri	Previous 12 month period
Nebraska	Previous or current calendar year
Nevada	Previous or current calendar year
New Jersey	Current or prior calendar year
New Mexico	Previous calendar year
New York	Immediately preceding four sales tax quarters - The sales tax quarters are: March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28/29
North Carolina	Previous or current calendar year
North Dakota	Previous or current calendar year
Ohio	Previous or current calendar year
Oklahoma	Preceding or current calendar year

State Wayfair Measurement Period

<u>State</u>	<u>The Measurement Period</u>
Pennsylvania	Preceding calendar year
Rhode Island	Preceding calendar year
South Carolina	Prior or current calendar year
South Dakota	Prior or current calendar year
Tennessee	Prior 12 month period
Texas	Preceding 12 calendar months. Initial period will be 7/1/2018 -6/30/2019
Utah	Prior or current calendar year
Vermont	Any 12-month period preceding the monthly period with respect to which that person's liability for tax under this chapter is determined
Virginia	Prior or current calendar year
Washington	Prior or current calendar year
West Virginia	Prior or current calendar year.
Wisconsin	Previous or current calendar year
Wyoming	Prior or current calendar year

When Do You Need to Register?

State	When You Need to Register Once You Exceed the Threshold
Alabama	January 1 following the year the threshold is exceeded
Arizona	The seller must obtain a TPT license once the threshold is met and begin remitting the tax on the first day of the month that starts at least thirty days after the threshold is met for the remaining of the current year and the next calendar year.
Arkansas	Next Transaction after meeting the threshold
California	The day you exceed the threshold
Colorado	The first day of the month after the ninetieth day the retailer made retail sales in the current calendar year that exceed \$100,000
Connecticut	October 1 of the year in which you cross the threshold on September 30
District of Columbia	Next transaction
Florida	Next transaction (state doesn't specify)
Georgia	Next Transaction after meeting the threshold
Hawaii	The first of the month following when the threshold is met.
Idaho	Next transaction (state doesn't specify)
Illinois	The retailer shall determine on a quarterly basis whether they meet the criteria for the preceding 12-month period
Indiana	Next Transaction after meeting the threshold
Iowa	The first day of the next calendar month that starts at least 30 days from the day the remote seller first exceeded the threshold
Kansas	Next transaction
Kentucky	First of the month following 30 days after the threshold is met (60 days eff. 7/1/2021)
Louisiana	Within 30 days of exceeding the threshold, the remote seller must submit an application to the Louisiana Remote Seller Commission and must begin collecting state and local sales and use tax based upon actual applicable bases and rates on sales for delivery into Louisiana within 60 days.
Maine	First day of the first month that begins at least thirty days after the seller has exceeded the threshold.
Maryland	First day of the month following when threshold is met

When Do You Need to Register?

State	When You Need to Register Once You Exceed the Threshold
Massachusetts	First day of the first month that starts two months after the month in which the remote retailer first exceeded the \$100,000 threshold, in the first year that it exceeds the threshold
Michigan	January 1 following the year the threshold is exceeded
Minnesota	First day of the calendar month occurring no later than 60 days after meeting or exceeding the threshold
Mississippi	Next transaction
Missouri	Not more than three months following the close of the preceding calendar quarter
Nebraska	The first day of the second calendar month after the threshold was exceeded
Nevada	By the first day of the calendar month that begins at least 30 calendar days after they hit the threshold
New Jersey	Required to collect on first taxable sale, 30 day grace period to register
New Mexico	January 1 following the year the threshold is exceeded
New York	Register within 30 days after meeting the threshold and begin to collect tax 20 days thereafter
North Carolina	Next transaction* Update based on the 2021 SST Disclosed Practice 8 submitted by the state; this has changed from 60 days to next transaction
North Dakota	The following calendar year or 60 days after the threshold is met, whichever is earlier
Ohio	Next day after meeting the threshold
Oklahoma	The first calendar month following the month when the threshold is met

When Do You Need to Register?

<u>State</u>	<u>When You Need to Register Once You Exceed the Threshold</u>
Pennsylvania	April 1 following the calendar year when threshold was exceeded
Rhode Island	January 1 following the year the threshold is exceeded
South Carolina	The first day of the second calendar month after economic nexus is established
South Dakota	Next transaction
Tennessee	The first day of the third month following the month in which the dealer met the threshold, but no earlier than July 1, 2017
Texas	The first day of the fourth month after the month in which the seller exceeded the safe harbor threshold
Utah	Next transaction (state doesn't specify)
Vermont	First of the month after 30 days from the end of the quarter that you exceed the threshold
Virginia	Next transaction (state doesn't specify)
Washington	The first day of the month that starts at least 30 days after you meet the threshold
West Virginia	Next transaction (state doesn't specify)
Wisconsin	Next transaction
Wyoming	Next transaction

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Sales Tax Hot Topics

- Software-as-a-Service and Digital / Technology Transactions
- Protective / Detective Services
- Use Tax for Professional Services Businesses
- Information / Advertising Services
- Artwork / Collectibles

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First Things First.....

- What digital products are subject to tax in NYS?
 - Canned Software – whether physically or electronically transferred or accessed (e.g., electronic download, SaaS, etc.). Tax Law § 1105(a) – really?
 - Canned Information Services – any information that comes from a common database (i.e., is not personal or individual to the purchaser and can be sold to other purchasers). Tax Law § 1105(c)(1), see also TSB-M-10(7)S.
 - IT Security Services – can be taxable as either remote use of software (firewalls, anti-spamware, anti-malware, etc.) or as a protective service. N.Y. Tax Law § 1105(c)(8); TSB-A-20(49)S; TSB-A-16(20)S; TSB-A-10(14)S.

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First Things First.....

- What digital products are NOT subject to tax in NYS?
 - eBooks, Digital Movies/Songs – provided they do not contain functionality that could allow them to be characterized as software or qualify as an information service. TSB-M-11(5)S; TSB-A-11(20)S.
 - Infrastructure as a Service – remote access of hardware (servers, CPUs, etc.) is not taxable. See TSB-A-15(2)S; TSB-A-17(21)S.
 - Data Hosting Services – generally not taxable, but be careful. Can it be taxable as access to software? TSB-A-16(19)S.
 - Software Maintenance – See Tax Law § 1115(o). But be careful: TSB-A-07(28)S.
 - Non-Fungible Tokens (NFTs) – not yet, but that's the next frontier....
 -

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The Primary Function Test

- But what if an otherwise nontaxable service has potentially taxable components?
- Enter the Primary Function Test.
- “...we cannot accept the Division's argument that the means by which a service is provided is the controlling factor in determining whether the subject service is taxable. To neglect the primary function of petitioners' business in order to dissect the service it provides into what appear to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature.” Matter of SSOV '81 Ltd. d/b/a People Resources, et al, DTA Nos. 810966, 810967, (TAT, Jan. 19, 1995).

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Matter of Beeline.com, Inc.

- In the Matter of Beeline.com, Inc., Division of Tax Appeals, DTA Nos. 829516, February 9, 2023:
 - The question was whether the taxpayer sold a taxable license to use software, or a nontaxable service of “matching” suppliers of temporary labor and customers needing such labor.
 - The taxpayer’s website highlighted how important the software was to the final product. According to the ALJ, “it is the software that streamlines, automates and integrates the entire bundle of services petitioner is selling.”
 - “...the ultimate goal was to provide customers a seamless, automated and efficient system of fulfilling and monitoring their temporary employment needs, and that required, as the contract reflects, utilization of the software technology license.”

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Matter of Yesware, Inc.

- In the Matter of Yesware, Inc., Division of Tax Appeals, DTA Nos. 829638, 829639 and 829640, September 29, 2022:
 - The ALJ held Yesware was selling an exempt information service and not licensing taxable software.
 - Yesware's service was storage of client data and provision of access to it through Yesware's website and browser extensions. The company tracks, processes, and analyzes data it receives from recipients of its clients' emails and generates individualized reports to assist clients with their email prospecting and customer engagement efforts.
 - Critically, the license agreement was for the license to use the service, and not a license of software.
 - The ALJ applied the "primary function" test to determine that Yesware's bundled product was more service than software. What Yesware's clients really wanted were the reports Yesware generated.
 - <https://www.dta.ny.gov/pdf/determinations/829638.det.pdf>

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Matter of Employment Screening Services, Inc.

- In the Matter of Employment Screening Services, Inc., Division of Tax Appeals, DTA No. 829702, October 6, 2022:
 - The ALJ held that the Petitioner's employee pre-screening services were not taxable as "protective or detective services". Petitioner provided screening services to employers, including verifying a prospective employee's federal and state criminal record, drug screenings, education, bankruptcies, etc.
 - The Judge reasoned the services could not be "detective" services, as Petitioner did not hold itself out as a detective service; nor was it licensed as a detective or private investigator. Nor did the services constitute "protective" service, since the services did not consist of watching, guarding and patrolling or similar functions:
 - "While it is acknowledged that petitioner's screening services provide some degree of assurance to its clients that they are screening out "bad actors," these services can hardly be considered the type of protective services that come within the purview of the statute."
 - The ALJ instead held the services constituted a form of "information service," but one that met the exclusion for information that is "personal and individual in nature".
 - <https://www.dta.ny.gov/pdf/determinations/829702.det.pdf>
 - PS – this taxpayer also sought to have the Tax Department to pay its legal fees, but its application was denied.

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Matter of Secureworks, Inc.

- In the Matter of SecureWorks, Inc., Tax Appeals Tribunal, DTA Nos. 828328 and 828329, February, 17 2022:
 - The Tribunal upheld the ALJ decisions which concluded that New York sales tax applies to certain online security services when such services are provided with respect to devices located in New York. The Tribunal found that most of the IT security services provided by the taxpayer were subject to New York sales tax as “protective and detective services” under N.Y. Tax Law § 1105(c)(8).
 - The taxable IT services generally included SecureWorks’ performance security “management” services and security “monitoring” services.
 - The Tribunal also concluded that certain ancillary SecureWorks offerings were not “protective and detective services,” but were taxable as “information services” under N.Y. Tax Law § 1105(c)(1). The Tribunal explained these information services did not qualify for New York’s “personal or individual in nature” exception because “[c]ustomization of publicly available information into a report does not render it personal or individual in nature.”
 - Lastly, the Tribunal concluded that only the “log retention service” was not a taxable “protective and detective service” because the taxpayer merely “ensur[es] the proper operation of a device so that it retains all of the events created on a network.”
 - <https://www.dta.ny.gov/pdf/decisions/828328and828329.dec.pdf>

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Matter of Breakdown Services, Ltd.

- In the Matter of Breakdown Services, Ltd., Division of Tax Appeals, DTA No. 829396, January 27, 2022:
 - The ALJ held that the taxpayer’s online casting facilitation service—helping casting agents find roles for film/television roles was similar to the dating service in SSOV’81. The taxpayer provided a forum through which casting directors and talent representatives could list and view roles and connect regarding those roles.
 - The record showed that the taxpayer was involved in the entire casting process, not just posting and providing access to information on roles, but assisting in facilitating connections and scheduling of auditions, etc.
 - The service included various software and information components, so SaaS was at issue, too.
 - BUT - “Clearly, the primary function of petitioner’s service is the facilitating of casting actors in acting roles, which is an unenumerated, nontaxable service.”
 - <https://www.dta.ny.gov/pdf/determinations/829396.det.pdf>

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Matter of Lender Consulting Services, Inc.

- In the Matter of Lender Consulting Services, Inc., Division of Tax Appeals, DTA No. 829198 December 2, 2021
 - ALJ determined the primary function/object of the Petitioner's environmental risk reports sold to commercial lenders was a professional opinion regarding risk of environmental contamination not merely a sale of the underlying information on which the opinion was based.
 - This was the case even though the "reports" often contained hundreds of pages of common database information on a parcel and only several pages explaining the resulting risk opinion.

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Primary Function Takeaways

- Define the product appropriately – be specific and technical.
 - Emphasize the aspects of the service/product that are not automated or that require employee interaction. Too often these are left out of or not adequately described in contracts and invoicing.
 - Avoid problematic buzzwords like software, technology, platform, SaaS, licenses, etc.
 - Focus on nontaxable services where appropriate: data processing, logistics management, computing power, data storage, advertising services.
 - This is about who "uses" the software; the service provider or the customer?
 - But ultimately, the facts of the situation will govern. If it quacks like a duck.....

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Primary Function Takeaways

- Speak with one voice
 - Make sure the following items all define the product consistently:
 - Books & records
 - Tax returns
 - Contracts
 - Invoices
 - Marketing brochures
 - Website material
 - Regulatory filings
 - Client deliverables

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Enforcement/Audit Issues

- How does a business get chosen for audit?
 - Audits of other taxpayers
 - Whistleblower Issues
 - NY's CISS program
 - Corporate tax return sales v. sales tax return sales
 - Consistent taxable percentage
 - Drastic changes in filing pattern
 - New "self-audit" letters based on ratios and "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
 - Cash/credit card ratio out of sync with similar businesses
 - Speeding and parking tickets
 - The pre-audit analysis (auditors have info before taxpayer knows an audit is underway)



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Initial Audit Letter

 **Department of Taxation and Finance**
Transaction Field Audit Bureau - Buffalo District Office
77 Broadway, Suite 300, Buffalo, NY 14203-1642

March 17, 2023

Initial Meeting

Taxpayer ID: [REDACTED]
Audit Period: 12/01/2018 - 11/30/2022
Tax Article(s): 28 & 29
Case ID(s): [REDACTED]

We've scheduled an audit of your New York State Sales and Use Tax records.

A Tax Department auditor, Mrs. Lisa Massey, will be at your place of business on **May 2, 2023 at 9:00 AM** to begin the audit.

Please call your auditor, Mrs. Lisa Massey, at (716) 855-5335 to confirm this initial conference.

Please confirm receipt of this Information Document Request (IDR) by either contacting your auditor by phone at the number listed above or returning an initialed copy of this letter. If not using U.S. Mail, see Publication 55, Designated Private Delivery Services.

What to expect

In a sales and use tax audit, Tax Department auditors will review your books and records to confirm that you've complied with all applicable tax laws. At the initial conference, the auditor can answer any questions you may have about the audit process.

To learn more, see the enclosed Publication 130F, *The New York State Tax Audit—Your Rights and Responsibilities* and Publication 600, *Important Information for Business Owners*.

Who should attend

Any of your business's officers or employees who are familiar with your business operations should attend the initial conference. If you've authorized someone to appear on your behalf during the audit, make sure that they bring a completed Power of Attorney (Form POA-1, available on our website, www.tax.ny.gov) to the meeting.

What books and records you must provide

You must show any and all documentation in auditable form and electronic form (if available) which supports the returns as filed. The enclosed IDR describes the books and records that you must have available at the initial conference. Please record the date each item is provided to the auditor in the "Date(s) Provided" column. Please also note what items are unavailable.

If records are voluminous, please discuss the IDR with the auditor. Audit techniques, as described in Pub 130F, can also be discussed at that time. The auditor may ask you to provide only a few items at the initial conference, or they may ask for specific records and information in addition to the items on the IDR.

DO-1631 (5/18)

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Be sure to have all **exemption certificates** available at the initial conference. The auditor may disallow any certificates that:


- you do not provide, or
- are not properly completed.

Other taxes

This audit will focus on **sales and use tax**. In the course of the audit, we may learn of issues regarding other kinds of taxes, such as personal income tax or corporation tax. If so, the Tax Department may expand the scope of the audit and conduct a multi-tax audit or a separate tax audit. If so, you must provide the auditors with records pertaining to these other taxes.

Communication by secure e-mail

The Tax Department's secure e-mail program allows taxpayers and their representatives to communicate electronically with auditors and to transfer data files quickly and securely. Please let your auditor know if you're interested in registering for the program.


Auditor name: Mrs. Lisa Massey
Auditor title: Field Audit Specialist
Auditor email: lisa.massey@tax.ny.gov
Supervisor name: Mr. Joseph N. Edwards
Supervisor phone: (716) 855-5335
Supervisor email: joseph.edwards@tax.ny.gov

Enclosures: Assistance Information Flasher
Information Document Request #01
Publication 130F
Publication 600
Sales Tax Questionnaire
Responsible Person Questionnaire
Computer Audit Feasibility Questionnaire

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Initial Audit Letter

 **Department of Taxation and Finance**
Transaction Field Audit Bureau - Long Island Regional Office
1175 Office Building, 120 Veterans Memorial Highway, Hempstead, NY
11788-5559

March 22, 2023

Audit case ID: [REDACTED]
Tax type: Retail and 10% Tax
Tax articles: 28 & 29
Audit period: 03/01/2020-02/28/2023
Taxpayer ID: [REDACTED]

We selected your New York State sales and use tax records for an audit.

This letter is to inform you that we will examine your records. Review the attached Information Document Request (IDR).

What to expect

A Tax Department auditor, Mrs. Kenichia Osbourne, will review your books and records to confirm you complied with all applicable tax laws. The auditor can answer any questions you may have about the audit process at any time.

To learn more, see the enclosed Publication 130-F, *The New York State Tax Audit—Your Rights and Responsibilities*, and Publication 600, *Important Information for Business Owners*.

What books and records you must provide

You must provide all documentation in auditable form and electronic form (if available), to support the returns as filed. The enclosed IDR describes the books and records that you must provide.

If your records are voluminous, discuss the IDR with the auditor. You can also discuss audit techniques, as described in Publication 130-F, at that time.

As the audit progresses, the auditor may ask you to provide records and information in addition to the items on the IDR. We may schedule a field visit to review the information requested.

AU-1631.2 (5/20)

Continued on page 2

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Other taxes

During the audit, we may learn of issues regarding other kinds of taxes. If so, we may expand the scope of the audit and conduct a multi-tax audit or a separate tax audit and you must provide the auditors with records pertaining to these other taxes.

Secure communication and data transfer

The Tax Department's secure e-mail program allows taxpayers and their representatives to communicate electronically with auditors and to transfer data files quickly and securely.

We also offer a secure data transfer tool for taxpayers and their representatives to share electronic files with their auditor.

Let your auditor know if you are interested in using either program.

Questionnaires

We enclosed one or more questionnaires requesting information about your business. The information that you provide on the questionnaires will help the audit process.

Please fill them out and return them by 04/05/2023:

- by mail to the address above;
- by secure email; or
- by FAX at (516) 435-8564.

What to do next

1. Call your auditor by **04/05/2023**, at the number below to confirm receipt of the IDR.
2. Compile all items on the IDR and send them to your auditor by the date shown on the IDR.

Questions?

- Visit our website
- Contact your auditor at the phone number below

Auditor name: Mrs. Kenichia Osbourne
Auditor phone: (631) 595-4223
Auditor email: kenichia.osbourne@tax.ny.gov

Supervisor name: Mrs. Mary Ohara
Supervisor phone: (631) 595-4242
Supervisor email: Mary.Ohara@tax.ny.gov

Enclosures: Assistance Information Flasher
Information Document Request #01
Publication 130F
Publication 600
Responsible Person Questionnaire
Sales Tax Questionnaire
Computer Audit Feasibility Questionnaire

AU-1631.2 (5/20)

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Information and Document Request #1

New York State Department of Taxation and Finance
www.tax.ny.gov
Transaction First Audit Bureau
Loree Isard Rogovin, CPA
NYS Office Building, 200 Veterans Memorial Highway, Yonkers, NY 10785-5995
Phone: (914) 592-4229 Fax: (914) 438-8564

IDR #01

Information Document Request

Taxpayer name: [REDACTED] Audit years: 03/01/2020 - 03/28/2023
 Identification number: [REDACTED] Case ID: [REDACTED]
 Auditor: Mrs. Kanichia Osbourne Article(s): 28 & 29
 Requested of: [REDACTED] Date requested: March 22, 2023

Your response is due by: 04/05/2023 Date(s) Provided column completed by:

Description of documents and information requested	Name	Date(s) Provided
1. Sales tax returns, worksheets, and canceled checks showing taxes paid		
2. Federal income tax returns (Forms 1120, 1065, or 1040)		
3. New York State corporation tax returns		
4. General ledger		
5. Year-end trial balance		
6. Year-end financial statements		
7. General journal and closing entries		
8. Sales invoices		
9. All exemption documents supporting non-taxable sales, including: <ul style="list-style-type: none"> resale, exempt use, exempt organization, and capital improvement certificates any other documentation necessary to prove non-taxable sales 		
10. Chart of accounts		
11. Fixed asset purchase/sales invoices		
12. Expense purchase invoices		
13. Merchandise purchase invoices		

Taxpayers are required to make all books and records available to the auditor, and they must remain available until the audit is complete, unless the auditor indicates that the records are no longer needed. An entry in the right column does not necessarily indicate that this portion of the request has been fully satisfied.

Audit Period 03/01/2020 - 03/28/2023

14. Bank statements, canceled checks, and deposit slips for all accounts	
15. Cash receipts journal -- including sales journal, if applicable	
16. Cash disbursement journal -- including purchase journal, if applicable	
17. The corporate book, including minutes, board of directors, and articles of Incorporation	
18. Depreciation schedules	
19. Lease/Rental Agreements	

AU-500 Page 2 of 2 3/22/2023

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Questionnaires

New York State Department of Taxation and Finance
Sales Tax Examination Questionnaire DO-1632 (8/14)

Address Number and street: [REDACTED]
 City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

If you have any of the following identification (ID) numbers, enter them in the spaces below:
 Sales tax ID number: [REDACTED] State Tax ID (NY) ID number: [REDACTED] NY State Worker ID: [REDACTED]
 NY State Employer ID: [REDACTED] Corporation Tax ID number: [REDACTED]

Print or type your answers to the following questions. Attach additional sheets if necessary.

1. Whom should we contact to start the examination?
 Name: [REDACTED]
 Business address: [REDACTED]
 Yes No

2. What types of products or services does your company sell or provide?
 [REDACTED]

3. Did you acquire this business (or assets of a business) from a registered sales tax vendor? Yes No
 If Yes, have you filed Form AU-100 to Notify of Sale, Transfer, or Assignment to BULK with the Tax Department? Yes No
 Please enter name: [REDACTED] Federal employer ID number: [REDACTED]
 Address: [REDACTED]

4. Does your company have a Web site? Yes No
 If Yes, provide Web address: [REDACTED]

5. Does your company make sales through this Web site? Yes No

6. Are sales made on the Internet through an affiliated company? Yes No
 If Yes, complete the following:
 Name of affiliated company: [REDACTED] Web address: [REDACTED] Federal EIN: [REDACTED]

7. Do you make tax exempt sales? Yes No
 If Yes, what is the basis for exemption? (check all that apply)
 Purchasers provide exemption certificates Sales delivered out-of-state
 Sales are not taxable Explain: [REDACTED]

8. Are there seasonal or other fluctuations in sales? Yes No
 If Yes, explain: [REDACTED]

New York State Department of Taxation and Finance
Responsible Person Questionnaire AU-431 (5/15)

Complete a questionnaire for each responsible person of the business.

Business name: [REDACTED]
 Sales tax identification number: [REDACTED] Date number: [REDACTED] Fiscal period: [REDACTED]

Identification section:
 Name of responsible person: [REDACTED] Social security number: [REDACTED]
 Title: [REDACTED] Physical mailing address: [REDACTED]
 Period served: [REDACTED] Percent of time devoted to business: [REDACTED]

For the person named above, mark an X in the appropriate box for each item below.

Item	Yes	No	Not applicable or unknown
1. Is he or she responsible for preparing or supervising the preparation of sales tax returns and ensuring the accuracy of said?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Does he or she participate in making significant business decisions?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Is he or she responsible for maintaining and managing the business?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Does he or she own: <ul style="list-style-type: none"> corporate stock? <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Does he or she derive substantial income or have a substantial economic stake in the business?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Does he or she have authority to: <ul style="list-style-type: none"> manage the business with knowledge and control over financial affairs? pay or direct payment of bills or other business liabilities? sign checks? act on behalf of the business with the Tax Department? sign contracts affecting interests of the business? sign leases affecting the business? sign consent filing tax? sign employment/purchase agreements? hire and fire employees? negotiate loans, borrow money for the business, or guarantee business loans? 	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

7. Describe any additional responsibilities not listed above:
 [REDACTED]

(Continued on back page)

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Areas to be Reviewed on Audit

- Auditors look at a few key areas:
 - Tax reconciliation
 - Expenses - usually recurring - use of test period or statistic sample preferred.
 - Sales - usually sampled, depends on level of sales activity: guest checks - register tapes - taxable ratio.
 - Capital acquisitions - full detail usually preferred, items usually reconciled with cash disbursements journal and federal depreciation schedule.

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Audit Methodology

- Audit Methodology
 - Direct Audit
 - What qualifies as “adequate records?”
 - Typical for non-cash businesses
 - Test Period Consent
 - Indirect or Estimated Audit Methodologies
 - Records must be requested and deemed inadequate
 - Observation Test
 - Purchase Markup Test
 - Cash to Credit Card Test
 - Industry Indices Test (e.g., rent to sales ratio)
 - Beware income tax issues!



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Major Audit Issues

- Major Audit Issues:
 - Where to hold audit
 - Responsible officer questionnaire
 - LLCs be especially careful
 - Access to information
 - Consent to extend
 - Statute of Limitations



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Concluding an Audit

- Concluding An Audit
 - Audit Work Papers
 - Presumption of Correctness and Burden of Proof Issues
 - Penalties:
 - Failure to file (max 30% of tax due),
 - Substantial Understatement (10% of amount omitted)
 - Fraud (200% of tax due)
 - interest (14.5%)
 - Follow-Up Audits



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Mitigation Strategies

- Issues to review to mitigate audit liabilities:
 - Customer paid use tax, direct pay permits, etc.?
 - Customer or transaction exempt?
 - Overlapping audit policy?
 - Chargeback customer? Six year statute of limitations on contract claims. May not be the best business decision.
- Send the customers an XYZ letter inquiring about these issues.

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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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Corporate Transparency Act



Choice of Entity: Ramifications for Business Owners and Investors

Presented by:

Scott Ahroni and Jeff Goldman

Overview

- Why does entity choice matter?
- What are the types of entities available?
- Comparison of entity types
- Comments on jurisdictions of organization
- Tax Considerations
- Conclusions

Why the choice of entity matters

- Limitation of personal liability
- Strategic matters (ownership, control, economics)
- Purpose and Operational Restrictions
- Financing Considerations
- Tax matters

State and Local Tax Considerations

- Nexus
- Allocation of Income and Apportionment
- Entity Level Taxes
- Pass-through Entity Tax
- Combined Reporting

Types of Entities

- General Partnership
- Limited Partnership
- Corporation (for profit, nonprofit; c-corp, s-corp)
- Limited Liability Company (“LLC”)
- Other Hybrids and Emerging Entities

General Partnership

- association of persons or an unincorporated business enterprise comprised of 2 or more persons
- partners share equally in both responsibility and unlimited liability
- default business structure
- Partnership generally does not pay tax – partners pay tax on their share of partnership income

Limited Partnership

- similar to a general partnership, except that in addition to general partners, there are one or more limited partners
- Requires a state charter
- general partners share equally in both responsibility and unlimited liability, limited partners avoid most liability in exchange for diminished control

- Limited Liability Limited Partnerships

Partnership Taxation

- Entity itself is a flow-through entity for tax purposes
- Flexible allocations of income and losses and distributions of cash
 - Partners may have to pay tax on partnership income regardless of whether they get any distributions of cash
 - On the other hand, distributions of cash can be tax free
 - Members may be subject to self-employment tax on income
- Tax can get very complicated very quickly
- Treatment of employee/owners (self-employment tax / guaranteed payments)

Corporation

- legal entity separate from its owners
- State charter
- an association of persons having a continuous existence independent of the existences of its owners, and powers and liabilities distinct from those of its owners
- C corporation is a taxpayer that pays tax on its income

Limited Liability Company (“LLC”)

- enterprise that blends elements of partnership and corporate structures.
- state charter
- provides limited liability to its owners
- Flexible ownership, control, economic and tax structure
- No status for tax purposes, owners can choose for the LLC to be treated as a partnership, corporation or, if only one owner, a completely disregarded entity for tax purposes

Series LLC

- A statutory business entity that essentially allows for asset, management, ownership and/or control segregation under common governing documentation without going through the cost or administrative hassle of setting up separate LLCs (establish a “stem” LLC and one or more “series” under the stem).
- Purported Use – to have several “series” that hold assets and liabilities that are shielded from claims against the other series and/or the stem LLC.

C Corporation Taxation

- Entity itself is a tax paying entity – currently 21%
- Double taxation potential – shareholders pay tax on dividends, usually at capital gains rates
- Treatment of employee/owners
- Section 1202 – qualified small business stock benefits
- Roach motel – easy to go in, but can be expensive to exit
- Has become more common after the 2017 tax act because the tax rate was reduced to 21%, in contrast to the 37% maximum rate for individuals

S Corporation Overview

- “S corporation” status is achieved by a tax election but is otherwise a corporation under state law; Thus:
 - Limited liability of owners
 - Formed by filing Articles/Certificate of Incorporation with the Secretary of State
 - Governed by Bylaws
 - Owned by Shareholders/Stockholders who hold Stock
 - Managed by Board of Directors
- Differences from C corporation:
 - Limited to one class of equity ownership (other than voting / nonvoting)
 - Limited number of shareholders
 - Limited type of shareholders
- Violation of any restriction → Automatically lose S corporation status

S Corporation Taxation

- Entity itself is a flow-through entity for tax purposes – owners pay tax on income at their usual rates, maximum 37% through 2025
- Limited double taxation potential
- Tax-free distributions
- Treatment of employee/owners
- Can still present tax issues on exit/liquidation

Limited Liability Company Overview

- Limited liability of owners
- Formed by filing Articles/Certificate of Formation/Organization with the Secretary of State
- Governed by Operating Agreement (which could be oral in some states)
- Owned by Members who hold Interests or Units
- Managed by Members or Manager(s)
- Allows multiple types of equity ownership
- No limitation on the number of members
- No limitation on the type of members

Limited Liability Company Taxation

- Entity itself is (generally) a flow-through entity for tax purposes
- Can be taxed as a partnership, corporation (C or S), or completely disregarded if only one member. Taxation follows the chosen tax status
- Limited double taxation potential
- Flexible allocations of income and losses and distributions of cash
- Tax-free distributions
- Treatment of employee/owners (self-employment tax / guaranteed payments)

Tax Comparison: S corporation and LLC

- Many similarities
- Big difference with respect to entity-level debt being included in an owner's basis
- Differences with respect to equity sale exits and distributions of assets

Effect of Entity Choice

- General Considerations:
 - Annual Fees (should not drive your decision)
 - Flexibility or lack thereof
 - Tax Code imposed restrictions
 - Employee incentives
 - Post-formation equity needs
 - Transitioning Among Entity Types

Effect of Entity Choice

- Simplicity v. Flexibility - The cost of simplicity is the lack of flexibility
 - Corporate Matters
 - Tax Matters
 - Allocating income / loss to owners
 - Owners' tax returns
 - Admission of new owners
 - Tax rate differential
 - A C corporation may be better if you want to reinvest profits in the business – 21% tax
 - A pass-through is better if you want to send profits to the owners – one level, 37%

Effect of Entity Choice

- Tax Code imposed restrictions
 - C corporations and LLCs – Very flexible in terms of economic arrangement among the owners, the number of owners, and type of owners
 - S corporations – Limitations on number of owners, types of owners, and allocations of income/loss to owners

Effect of Entity Choice

- Types of Employee incentives
 - Outright grants of equity
 - Grants of unvested equity (aka restricted stock)
 - Phantom stock / stock appreciation rights
 - Grants of profits interests
 - Grants of stock options
- Tax Effects

Effect of Entity Choice

- Transitioning Among Entity Types
 - C Corp to S Corp – tax free
 - S Corp to C Corp – tax free
 - LLC to Corp (C or S) – can be tax free
 - Corp (C or S) to LLC – taxable

Effect of Entity Choice

- Buy side
 - Tax-free merger rules
 - Partnership rules
- Sell side
 - Tax-free exit
 - Taxable exit
 - Equity sale by shareholders
 - Asset sale by company

Planning / Traps

- Double taxation
 - Mitigate C corporation double taxation with high salaries
 - Only reasonable compensation is deductible
- Employment taxes
 - Mitigating employment taxes with low salaries – don't play this game
 - S corporations must pay reasonable salaries to employee/owners
- LLC Taxed as an S corporation
 - Used to minimize formalities
 - Can be a costly trap
 - Rarely recommended

Summary

- Complex decision
- Driven by your facts and circumstances
- Professional advisors are key



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real challenges. real answers. SM

Questions?



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Agenda

- The Corporate Transparency Act Universe
- Reporting Requirements: Reporting Company, Beneficial Owners, Company Applicants
- Personal Identifying Information (PII)
- Reporting vs. Exempt Companies
- Impending Deadlines
- Penalties and Enforcement
- BOSS Access: Law enforcement, Financial Institutions
- Derivative State Transparency Initiatives
- Q & A

About the Corporate Transparency Act (CTA)

The CTA is intended to combat the use of “shell” companies in the commission of Illicit activity and corrupt practices, as well as protect national security.



MONEY LAUNDERING



**FINANCIAL AND TAX
FRAUD**



TERRORIST FINANCING

The CTA was enacted by Congress on January 1, 2021

About the CTA Requirement

The CTA requires certain businesses (including privately held and non-profit entities) to **report direct and indirect, human, beneficial ownership, control and service provider information** to the Financial Crimes Enforcement Network of the US Department of Treasury (i.e., FinCEN).



Reporting Information on Beneficial Owners

1. Individuals with substantial control over the reporting company
2. Individuals who own or control at least 25 of the ownership of a reporting company
3. Company applicant

Substantial Control

- A person who has substantial control over a Reporting Company includes senior officers, important decision-makers, and a broad catch-all category of persons with any form of substantial control over a Reporting Company.
- A trustee of a trust may have substantial control over a Reporting Company if they are on the board, the trust owns or controls a majority of the voting power or voting rights of the company, or the trust has rights associated with financing or interest.

Personal Identifying Information (PII)

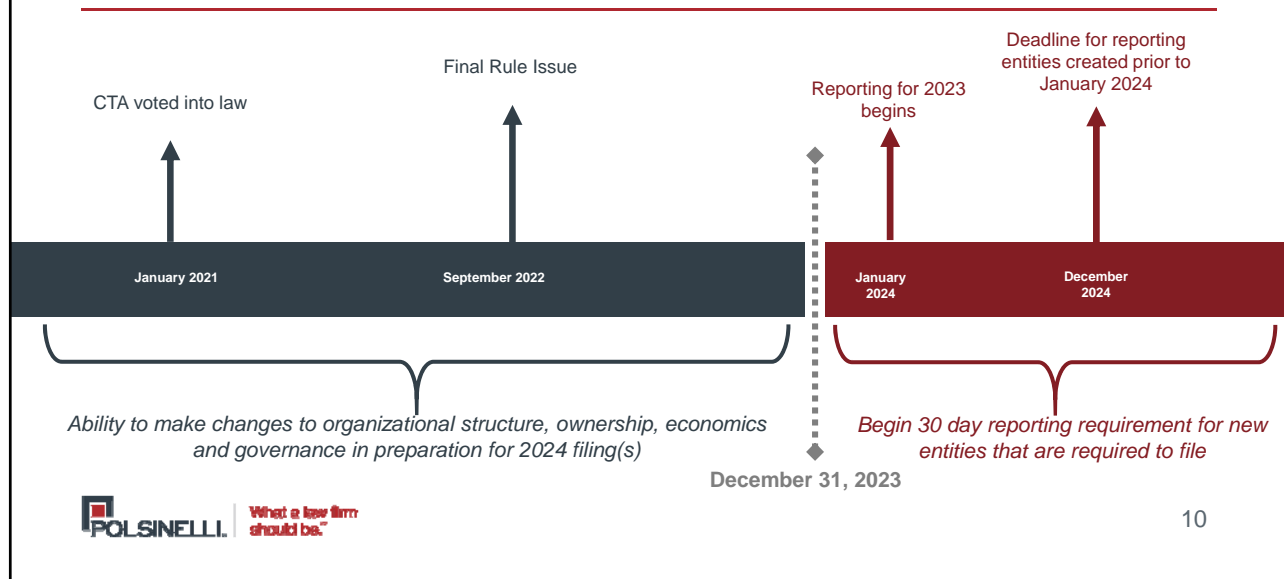
1. Full legal name
2. Date of birth.
3. Current business street address.
4. Photo ID with a unique identifying number from an acceptable identification document defined in 31 U.S.C. § 5336 (a)(1) (which may be a nonexpired U.S. passport, a nonexpired identification document issued by a state or local government or Indian tribe to the individual for the purpose of identifying that individual, a nonexpired driver's license issued by a state, or if the individual does not have any of the foregoing documents, a nonexpired passport issued by a foreign government).
5. Utilization of FinCEN ID number

How Many Business Entities Are Implicated?

FinCEN estimates that approximately **32 million** “reporting companies” will exist as of January 1, 2024, and that approximately **5 million** new reporting companies will be formed each year thereafter.



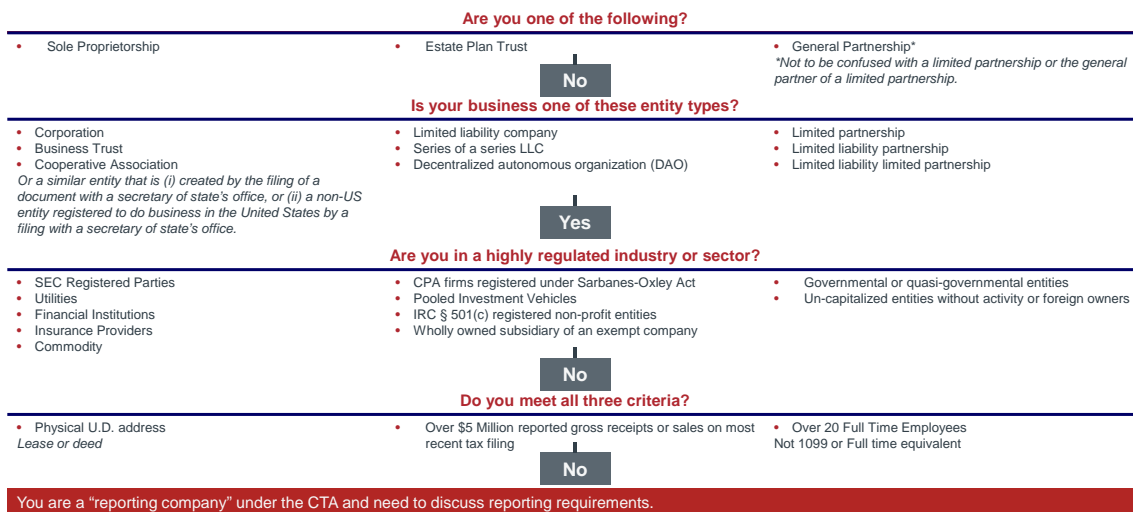
Timing



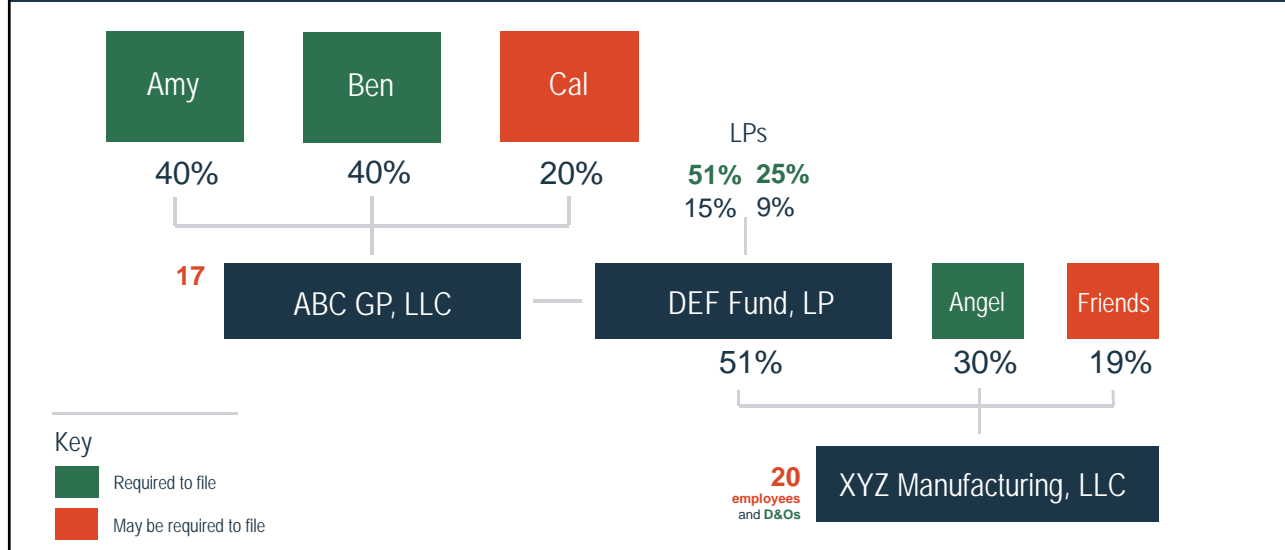
Extension to Reporting Deadlines

- The reporting deadline for Reporting Companies formed between January 1, 2024 and January 1, 2025 has been extended from 30 days to 90 days to file their initial BOI
- If the reporting company was formed prior to January 1, 2024, they would still have until January 1, 2025 to submit their initial BOI
- If the reporting company is formed after January 1, 2025, they will have 30 days to file their initial BOI

CTA Reporting Exemptions



Hypothetical: Who Needs to Report and What Needs to be Reported?



Penalties – Am I Going Away?

- Civil penalties of \$500 each day a violation continues up to \$10,000
- Criminal penalties include up to 2 years of imprisonment

New York LLC Transparency Act (NYTA)

- Passed NY Legislature on June 20, 2023; Governor Hochul has not yet signed it. The NYTA may still become law if a two-thirds majority of both houses of the New York State Legislature votes in favor of the bill.
- Under the NYTA, LLCs formed or registered to do business in New York are required to disclose to the New York Department of State in their formation or registration documents, as applicable, the same beneficial ownership information required to be disclosed under the Federal CTA
- While both pieces of legislation have similar goals and impose similar disclosure obligations, they differ drastically in terms of the use and availability of the information submitted.

Access to Info

- NYTA will make the names and addresses of the beneficial owners of such LLCs publicly available in a searchable database
 - DOBs and SSN will be "deemed confidential except for the purposes of law enforcement, or as otherwise required to be disclosed pursuant to a court order."
- Waiver
 - NYTA provides for the possibility of regulations to allow beneficial owners with "significant privacy interests" to apply for waivers to keep their name and/or business street address confidential; however, it is unlikely "significant privacy interests" will be interpreted broadly.
 - i.e., Whistleblowers using LLCs to file False Claims Act lawsuits and individuals participating in an address confidentiality program will each be deemed to have significant privacy interests exempting them from inclusion in the public database.

Other Notable Differences

- NYTA only applies to LLCs where CTA applies to all entities
- NYTA requires an affirmative reporting of exemption status; CTA does not
- NYTA does not have an equivalent to the FinCEN identifier number
- NYTA provides for a \$250 fine if delinquency continues for two years and is not remedied within 60 days of notice thereof.

Mitigating CPA Firm Risk

- Firm-wide policy on handling CTA compliance should be considered
- Consider specific disclaimer in engagement letter:
 - Assisting you or your companies with any action related to the Corporate Transparency Act ("CTA"), is not within the scope of this engagement. You have sole responsibility for your compliance with the CTA, including its BOI reporting requirements and the collection of relevant ownership information. We shall have no liability resulting from your failure to comply with CTA. Information regarding the BOI reporting requirements can be found at <https://www.fincen.gov/boi>. Consider consulting with legal counsel if you have questions regarding the applicability of the CTA's reporting requirements and issues surrounding the collection of relevant ownership information.

Mitigating CPA Firm Risk

- Consider asking insurance carrier if CTA services are covered
- Increased Data security
- Consider modifying client intake forms/organizers to account for the CTA

What Can I Do Now? Preparing for 2024

- Determine if your existing business entities are reporting companies
- Determine who is in your control group for each entity
- Identify and notify your beneficial owners (direct and indirect) in each entity and gather BOI
- Establish policies, procedures and protocols, and responsible parties, to ensure timely compliance (including for corrections and changes)
- Develop system for tracking and retaining reported information
- Determine when to file in 2024 for pre-2024 entities
- Establish protocol and deadlines for new entities formations steps
- Keep apprised of new CTA developments



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2023 New Jersey Taxation Update ACE Seminars

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Director



Agenda

1. Estate Tax – Inheritance Tax
2. Individual Tax
3. Corporate Business Tax (CBT)
 - Rates
 - Nexus
 - State Taxable Income
 - Conformity
 - Interest Expense
 - NOLs
 - Combined Reporting
4. Partnership
5. Business Alternative Income Tax (BAIT)
6. S Corporation Election
7. Sales Tax
8. Potpourri

Estate Tax – Inheritance Tax

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Estate Tax – Inheritance Tax

- As the ball dropped back in January 2018 the NJ Estate Tax was officially phased out
- The inheritance tax was not changed
- Due 8 months after death vs estate tax due 9 months after death
- Class A beneficiaries are exempt
- Class C&D are taxable at varying rates
- Class E is for charitable beneficiaries

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Estate Tax – Inheritance Tax

- New Jersey is one of 6 states that have an inheritance tax
- The others are:
 - Iowa
 - Kentucky
 - Maryland
 - Nebraska
 - Pennsylvania

Estate Tax – Inheritance Tax

- Class C: brother or sister of decedent; the husband, wife, or widow/widower of a child of decedent (i.e., the son-in-law or the daughter-in-law of decedent); and half-brothers or half-sisters of the decedent.
 - Note that the terms “half-brother and half sister” refer to a sibling with whom the decedent shares one common biological parent. “Step-brothers and step-sisters” of the decedent are Class D beneficiaries.

Estate Tax – Inheritance Tax

- Class C beneficiaries are taxed at rates of 11%–16%, with the first \$25,000 exempt from taxation. Here is the progressive rate table for Class C beneficiaries:
- First \$ 25,000 Exempt
- Next 1,075,000 11% inheritance tax rate
- Next 300,000 13%
- Next 300,000 14%
- Over 1,700,000 16%

Estate Tax – Inheritance Tax

- Class D: stepbrother or stepsister of the decedent, niece, nephew, cousin, other “distant” relatives such as 2nd cousins, and everyone else without a family relation to decedent (i.e., friends of decedent.) Class D beneficiaries pay no inheritance tax if their gift is less than \$500. If in excess of \$500, they are taxed at a rate of 15% on the entire amount of their gift up to \$700,000, and at 16% on any amount over the first \$700,000. Thus, the classic “million-dollar inheritance” from one’s long-lost uncle is in New Jersey a net, after-tax gift of only \$847,000.

Estate Tax – Inheritance Tax

- Class E – Gifts to charitable organizations, churches etc.- all gifts to charities and entities below are 100% exempt from NJ Inheritance Tax:
 - Gifts to the s tate of New Jersey or any political subdivision thereof, or any educational institution, church, hospital, orphan asylum, public library or Bible and tract society or to, for the use of or in trust for religious, charitable, benevolent, scientific, literary or educational purposes, including any institution instructing the blind in the use of dogs as guides, no part of the net earnings of which inures to the benefit of any private stockholder or other individual or corporation; provided, that the exemption does not extend to transfers of property to such educational institutions and organizations of other states, the District of Columbia, territories and foreign countries which do not grant an equal, and like exemption on transfers of property for the benefit of such institutions and organizations of this State.

Estate Tax – Inheritance Tax

- Issue of cryptocurrency as estate asset
- Volatility
- Liquidity

Individual Income Tax

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Individual Income Tax

- New Jersey does not consistently follow federal rules
- New Jersey uses the bucket system of taxation
- The statutes currently include 16 buckets
- If income does not fit into one of the buckets or “classes” then it is not taxable; i.e., straight debt relief with no asset transfer
- Contrast this with debt relief with deed transfer is taxable regardless of IRC §108
- Losses in one bucket cannot be used against income in another bucket
- Very limited NOL provision which is forward only and no carrybacks

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Individual Income Tax

- Salaries and wages defined as remuneration for services rendered
 - This is the type of income we associate with a W-2
 - Also include taxable distributions from HSA
- Exclude moving expenses included in your W-2 but deductible as of 12/31/2017
- IRC Sec 125 Cafeteria plan amounts are taxable in NJ
- Only IRC Sec 401(K) plan deductions reduce wages

Individual Income Tax

- Interest income
 - Earning on debt and debt instruments See GIT-5 for a nonexclusive list of taxable and exempt interest income
 - Exclusion for NJ Municipal interest income
 - Exclusion also includes Port Authority bonds and USTY
 - Other state's municipal bond interest is taxable
 - Muni money market rule
 - Exclusion for USTY and municipal dividends

Individual Income Tax

- Dividend income
- Defined as “distribution in cash or property made by a corporation ... (1) out of accumulated earnings and profits, or (2) out of earnings and profits of the year in which such dividend is paid ... “
- Issue of IRC 965
- NJ views it as a deemed dividend
- Deemed dividend is a misnomer since it is part of the general bucket for form 1116 and IRC §965 defines it as subpart F income

Individual Income Tax

- Net profits from business
 - This is income we associate with Schedule “C”
 - NJ has not adopted the federal 50% meal disallowance so for a NJ schedule “C” all meals are deductible
 - Similarly, NJ has not adopted the full entertainment disallowance
 - Taxes based on income are an addback
 - Filing fees are not, example IT-204-LL fee or Delaware annual report fee
 - See TB-80 taxes that are addbacks or excludable

Individual Income Tax

- Net gains from sale, exchange or dispositions of property
 - This is income we associate with Schedule "D"
 - This would also include gains we associate with Form 4797 for a sole proprietor
 - Includes the sale of real estate such as from a Schedule "E" page 1
 - Excludes income excluded for federal purposes like exchanges in reorganizations (mergers and acquisitions) or IRC §1031 exchanges or IRC §121 (sale of personal residence)
 - An exchange exempt under IRC §351 will be excluded as well
 - Special rule for basis adjustment for sales or real estate, real estate partnerships (Koch rule)
 - Special basis increase for S Corporations stock for losses not previously utilized (Smith Case)

Individual Income Tax

- Gambling winnings (net of gambling losses)
- Estate and Trust income
 - Note NJ reduces all income to one number
- Income in respect of a decedent
- Distributions from a pension trust which were excluded when contributed
 - This is income we associate with 401(k) plans
 - IRAs exclusion equal to the ratio of contributions over current value
 - Same rule applies for 401(k) contributions before 1983

Individual Income Tax

- Partnership income
 - This is income we associate with a form 1065 K-1
 - Like trusts NJ reduces all income to one number
 - NJ Include only the income items and ignores expenses
 - Look to lines 1 to lines 11 of the K-1 form
 - Limited number of deductions are allowed
 - Contributions related to the business
 - 50% federal disallowance of meals
 - IRC SEC 754 Deduction
 - If you do not receive a NJ-K-1 you need to recreate it yourself (or the Division will do it for you)
 - Don't forget to compute adjustments, such as, a depreciation adjustment or tax addbacks

Individual Income Tax

- Prizes and awards
 - Lottery winnings exclusion was repealed in 2009
- Rental value of a residence furnished by the employer
 - This is what we would associate with a super's apartment
- Alimony received under a divorce decree not including child support
- NJ is decoupled from the TCJA change to alimony for divorces after 2018
- Therefore, alimony is a deduction for the payor and income to the recipient

Individual Income Tax

- S Corporation income
 - This is income we associate with form 1120S K-1
 - Like trusts NJ reduces all income to one number
 - State income tax addback – TB-80
 - Depreciation adjustments
 - Be mindful that there may be a different AAA for NJ by virtue of date of election
 - Ability to offset inside gain with outside loss if liquidation occurs in year of sale (Miller and Mandelbaum cases)
- Income, gain, or profit derived from acts or omissions defined as crimes or offenses under the laws of this state or any other jurisdiction
 - This includes the usual suspects like embezzlement

Individual Income Tax – Exclusions/Exemptions

- Social security income
- Death benefits/life insurance proceeds
- Gifts and inheritances
- Compensation for illness or disability
- What we would exclude under IRC §114
- Unemployment insurance benefits
- Scholarships
- Gains on sale of NJ securities

Individual Income Tax – Exclusions/Exemptions

- Commuter transportation benefits
- Municipal bond interest
- Distributions from state tuition program
- Distributions from ABLE used for disability expenses
- Distributions from HSA (conversions are taxable)
- Starting in 2021 military pay is now exempt from tax

Individual Income Tax – Not Deductions

- NJ does not allow for NOL carryforward or carryback
- NJ does not allow for a capital loss carryforward
- NJ does not allow for passive loss carryforwards
- NJ **does** allow Alternative Business Calculation Adjustment
- Use forms NJ-BUS-1 and NJ-BUS-2
- You add up the losses from “C”, “E”, Partnerships and S Corporations
- It is now fully phased in at 50% of the business increment for 2016 and after
- See Koch rule discussed above

Individual Income Tax - Deductions

- Medical expense in excess of 2% of NJ income
- Self employed health insurance
- Personal exemption
- Real estate taxes
 - Limited to \$10,000 for years before 2018
 - Limited to \$15,000 for 2019 and thereafter
 - Deduction generally limited to amount on Green Card
- Alimony
- Contributions to HSA
- Bone marrow and organ donors can deduct up to \$10,000 of unreimbursed expenses (2020 budget)

Individual Income Tax – Deductions

- Pension plan income exclusion of up to:
 - For 2018 \$45,000 S \$60,000 MFJ, \$30,000 MFS
 - For 2019 \$60,000 S \$80,000 MFJ, \$40,000 MFS
 - For 2020 \$75,000 S \$100,000 MFJ, \$50,000 MFS
- Requirements are for income \$100,000 or less (cliff for loss of benefit)
- At least age 62, blind or disabled

Individual Income Tax – Deductions

- For 2021 and beyond the exclusion/exemption is based on income
- If total income is \$100,000 or less
- Then the exclusion maximum is: \$75,000 S \$100,000 MFJ, \$50,000 MFS
- If total income is \$100,001-\$125,000
- Then the exclusion maximum is: 37.5 % S 50% MFJ 25% MFS of taxable pension income
- If total income is \$125,001-\$150,000
- Then the exclusion maximum is: 18.75 % S 50% MFJ 12.5% MFS of taxable pension income

Individual Income Tax – Deductions

- Other retirement exclusion
 - Over 62 at year end
 - Gross income of \$100,000 or less (makes high exemption useless)
 - Earned income from wages, “C”, partnership or S Corps is less than \$3,000
 - Did use up the entire allowable exclusion for your filing status
 - See examples 4 and 5
- Special exclusion
 - You do not qualify for Social Security (less than 40 quarters)
 - Over 62 at year end
 - Can be applied to any income class
 - Limited to \$6,000 MFJ or \$3,000 for S and HOH

Individual Income Tax – Deductions

- Veteran's exemption for veterans honorably discharged or released from active duty
- For 2021 and beyond extended to include peacetime veterans
- Exemption was \$3,000 in 2017 and \$6,000 for 2018 and thereafter
- Both spouses can get it if they both qualify
- Available to residents and nonresidents
- Must provide documentation including DD-214, WD AGO 53, WD AGO 53-98, WD AGO 55, NAVCG 553, NAVMC 78PD, NAVPERS 553
- Use Veterans Exemption Submission Form as cover sheet
- Full list on NJ Division of Taxation website
- Best to upload documents before filing to expedite processing

Individual Income Tax – Pension Example 1

- Lisa is 65 years old. Lisa is single. She has gross income of \$25,000 which includes \$10,000 of pension income.
- Since she earns less than \$100,000 and is over 62 at year end
- Linda qualifies for the pension exclusion of \$10,000

Individual Income Tax – Pension Example 2

- Mork and Mindy are both 65 years old and file MFJ. Mork earns pension income of \$15,000. They have gross income of \$150,500.
- They are over 62 at 12/31
- They earn more than \$150,000
- They do not qualify for the pension exclusion

Individual Income Tax – Pension Example 3

- Mork and Mindy file MFJ. Mork is 65 years old and earns pension income of \$15,000. Mindy is 61 and earns a pension of \$20,000. They have gross income of \$85,000.
- He is over 62 at 12/31 while she is not
- They earn less than \$100,000
- He qualifies while she does not qualify for the pension exclusion
- The exclusion is limited to \$15,000

Individual Income Tax – Pension Example 4

- Bob and Carol are over 65 and file MFJ. Their income is \$29,000 consisting of interest and dividends \$25,000 and each earns a pension of \$2,000. They do not earn any wages, “C”, partnership or S Corp. income.
- They are both over 62
- They earn less than \$100,000
- Regular pension exclusion is \$4,000
- Allowed an ORIE of \$25,000

Individual Income Tax – Pension Example 5

- Ted and Alice are over 65 and file MFJ. Their income is \$59,000 consisting of interest and dividends of \$57,000. They did not collect a pension this year. They earned wages of \$2,500 but had no, “C”, partnership or S Corp. income.
- They are both over 62
- They earn less than \$100,000
- No regular pension exclusion
- Allowed an ORIE of \$59,000

Individual Income Tax – Pension Example 6

- Ted and Alice are over 65 and file MFJ. Their income is \$59,000 consisting of interest and dividends \$50,000 and each earns a pension of \$2,000. Ted earns a salary of \$5,000 working 1 day a week at the local Walmart.
- They are both over 62
- They earn less than \$100,000
- Regular pension exclusion is \$4,000
- They cannot qualify for an ORIE since Ted earns a salary greater than \$3,000

Individual Income Tax – New 2020

- Bone marrow and organ donors are granted paid leave for their donation – 30 days for organ donation – 5 days for marrow donation
- NJ BAIT regime is operative – credit provided for BAIT paid
- Credit available for other states – list is in development
- Beginning in 2020 there is a tax rebate of \$500 or the amount of tax
 - for income not more than \$150,000 if MFJ/HOH or \$75,000 for MFS/S
 - Residents of NJ
 - Have a dependent child
 - Have a “balance of tax” of \$1 or more (line 44)

Individual Income Tax – New 2021

- Child and Dependent Credit revamped for 2021 and beyond
- The credit is now a % of tax based on income on a sliding scale
- Must have incurred childcare expenses, qualified for a federal credit and taxable income of \$150,000 or less

Individual Income Tax – New 2021 – Child and Dependent Credit Rate

If NJ taxable income is:	Amount of the NJ credit is:
Not over \$30,000	50% of federal credit
over \$30,000 but not over \$60,000	40% of federal credit
over \$60,000 but not over \$90,000	30% of federal credit
over \$90,000 but not over \$120,000	20% of federal credit
over \$120,000 but not over \$150,000	10% of federal credit

Individual Income Tax – New 2022

- New education deduction for 2022 for taxpayers making up to \$200,000
- Contributions to NJBEST – New Jersey’s 529 plan
- Up to \$10,000 of NJ in-state tuition
- Up to \$2,500 of principal and interest for NJ college loan (NJCLASS) payments
- Taxpayers with gross income < \$75,000 will get a onetime grant of up to \$750 to a NJBEST plan as an incentive to save for higher education
- Attorney fees for False Claim Action included in taxable income (can’t report just the net award) – Depace v. NJ Division of Taxation

Individual Income Tax – New 2022

- Families earning up to \$30,000 a year will get a credit of \$500 per child under 6 years old
- The credit phases out at \$10 per \$1,000 of income over \$30,000
- The credit is \$300 per child at an income level of \$80,000

Individual Income Tax – New 2022

- New Anchor Credit is available to NJ homeowners and NJ renters
- This is essentially property tax relief
- Homeowners with income of \$150,000 or less get \$1,500
- Homeowners with income \$150,000 < > \$250,000 receive \$1,000
- Tenants with income of \$150,000 or less get \$450

Individual Income Tax – New 2022

- Schechtel vs. Director, Division of Taxation (32 NJ Tax 180 2020)
- Schechtel had an at-risk loss limitation in 2009 that he carried to 2010
- Schechtel applied the same limitation on NJ as was applied on the federal return
- Division argued that there are no carryforward provisions in GIT
- Division argued that IRC Sec 465 rules do not apply to NJ
- NJ argued that IRC Sec 465 is not a method of accounting
- (NJ has consistently held that the federal method of accounting applies)

Individual Income Tax – New 2022

- Schechtel argued that IRC Sec 465 is a method of accounting
- Tax Court rejected this argument stating IRC Sec 465 was enacted to limit the tax benefit a tax shelters
- Appeals Court made a detail study of overall accounting methods and for particular items and ultimately the Appeals Court reversed the Tax Court ruling
- NJ acquiesced to this ruling and will apply now IRC SEC 465 at risk rules to deduction of losses
- This will apply to partners in partnership and sole proprietors

Individual Income Tax – New 2022

- NJ is following federal treatment of cryptocurrency
- For now, it is property subject to gain and loss on transfer or sale
- Election worker's compensation, including during early voting, are exempt from GIT

Individual Income Tax – TCJA

- IRC § 965 repatriation is taxable without an IRC § 965(c) deduction
- NJ treats it like a special dividend (otherwise it would be nontaxable – remember the bucket system)
- There is no special tax rate
- There is no option for an 8-year payout of the 965 tax

Individual Income Tax – TCJA

- GILTI is not taxable to individuals
- GILTI taxable on distribution as a dividend
- GILTI is a corporate income concept
- IRC Sec 163(j) interest expense limitation does not apply to individuals
- Excess losses do not apply as loss in one bucket (category of income) do not offset income in another
- Likewise, NOL limitations do not apply as NJ does not allow for NOL carryforwards or carrybacks (except for the limited BUS-1/2 deduction)
- Itemized deduction limitations also do not apply
- 2018 Legislation permitting the creation of municipal charity has gone nowhere

Individual Income Tax – New 2023 Convenience Rule

- Applies retroactively to 1/1/2023
- Applies only to residents of Alabama, Delaware, Nebraska and New York
- Applies essentially as a reciprocal rule for the triggering state employed
- Does not apply to CT (handshake agreement)
- Does not apply to PA residents because of reciprocal agreement
- Need to be employed by New Jersey employer
- Not clear who a NJ employer is, i.e., EY
- No penalty if tax is paid by 4/15/2024

Individual Income Tax – New 2023 Credit for Challenging a Convenience Rule

- Applies to 2020 – 2023
- Applies to a NJ resident who successfully challenges the other state's convenience rule
- Pay tax to the other state and take a resident credit on the NJ resident return
- Have refund request denied and an appeal filed with other state
- Obtain a final judgement and receive a refund
- Credit is half of the increased NJ tax
- Need to file an amended return

NJ Tax Rates

Single	2019	2020/2021	2022/2023
\$0 - \$19,999.99	1.4%	1.4%	1.4%
\$20,000 - \$34,999	1.75%	1.75%	1.75%
\$35,000 - \$39,999	3.5%	3.5%	3.5%
\$40,000 - \$74,999	5.53%	5.583%	5.525%
\$75,000 - \$499,999	6.37%	6.37%	6.37%
\$500,000 - \$999,999	8.97%	8.97%	8.97%
\$1,000,000 - \$4,999,999	8.97%	10.75%	10.75%
\$5,000,000 +	10.75%	10.75%	10.75%

NJ Tax Rates

MFJ	2019	2020/2021	2022/2023
\$0 - \$19,999.99	1.4%	1.4%	1.4%
\$20,000 - \$49,999	1.75%	1.75%	1.75%
\$50,000 - \$69,999	2.45%	2.45%	2.45%
\$70,000 - \$79,999	3.5%	3.5%	3.5%
\$80,000 - \$149,999	5.525%	5.525%	5.525%
\$150,000 - \$499,999	6.37%	6.37%	6.37%
\$500,000 - \$999,999	8.97%	8.97%	8.97%
\$1,000,000 - \$4,999,999	8.97%	10.75%	10.75%
\$5,000,000 +	10.75%	10.75%	10.75%

Corporation Business Tax (CBT)

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Corporation Business Tax Rates

- C Corporations
- Higher of computed tax or fixed dollar minimum
- Fixed dollar minimum \$ 500 for taxable income < \$100,000
- Fixed dollar minimum \$ 750 for taxable income \$100,000<> \$250,000
- Fixed dollar minimum \$1,000 for taxable income \$250,000<> \$500,000
- Fixed dollar minimum \$1,500 for taxable income \$500,000<> \$1,000,000
- Fixed dollar minimum \$2,000 for taxable income > \$1,000,000

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Corporation Business Tax Rates

- S Corporations
- Fixed dollar minimum based on revenue
- Fixed dollar minimum \$ 375 for receipts < \$100,000
- Fixed dollar minimum \$ 562 for receipts \$100,000<> \$250,000
- Fixed dollar minimum \$ 750 for receipts \$250,000<> \$500,000
- Fixed dollar minimum \$1,125 for receipts \$500,000<> \$1,000,000
- Fixed dollar minimum \$1,500 for receipts > \$1,000,000

Corporation Business Tax Rates – Surcharge

- Tax rate is 6.5% for taxable income of \$50,000 or less
- Tax rate is 7.5% for taxable income greater than \$50,000 but equal to or less than \$100,000
- Tax rate is 9% for taxable income over \$100,000
- Corporate surcharge applies to taxable income in excess of \$1 million
- Corporate rate surcharge was 2.5% for 2018 and 2019
- Corporate rate surcharge was to be phased out to 1.5% for 2020 and 2021 but was extended at 2.5% through 12/31/2023
- **New rates apply as a cliff**

Corporation Business Tax – Nexus Pre 2023

- NJ does not have economic nexus but . . . (tell that to insurance carriers, banks and brokers, holding companies to name a few)
- NJ generally applied a physical presence nexus standard
- NJ follows a definition similar to NYS
- Doing business is defined
- Deriving receipts from the state
 - Employing capital or property in the state
 - Maintaining an office in the state
 - Like NYS registration alone creates nexus
- NJ follows PL 86-272 but requires filing a return and paying the minimum tax – Pomco Graphics
- Watch out for Telecommuters – Telebright Corp. vs. Director (2012)

Corporate Business Tax Nexus

Corporation Business Tax – Nexus Pre 2023

- Alternative Minimum Assessment is repealed for years beginning after 1/1/2018
- PL 86-272 preempts the AMA – June 2019 ruling the NJ Tax Court – Stainslaus Food Products Co
- Appealed and final ruling 4/22/2021
- Procacci Brothers – Pick up of rejected produce in own trucks exceeds PL 86-272 protection

Corporation Business Tax – Nexus 2023

- Effective for years ending on or after 7/31/2023
- Bright line Nexus
 - 200 or more transactions during the fiscal or calendar year or
 - More than \$100,000 in receipts
- This adds a new avenue of establishing Nexus with NJ
- Sales of TPP sourced to destination
- Sales of Services is sourced to where benefit is received
- Nonoperational income is either 100% in or out of NJ
- PL 86-272 still trumps nexus

Corporation Business Tax – Nexus 2023

- Corporate partners have a new way of being taxable in NJ
- Flow through the distributive share of revenue to the corporate partner to determine Bright Line Nexus
- Included MTC new definitions for online activity exceeding PL 86-272
- Effective for years ending on or after 7/31/2023

Corporate Business Tax
State Taxable Income

Corporation Business Tax – Sourcing

- Market based sourcing for service revenue effective for years after 12/31/2018
- Does not apply to unincorporated entities (since in CBT section) pre-2023
- Services sourced to where benefit is received
- Special rule for airlines and trucking companies
- Special rule for broadcasters
- Special rule for securities brokers and dealers
 - Receipts from asset management services are sourced to NJ if the customer is in NJ
- If it is not clear where the benefit is received, then the following tiered rules apply:
 - For services provided to individuals look to billing address
 - For services provided to businesses look to where the service was ordered, if not, then to business billing address

CBT – Income Calculation – IRS Conformity

- New Jersey does **not** consistently follow federal rules
- New Jersey conforms to IRC §1031 (like kind exchange) and IRC §1033 (involuntary conversions)
- New Jersey conforms to IRC §465 and IRC §469 insofar as the starting point is federal taxable income. However, New Jersey does not have a concept of passive loss c/f
- New Jersey conforms to IRC §965 but does not allow the §965(c) participation deduction
- New Jersey includes GILTI as taxable income

CBT – Income Calculation – IRS Conformity New 2021

- PPP relief is exempt if exempt for federal tax purposes
- Deductions are fully allowed
- SBA payments of loan, interest and fees are COD
- This COD is not subject to GIT
- This COD is not subject to CBT if exempt federally
- NJ Covid-19 grants are not subject to GIT or CBT (but taxable federally)

CBT – Income Calculation Pre 2023

- Starting point is federal taxable income before NOL and special deduction – line 28
- State Adjustments include:
 - Addback of state income taxes – NJ and other
 - OHIO CAT and Washington B&O are addbacks – see TB-80
 - Related party interest expense – before application of IRC §163(j)
 - Pre 2018 exemption for payment to related foreign entity
 - Addback for related party intangible expense (royalty) unless
 - Similar terms used with unrelated entities
 - Related entity has nexus with NJ (when separate entity filing applies)

CBT – Income Calculation Pre 2023

- Addition or subtraction for depreciation
- Addback for DMD (199 deduction) if not a manufacturer
- No subtraction for USTY (subtraction applies only to individuals)
- GILTI is included in taxable income unless a combined return is filed
- IRC §250 deduction is allowed
- Same for FDII

NJ CBT – Interest Expense Pre 2023

- As a result of Business Tax Reform in 2002 related party interest expense between NJ companies has been limited
- Prior to IRC 163(j) related party interest expense had to meet all 3 criteria to be deductible
 - A principal purpose of the transaction giving rise to the payment of the interest was not to avoid tax otherwise due
 - The interest is paid pursuant to arm's length contracts at an arm's length rate of interest
 - The recipient related member was subject to NJ or another State's income tax at a rate that is within 3 percentage points of the tax rate imposed on the NJ payer entity

NJ CBT – Interest Expense Pre 2023

- Exceptions to related party addback include
- Both parties are included in a combined return
- Unreasonable exception – Kraft Foods Global Inc. and Beneficial New Jersey Inc vs Director, Division of Taxation
- In Beneficial there were back-to-back loans but not guaranteed to the parent
- Subsidiary guarantees debt – very difficult to meet since subsidiary rarely named as a debtor

NJ CBT – Interest Expense Addback Exemptions Pre 2023

- New for 2019 and beyond requires interest payments to related foreign entity are exempt from addback if:
 - That there be a treaty in place with the foreign country
 - The related member is subject to tax
 - The related member paid tax with the 3% rule above
- For 2018 and forward – FDII or GILTI exception – to the extent that CFC income is included in combined taxable income

NJ CBT – Interest Expense Pre 2023

- IRC 163(j) is layered on top of this limitation
- Since NJ CBT starts with federal taxable income – line 28 NJ effectively conforms to the new limitation
- NJ applies the 163(j) limitation pro-rata between related and unrelated parties (regardless of whether the interest is already subject to the existing limitation)
- Company A has \$100 of interest expense. This includes \$20 accrued to a related party. IRC 163(j) limits the federal deduction to \$75. Therefore, the addback for NJ purposes is \$15.
- FDII or GILTI exception – to the extent that recipient income is included in taxable income no double addback

CBT – Interest Expense New 2023

- The new legislation codifies the Division's position on IRC §163(j)
- Members of a consolidated return that are not part of a combined return are still treated as one filer for purposes of computing the limitation
- Related party interest expense payments addback was repealed
- Related party intangible expenses addback (royalties) was also repealed

Corporate Business Tax – NOLs Pre 2023

- Like NYS NJ has adopted the PYNOLC scheme to convert prior year NOLs from pre-apportionment to post apportionment
- Unlike NY a pool is not created
- Historical NOLs retain their age in the 20-year carryover term
- Pre-unitary NOLs can only be used by the entity generating the NOL
- Applicable to periods **ending after 7/31/2019 (AS 4495 9/24/2018)**
- **For the conversion use the apportionment percentage for 2018 (calendar filers) or the last filing period ending before 7/31/2019 (the year before the year of the conversion)**

CBT – NOLS New 2023

- NJ couples with IRC §172(a)(2) – 80% limitation on NOL usage
- NJ honors income exempt under a comprehensive treaty with the US
- Since the income is excluded, it cannot be included in the apportionment factor
- Effective for years ending on or after 7/31/2023

CBT – Computation of Income – New 2021

- Income excluded pursuant to a treaty does not need to be added back per se
- May need to be added back because of related party or addback for interest described above
- Refund opportunity exists for years 2018 through 2020
- No adjustment for wage reduction due to claiming ERC
- NJ is following federal treatment of cryptocurrency

CBT – R&D Expenses New 2023

- NJ decouples from IRC §174 allowing a current deduction for R&D in year it occurs
- The language is vague and can be read as a full decoupling from the federal provision
- The Division will issue a TB explaining that this current expense only applies to NJ R&D as the credit for NJ applies only to R&D conducted in NJ
- Effective for years ending on or after 7/31/2023

CBT – TCJA Pre 2023

- IRC §965(a) deemed repatriation is included in taxable income as a special dividend
- IRC §965(c) participation deduction is not allowed
- No gross up of dividend and no FTC to offset the income
- No eight-year spread of and payout of tax
- Previously DRD was 100%
- Effective 1/1/2017 DRD reduced to 95% if ownership at least 80%
- Therefore 5% of repatriation is subject to NJ tax for 2017 calendar year filers
- This 5% is apportioned at either the lesser of average apportionment over 2015 – 2017 or at 3.5%

CBT – TCJA Pre 2023

- A 50% DRD is provided for dividends from entities owned at least 50% but less than 80%
- The includable part (if at 50%) is subject to the normal apportionment for 2017 (can't use the average or 3.5%)
- GILTI is included in taxable income unless a combined return is filed
- IRC §250 deduction is allowed
- Same for FDII
- IRC §163(j) is also effectively applied

CBT – TCJA New 2023

- GILTI is now treated as a dividend
- FDII is fully taxable
- IRC §250 deduction for GILTI or FDII is no longer allowed
- DRD are now 100% excluded for 80% or more ownership
- 5% expense claw back
- Only taxable amount included in denominator
- Effective for years ending on or after 7/31/2023

CBT – New 2023

- Licenses cannabis businesses are now allowed to deduct expenses for NJ CBT filing purposes
- Effective 1/1/2023
- Also applies to cannabis business operates as a Schedule “C”, partnership or S Corporation

CBT – Administrative Changes 2023

- The safe harbor for estimated taxes is increased from \$500 to \$1,500
- The safe harbor for combined groups is \$1,500 multiplied by the number of taxable members
- Codifies that the CBT is due 1 month after the corresponding federal return is due
- Effective for year ending on or after 7/31/2023

Corporate Business Tax Combined Reporting

CBT – Combined Reporting Pre 2023

- Mandatory requirement for combined reporting for unitary business
- Ownership of more than 50% directly or indirectly vs. federal requirement of 80%
- Unitary defined as one economic unit of a group of business entities under common ownership that are sufficiently integrated, interdependent and interrelated through their activities to provide synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value among the separate parts
- All you need is one member to be subject to CBT to bring in the group
- NJ is applying the “Interdependence of Functions Test or Unity of Operations and Use Test

CBT – Combined Reporting Pre 2023

- NJ has looked to these cases for guidance
 - Butler Brothers v McColgan, 315 US 501 (1942)
 - Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980)
 - Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983)
 - Allied-Signal Inc. v. Director Division of Taxation, 504 U.S. 768 (1992)
 - Barclays Bank PLC v. Franchise Tax Board of California, 512 U.S. 298 (1994)
 - MeadWestvaco Corp. v. Illinois Department of Revenue, 553 U.S. 16 (2008)

CBT – Combined Reporting Pre 2023

- Effective for tax years beginning after 12/31/2018 deferred to years after 7/31/2019 by AS 4495 (9/24/2018), therefore, 12/31/19 first year
- Water's Edge is the default rule
- Election to report on worldwide basis
- Election to report on affiliated basis
- Election to include S Corporations
- Joyce rule is applied to revenue factor of the apportionment (include in numerator only receipts of taxable entity – members that have nexus with NJ)
- Joyce applies to Water's Edge and worldwide reporting

CBT – Combined Reporting Pre 2023

- Includable entities to water's edge or worldwide include:
- US domestic Corporations that are unitary
- 80/20 Corporations excluded
- Foreign Corporations (WW election)
- Federal S Corporations not electing in NJ
- NJ electing S Corporations (upon election in)
- Captives are included and exempt from the insurance premium tax
- Insurance companies are excluded
- Includes non-unitary entities if ownership is met and affiliate return is elected
- Professional Corporations

CBT – Combined Reporting Pre 2023

- Affiliate election is limited to only US domestic corporations commonly owned
- Unitary is not required
- Foreign organized companies are excluded by definition
- Foreign companies can be included if they have ECI
- Apportionment uses Finnigan method – include all NJ receipts regardless of whether the member is a taxable member of the group
- Sole US domestic corporation of a world-wide group cannot make affiliate election – world-wide needs to be elected if foreign affiliates have NJ source income/nexus

CBT – Combined Reporting Pre 2023

- Olive branch provided by the Division for SEC filers
- In the fifth year into the combined reporting regime a new deduction is available
- 10% of the increase in deferred tax liability generated from the application of combined reporting (54:10A-4k(16)(E))

CBT – Combined Reporting – New 2020

- For 2019-2021 form CBT-100U is used to affect the combined reporting mandate
- The assigned managerial member of the group needs to be assigned an ID number to help with tracking
- This member then identifies the other members of the group
- Default is Waters Edge
- Election locked in for 6 years

CBT – Combined Reporting – New 2022

- For 2022 a new form is in development – Standardized Form (postponed to 2024)
 - Will require attachment of the federal return
 - Will rely on federal return
 - Will start with federal consolidated income
 - Adjustments will be made to this amount
 - Still considering how to handle a NJ group which has different members than the federal consolidated return group – i.e., foreign subsidiaries

CBT – Combined Reporting – Almost New

- The Division has either issued new TBs or revised previously issued TBs effective for privilege periods after 7/31/2020
 - To clarify that the combined group is treated as one taxpayer for limitations, such as:
 - Interest expense
 - Contributions
 - Dividend received deduction
 - For eliminations
 - Qualification of PL 86-272 protection
 - Credit limitations

Combined Reporting – Tax Computation Considerations

- Technical corrections legislation signed 11/4/2020
- Retroactive and applies to returns just filed 11/15/2020
- NOLS can be sold within the group (technology and biotech NOLS)
- Members leaving the group can take NOLs with them
- Dividend received exemption is now to apportioned via the combined group's apportionment
- Affiliate groups may now include foreign affiliates that earned ECI
- Any member's AMA credit can be applied against combined group liability

Combined Reporting – New Group Reporting Rules 2023

- NJ has slowly been moving in this direction for years
- With this legislation they conform to IRC §1502 so long as it does not conflict with NJ CBT statutes and regs
- Example: to consolidate need 80% ownership
- NJ requires combined reporting with more than 50% ownership
- NJ requires a unitary relationship (not needed for federal consolidation) for World-Wide or Waters Edge reporting
- Effect is items such as NOLs, interest expense, charity, and other limitations are computed on the total combined entire net income
- Depreciation follows CBT rules so no bonus and IRC §179 is limited to \$25,000

Combined Reporting – New Group Reporting Rules 2023

- Definition of unitary group expanded to include:
 - Common ownership that are sufficiently interdependent, integrated, or interrelated through their activities so as to provide a synergy or mutual benefit
 - Prior rules required it meet all 3 criteria

Combined Reporting – New Group Reporting Rules 2023

- NJ follows either GAAP reporting or IFRS
- All items must be converted to US \$\$
- Debt relief exemption under IRC §108 requires a reduction of attributes
- NJ requires a similar reduction in NJ NOLs or PNOLs
- One time exception to rejigger the combined group as a result of PL 2023 c 96

Combined Reporting – New NOL Reporting Rules 2023

- NJ NOLS are computed on a pooled or combined basis
- NOLs still need to be tracked by company to be able to account for members who come and go
- Post 7/31/2023 NOLs from new members can be used by the combined group
- Members who leave the group take NOL with them
- The DRD is taken into account before NOL carryovers
- Prior to this change NOLS were computed on a company-by-company basis and could only be used by the company that generated the NOL
- NOLs can no longer be sold within a group – not necessary anymore

Combined Reporting – New NOL Reporting Rules 2023

- NJ now adopts IRC §172(a)(2) 80% limitation on NOL usage
- However, NJ retained the 20-year life of NJ NOLs
- ROP Aviation case – NJ could not change a historic NOL from a closed year to change the c/f to an open year
- The 2023 legislation reverses this case
- Both the Division on audit or taxpayers on their own can recompute an NOL from a closed year and change the c/f to the current year
- Maximum lookback is 10 years
- Effective for tax years beginning on or after 7/31/2022

Combined Reporting – New Nexus 2023

- Effective for period that begin after 7/31/2023, Brightline nexus applies to determine taxable members of a combined group
- Combined Groups now use Finnigan method to determine numerator sale (this includes sales from nontaxable members unless eliminated in consolidation)
- By using Finnigan essentially PL 86-272 does not apply to a combined group so long as 1 member of a combined group has nexus

Combined Reporting – 2023

- DRD is reinstated at 100% for 80% or more owned subsidiaries
- DRD has a 5% expense claw back, so, net 5% still taxable
- DRD now applied against pre-apportionment income and NOLs are applied to post apportionment income

Combined Reporting – 2023

- NJ honors treaty income exclusion and exemption
- Foreign Corporations included in a combined group only include ECI
- Amounts excluded are also excluded from NOL calculation and also from apportionment factors

Combined Reporting – 2023

- 2023 legislation codifies the Divisions rule on IRC §163(j)
- The limitation is applied to the combined group as a whole – as if they filed a federal consolidated return
- Members who are part of a consolidated return but not part of a NJ combined group are included for computation of the limitation
- Prior to this change the limitation was applied to the total on a pro-rata basis

Combined Reporting – 2023

- Net Deferred Tax Liability deduction reduced to 1% per year for years 2023-2029. Then 5% per year for years 2030-2048 limited by ENI
- Any balance is carried forward and used until exhausted

CBT – Combined Reporting – New

- Change in policy in application of PL 86-272
- For 2019-2021 if any member of the group has nexus with NJ no company could claim PL 86-272 protection
- In April 2022, the Division changed its policy. Now PL 86-272 protection will be determined on an entity-by-entity basis
- Change in policy is retroactive so can file amended returns for 2019-2021 to reflect this change

CBT – Combined Reporting – New

- Tax is to be computed on a combined group basis rather than add up entity by entity
- Credits are applied at group level
- Dividend exclusion at group level
- NOLs survive mergers and reorganizations between the group
- NOLs survive for members that will be part of the group after the merger or reorganization
- General conformity to IRC Sec 1502 where it does not conflict with CBT rules and regulations (i.e., due dates, bonus depreciation, credits, etc.)

Partnership

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Partnership

- The federal return reflects a number of items separately stated on Schedule K
- The NJ return is the flow through to the individual member/partner
- NJ does not allow individuals most deductions
- NJ adds Schedule K lines 1-11 as one total number
- NJ allows a limited number of deductions
 - Depreciation adjustment
 - IRC §754
 - Charity – if related to business

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Partnership

- 2 sets of apportionment
- A 3 factor equally weighted formula is used to apportion income to the partners
- A single sales factor is used to compute nonresident withholding
- This can result in over withholding or under withholding
- Nonresident withholding mandatory with no floor

Partnership – New 2023

- Effective 1/1/2023 GIT will now be aligned with CBT method of apportionment
- Single sales factor
- Market based sourcing
- This new scheme will apply to “C”, partnerships and S Corporations
- Therefore, there will now be uniformity in apportionment across different entity types
- Section 8 relief available if you feel standard apportionment factors do not result in equitable apportionment

Partnership – New 2023

- Guaranteed payments are considered a distributive share of business income and not compensation
- Some CBT concepts will now apply to GIT as well
- Operational income vs. nonoperational income is an example
- Unitary income vs. nonunitary income
- Unitary income is subject to apportionment

Business Alternative Income Tax (BAIT)

Partnership – SALT Limitation Workaround BAIT

- 2020 is first year this is available
- Election to pay a business level tax where the partners/members are given credit for the BET (Business Entity Tax) also known as BAIT – Business Alternative Income Tax
- Election is required every year
- Tax computed in 4 brackets ranging from 5.675% on the first \$250,000 up to 10.9% for income over \$5 million
- Fly in the ointment – still need to pay in nonresident withholding for nonresidents

Partnership – 2022 BAIT Update

- Legislation passed 2022 to correct problems with the BAIT
 - To allow flow up/down the tiers in partnerships
 - Remove duplication of nonresident withholding if expect BAIT will cover the individual tax
 - To allow flow down to S Corporation shareholders
 - Trusts cannot pass through to beneficiaries
 - To tax only source income for nonresidents (similar to NYS PTET)
 - Source income computed using 3 factor formula (similar to NJ-NR-A for partnerships and S Corporations)
 - Other minor cleanup items

Partnership – 2023 BAIT Update

- Single sales factor described above applies to BAIT computation as well

Partnership

- The Supreme Court has denied Ferrellgas Partner LP petition (2022)
- The Per Partner Fee is constitutional – Ferrellgas Partner LP
 - This is a publicly traded partnership
 - It paid the maximum fee of \$250,000
 - There were 67,019 partners (K-1s) issued in 2009
 - There were 66,8735 partners (K-1s) issued in 2010
 - There were 82,047 partners (K-1s) issued in 2011
 - One of the constitutional challenges was that fee was a flat tax and not apportioned

S Corporation Election

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Recognition of Federal S Corporation Election

- Applies as of 12/22/2022
- For calendar year filers effectively applies to 2023
- Separate S election eliminated
- BUT
- 3 different consents are still required to be completed
 - Shareholder Jurisdictional Consents
 - C Corp. Tax Status Election Consents
 - Revocation of C Corp. Tax Status Election Consents
- The decision to file C or S can be made up to the extended due date
- The BAIT election must still be made by 3/15

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Recognition of Federal S Corporation Election

- Shareholder Jurisdictional Consents must be filed with the Division
- NJ statutes require the S Corporation to pay tax for any nonconsenting shareholder.

Recognition of Federal S Corporation Election

- S Corps. can convert to C Corp. status if 100% of the shareholders' consent
- This consent needs to be kept by the Corp. and available upon request
- C Corp. status can be revoked with consents signed by 50% of the shares
- These consents also are not required to be submitted to the Division
- Back to Jurisdictional Consents
- Same rules apply to electing QSSS status

Sales Tax

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Sales Tax – General Rules

- Sales of tangible personal property is taxable unless a specific exemption applies
- Services are exempt unless specifically enumerated
- Bundled transaction require application of True Object test
- Where both taxable and exempt items are sold together the transaction is taxable
 - Example: Rent a hotel room and you are provided with shampoo, lotions, soaps and other personal grooming items.
 - The object is the hotel rental and not the receipt of the gifts
 - Therefore, there is no sale of the shampoo
 - Likewise, the hotel cannot purchase these items for resale
 - Adamar case 1997

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Sales Tax – Taxable Services

- Information services
- Spectator sports and place of amusement
- Animal boarding and grooming
- Carpet cleaning
- Garbage removal not under 30-day contract
- Investigation and detective service
- Locker rental
- Massage not under prescription

Sales Tax – Taxable Services

- Pager and answering service
- Parking or storage
- Photography and videography
- Security
- Snow removal
- Telecommunications both landline and wireless
- Tips paid to employees are exempt

Sales Tax – Digital World

- Computers sold with software – the whole charge is taxable
- Software is taxable if in tangible form – a disc in a box
- Software purchased electronically used exclusively in business is exempt
- Custom software is exempt. Therefore, the base package of SAP is taxable but the fee to customize is exempt and needs to be separately stated
- Software for general consumption is taxable regardless of the means of delivery
- Services are exempt so a website creation and design is exempt
- Repairs are taxable as are all repairs to tangible personal property

Sales Tax – Digital World

- Digital products sold to individuals are subject to sales tax
- Digital software sold to businesses purely by download are exempt
- SaaS is not taxable (but is in NYS)

Sales Tax – Exemptions

- Clothing
 - Clothing and footwear for human use is exempt
 - Yarn fabric and thread used to repair or make clothing is also exempt
 - Protective clothing such as, masks, goggles, ear protectors qualify for the exemption
 - Accessories are taxable
 - Backpacks, barrettes, wigs or watches
 - Yarn fabric and thread used to repair or make a drape is taxable
 - Needles, sewing machines, knitting needles are always taxable
 - Sports equipment is taxable
 - Helmets, gloves, skates, pads and the like

Sales Tax – Exemptions

- Food and food ingredients for human consumption off premises are exempt
- Includes dietary supplements
- Excludes alcoholic beverages and tobacco
- Candy is taxable and is defined as a confection that does not include flour or require refrigeration
- Beverages that contain milk, soy or rice milk, > 50% vegetable or juice content are exempt
- Plain water is exempt
- Carbonated beverages, juice drinks and the like are taxable
- Disposable packaging is exempt, but the silverware and napkins are taxable
- Prepared food is taxable – defined as food heated or provided with eating utensils

Sales Tax – Exemptions

- Medicine and health related products for human consumption or use are exempt
- Include prescription drugs
- Includes over the counter drugs like aspirin
- Knee braces and other prosthetic devices
- Exemption does not apply to supplies used by a doctor in the execution of medical services, such as, tongue depressors or needles and syringes
- Exemption does not apply to medicine or food for pets

Sales Tax – Exemptions

- Equipment used predominantly in manufacturing is exempt from sales tax
- Assembling or refining also qualify
- Energy, short lived parts and autos do not qualify
- Manufacturing begins with raw materials and ends with a finished product
- Controversy on packaging if separate from the flow of the production line
- Catalyst and chemicals qualify even if not included in the finished product, such as, chemicals to process film
- QC does not qualify

Sales Tax – Exemptions

- Resale exemption
- Must collect resale certificates (more complicated since Wayfair)
 - Good faith rule applies
- R&D Equipment and supplies if used exclusively for R&D
 - Here energy does not qualify as well
- Recycling equipment

Sales Tax – Exemptions

- Repairs to or construction to real property – labor is exempt. The purchaser of the materials pays tax.
- Capital improvement defined as increasing the value or lengthening the life of the structure
 - Contrast this with federal definition/requirement for capital improvement
- Repairs qualify if the work becomes part of the real property
- Repairs to personal property are always taxable
- Supplies purchased by a repairer may be bought tax exempt
- Landscaping is taxable as is carpet installation and snow plowing
- Installing shrubs is exempt

Sales Tax – Almost New

- Beginning with 7/1/2020, the sales tax of 6.625% on medical marijuana is being phased out as follows:
 - 4% Between 7/1/2020 and 6/30/2021
 - 2% Between 7/1/2021 and 6/30/2022
 - 0% for sales after 7/1/2022
- Municipalities with a population over 100,000 may now charge a parking tax of 3.5% on nonresidents (mostly at commuter lots)

Sales Tax – New 2021

- How not to trade-in a vehicle – Andrew and Laura Botwin
- A4261 passed both houses 6/30/2018
- Provision includes requirement of marketplace facilitators like Amazon or Etsy to collect sales tax if seller is not registered
- Effective 10/15/2018
 - A surcharge on E-Cigarettes and tobacco
 - Surcharge of \$4.50 per ride for rideshare that begin and end in NJ. This affects UBER, LYFT, etc.
 - Short-term housing through market facilitators now subject to sales tax. This is targeting Airbnb and similar websites
 - This last provision was partially repealed 8/9/2019

Sales Tax – New 2022

- Medical marijuana is now sales tax free
- Effective 10/1/2022 installation of signs is no longer a capital improvement
- Therefore, purchase of materials by sign fabricators and installers is exempt from sales tax
- First ever, sales tax holiday from 8/27/2022-9/5/2022 on school supplies, computers and computer supplies, sports and recreational equipment

Sales Tax – New 2022

- New limitations on purchases in Enterprise Zones
- Effective 1/1/2022 not all purchases made by a UEZ business are exempt
- A UEZ business can only purchase \$100,000 of goods and services tax exempt
- Same applies for contractor purchases in the zone
- Exceptions apply
 - Grocery stores in food desserts
 - Purchases of materials for construction or improvement of qualifying property in the zone

Sales Tax – Miscellaneous

- Like delivery charges COVID-19 surcharges are taxable if the product or service is taxable

Potpourri

Potpourri

- Due to emergency orders the statute of limitations for assessment is still open while the refund window closed in April 2022
- Legislation, AB 4295 was passed by the Assembly to correct this status
- Governor Murphy vetoed a bill to require travel marketplace facilitators (like Travelocity) to collect sales tax

Potpourri

- New Jersey provided a month extension to file corporate returns due 10/15/2020. They were due 11/15/2020. Remember this in case a notice arrives
- Mandatory electronic filing of W-2 series and 1099s forms
- On 10/1/2021, the motor fuel tax on gasoline was scheduled to decrease by 9.3 cents. Ironically, since then, the price of gas has skyrocketed
- NJ townships are looking to narrow the exemption from real estate taxes for NFP organizations
- American Dream Mall is also appealing its tax assessment which will affect what the bondholders get

Potpourri

- NJ announced 10/19/2023 that NJ will provide relief for those affected by the “terrorist attacks in Israel”. The 10/16/2023 deadline is postponed to 10/7/2024
- NJ’s general policy is to follow the IRS lead in Presidential Disaster declarations

Questions?



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Thank you.

The information presented herein is general in nature and should not be acted upon without the advice of a professional.

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