SALT Updates

MAY 2018

Federal Credit available for employers affected by Hurricanes Harvey, Irma, and Maria and Certain California Wildfires

After the natural disasters of this past fall, Congress enacted the Disaster Tax Relief and Airport and Airway Extension Act of 2017, Public Law 115-63, creating tax relief via a tax credit for victims of Hurricanes Harvey, Irma and Maria, and for certain California wildfires. The Employee Retention Tax Credit (ERTC) was created for businesses that were inoperable for a period of time as a result of one of the hurricanes or certain wildfires but continued to pay employees during this time. Eligible employers are allowed a credit of 40% of qualified wages up to $6,000 for each qualified employee. However, the ERTC is not available for wages paid to employees that qualify under the Work Opportunity Tax Credit (WOTC). The IRS is currently working on a draft Form 5884-A.

States Continue to Fight

$10,000 SALT Deduction Limitation

Several states have continued to push back on the $10,000 limitation to the SALT deduction imposed by the Tax Cuts and Jobs Act. While there have been various proposals and ideas floated around since the limitation was first announced, states are now starting to take real action. New York's 2018-2019 Budget Bill includes two direct responses to the $10,000 limit by introducing an Employer Compensation Expense Tax and establishing a Charitable Gifts Trust Fund. The Employer Compensation Expense Tax creates an optional payroll tax that would be paid by the employer, as well as a new tax credit equal to the value of this tax, effectively cutting the personal income tax on wages. The Charitable Gifts Trust Fund allows taxpayers to make contributions to the fund and then claim a tax credit of 85% of the contribution amount.

The Illinois House of Representatives also passed a similar bill, creating the Illinois Excellence Fund. Taxpayers would receive a credit against their Illinois tax for contributions made to the fund. New Jersey is another state that has attempted to combat the $10,000 SALT limitation by granting assessors the authority to accept prepayments of 2018 property taxes in 2017, even if the 2018 property tax bill had not yet been issued. The law is retroactive to July 1, 2017, meaning that any New Jersey residents who prepaid property taxes in 2017 may be able to fully deduct those payments in 2017.

South Dakota v. Wayfair, Inc.

The Supreme Court heard arguments on April 17, 2018 in South Dakota v. Wayfair, Inc. Although a decision is not expected until June of this year, it seems unlikely that the Court will rule to nullify the physical presence requirement that was established in Quill Corp v. North Dakota. Several comments were made during the proceedings that indicated that this was an issue for Congress and would require legislation in order to reach a reasonable outcome. Simply repealing Quill would create an administrative burden for small businesses operating over the internet and possibly force them out of the market, leaving companies like Amazon with little competition.

Kentucky Bill Containing Extensive Changes to Multiple Taxes Enacted

Despite being vetoed by Kentucky governor Matt Bevin, the Kentucky Legislature bills making extensive changes to the corporate and personal income tax provisions and sales taxes have been enacted. The following are key points of the significant tax changes to consider:

INCOME TAXES

- Require combined income tax reporting by corporations that are members of a unitary business group.
- A flat tax rate on corporations and individuals at 5%
- Require add back for individuals who claim the 20% federal qualified business income deduction (IRC §199A).
- Kentucky does not adopt the 100% bonus deduction under IRC Sec. 168(k) for property placed in service after September 27, 2017 and before January 1, 2023 or the $1 million dollar amount and $2 million investment phase-out limit for assets that qualify for IRC Sec. 179 expense. Taxpayers may claim a depreciation and IRC Sec. 179 expense deduction without regard to federal bonus depreciation or IRC Sec. 179 amounts exceeding the $25,000 or $200,000 investment phase out limits.
- Maintains a 3- factor apportionment formula for telecommunication companies.
- Single factor apportionment formula for most corporations and pass through entities.
- Most businesses must source receipts based on market-based sourcing rules
- Mandate electronic income tax return filing for corporations and pass- through entities with $1 million or more in federal gross receipts for the tax year.

SALES TAXES

- Broadens the sales tax base to include certain services that were previously not included such as: landscaping services, janitorial services, small veterinary services, pet care services, extended warranty services, and others. (For a complete list, please see Illinois H.B. 487 Section 37)
- Expands the definition of "retailer engaged in business in this state" to include remote sellers of tangible personal property or digital property delivered or transferred electronically to a Kentucky purchaser of their sales in the current or prior calendar year that exceeded 200 transactions or gross receipts of $100,000
- Modifies the definition of "prewritten computer software"
- Clarifies "cost of production" in the partial exemption for energy or energy-producing fuels used in manufacturing, processing, mining, or refining
- Modifies the exemption for tangible personal property for use in manufacturing to require direct use of the property in manufacturing or industrial processing, as well as provides a definition for "industrial processing" and exempts the labor or services to install, repair or maintain such property.

Oklahoma: Third-Party Online Retailers to Collect and Remit Sales Tax

Oklahoma Governor Mary Fallin signed the bill that requires a marketplace facilitator to collect sales or use tax on sales by third-party sellers in the marketplace. A remote seller or marketplace facilitator who had at least $10,000 in aggregate Oklahoma sales in the preceding 12-calendar-month period must file the election with the Oklahoma Tax Commission to collect and remit sales tax due on tangible personal property and obtain a sales tax permit. This election must take place by July 1, 2018 and by June 1 of each calendar year starting in 2019.

The other option is to not collect tax and obtain sales tax permits, but comply with notice and reporting requirements. Such sellers and facilitators must post a conspicuous tax notice on their forums to alert potential purchasers that sales or use tax may be due on the purchase and delivery of the tangible personal property, and that the purchasers must file a return if use tax is due. Sellers must also provide a written notice on invoices at the time of sale. Sellers and facilitators who elect not to collect sales and use tax also have a reporting requirement by January 31 each year. They must provide a written report to purchasers who were required to receive the notice on invoices during the preceding calendar year.

If the remote seller or marketplace facilitator fails with notice and reporting requirements, they are subject to penalties, which are the lesser of $20,000 or 20% of total Oklahoma sales in the previous 12 months.

Maryland to Phase-In Single Sales Factor Apportionment Formula for Corporations

Maryland has enacted legislation that phases-in single sales factor apportionment for corporations. While the current standard apportionment formula is a three-factor formula using property, payroll and sales, with sales double-weighted, there are certain manufacturers that were already using a singles sales factor formula, and will continue to do so. There is also a headquarters exception for those corporations with their worldwide headquarters in Maryland that may elect annually to continue using the current double-weighted sales factor formula, as long as certain requirements are met.

The standard apportionment formula will be phased-in as follows:

- **2018 tax year**
  Three-factor formula with the sales factor multiplied by three
- **2019 tax year**
  Three-factor formula with the sales factor multiplied by four
- **2020 tax year**
  Three-factor formula with the sales factor multiplied by five
- **2021 tax year**
  Three-factor formula with the sales factor multiplied by six
- **2022 tax year**
  Single-factor formula will be the standard formula

Utah Lowers Corporate and Personal Tax Rates, to Phase-In Single Sales Factor Apportionment Formula for Corporations

Utah has enacted legislation that lowers income tax rates beginning in 2018 and phases-in single sales factor apportionment for corporations beginning in 2019.

TAX RATES

Both the corporate and personal income tax rates are lowered from 5% to 4.95% for taxable years beginning on or after January 1, 2018.

APPORTIONMENT

Utah had a rather confusing 3-method system of apportioning income. There was a single sales factor method for "sales factor weighted taxpayers", the "other multistate taxpayers" could elect to use either the standard three-factor formula using property, payroll and sales apportionment formula could double-weight the sales factor, while the rare "optional sales factor weighted taxpayers" could use any of the 3 methods. For tax years beginning on or after January 1, 2019, all corporations except "optional apportionment taxpayers" will be required to use the phased-in single sales factor apportionment method as follows:

- **2019 tax year** – The sum of the property factor, the payroll factor, and four times the sales factor, divided by six
- **2020 tax year** – The sum of the property factor, the payroll factor, and eight times the sales factor, divided by ten
- **2021 tax year** – Single-factor formula will be the standard formula

"Optional apportionment taxpayer" is a corporation with property and payroll in Utah that together equals more than 50% of its property and payroll everywhere. Airlines have special rules. The optional apportionment taxpayer may use either the equally weighted three factor formula or the phased-in single sales factor method. Once the single sales factor method is elected, the taxpayer cannot switch back.

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