

State and Local Taxation: Headline News and Trends

March 22, 2022

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- 349 East Multistate Tax Planning LLC
- Ben Carmel Law Offices

*Special Guest: Jennifer Noel, Director, Delaware
Division of Revenue*



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Today's Agenda

Today's Presentation

Megatrends – General	02-09
Business Activities Taxes	10-23
Transaction Taxes	24-39
Miscellaneous	40-51

Megatrends and Developments

U.S. Supreme Court



Still pending: *Delaware v. Pennsylvania* and *Arkansas v. Delaware*, Dkt. Nos. 220145 and 220146 Escheat of unclaimed property; Briefing completed; “The Exceptions to the Special Master Report are set for oral argument in due course.”

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Megatrends and Developments

U.S. Supreme Court



Cert. Petition Filed/Briefing Completed

Cooper Tire & Rubber Co. v. McCall (No. 21-926) Does mere registration to do business confer general jurisdiction?

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Megatrends and Developments

U.S. Supreme Court



Cert. Petition Filed/Briefing Completed

Ferrelgas Partners, LP v. Director, Division of Taxation (No. 21-641)
Is a local levy subject to the Commerce Clause's internal consistency test?

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Megatrends and Developments

U.S. Supreme Court



Cert. Petition Filed/Briefing in Progress

Washington Bankers Association v. Washington et al. (No. 21-1066)
Does a surtax that affects out-of-state institutions almost exclusively violate the Commerce Clause?

5

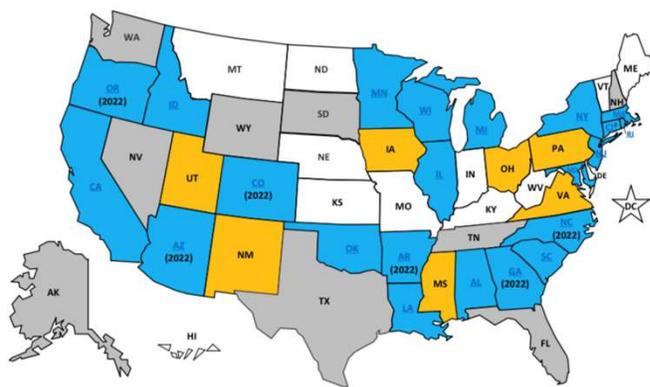
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Megatrends and Developments

Passthrough Entity Taxation

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

As of March 7, 2022



- 22 states that enacted a PTE tax since TCJA SALT deduction limitation, effective for 2021 (or earlier) unless noted:
 - [AL](#), [AR](#), [AZ](#)¹, [CA](#), [CO](#)¹, [CT](#)², [GA](#)¹, [ID](#), [IL](#), [IA](#), [MA](#), [MI](#), [MD](#), [MN](#), [NC](#)¹, [NJ](#), [NY](#), [OK](#), [OR](#)¹, [RI](#), [SC](#), [WI](#)
 - ¹ Effective in 2022 or later
 - ² Mandatory
- 7 states with proposed PTE tax bills:
 - IA - [HF 2087](#), in committee
 - MS - [HB 1691](#), passed House
 - OH - [SB 246](#), in committee
 - NM - [HB 102](#), passed both chambers
 - PA - [HB 1709](#), in committee
 - UT - [HB 444](#), in committee
 - VA - [SB 692](#), in committee
- 9 states with no owner-level personal income tax on PTE income:
 - AK, FL, NH, NV, SD, TN, TX, WA, WY
- 11 states with an owner-level personal income tax on PTE income that have not yet proposed or enacted PTE taxes:
 - HI, IN, KS, KY, ME, MO, MT, NE, ND, VT, WW

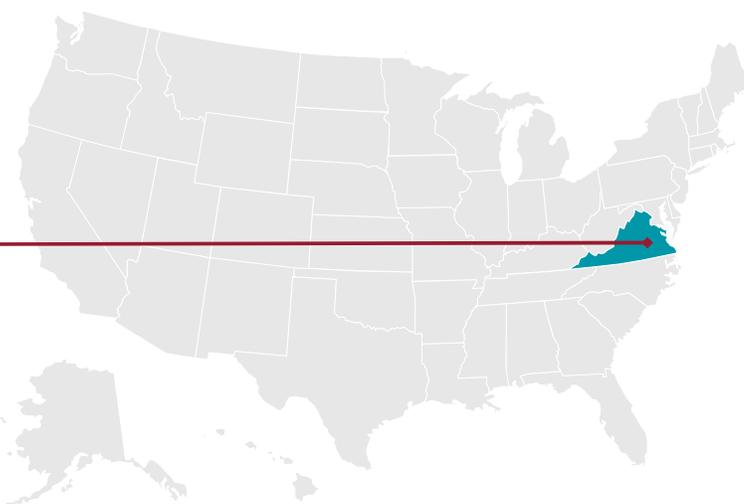


Megatrends and Developments

Passthrough Entity Taxation

Virginia.

No credit at partner level for PTE tax paid at entity level. In addition, PTEs other than S Corps do not qualify for the statutory credit.

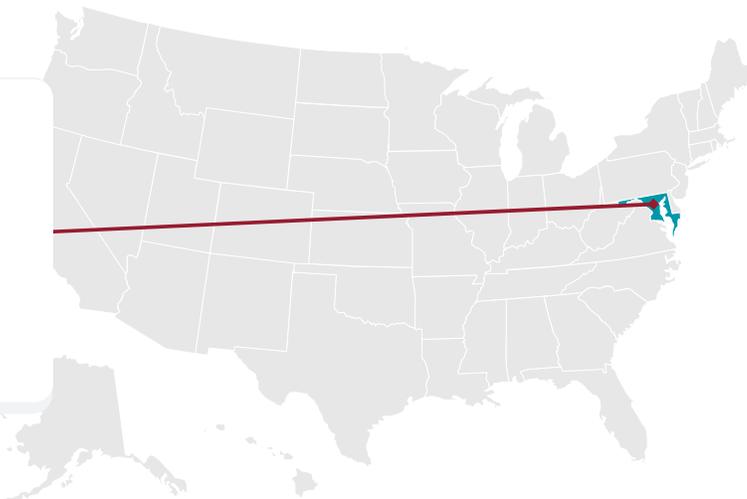


Megatrends and Developments

Digital Taxes

Maryland

Tax Injunction Act barred a portion of challenge in federal court to Digital Advertiser Gross Receipts Tax



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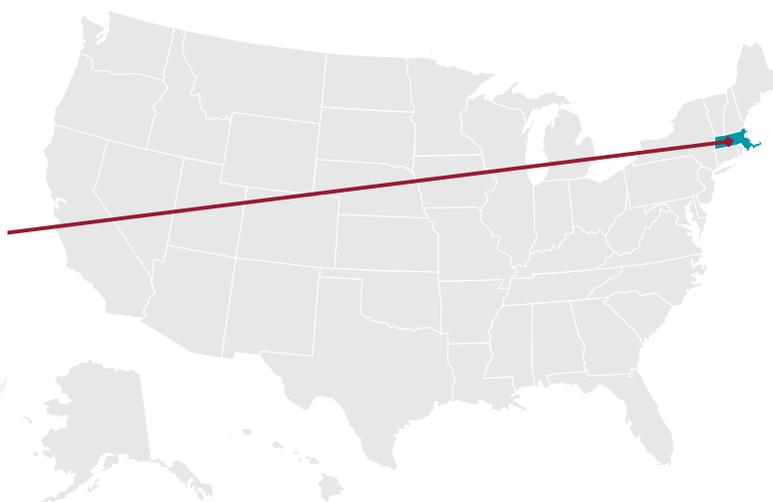
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Megatrends and Developments

Receipts factor

Massachusetts.

Online software provider is a “manufacturer” and may use single factor receipts apportionment formula.



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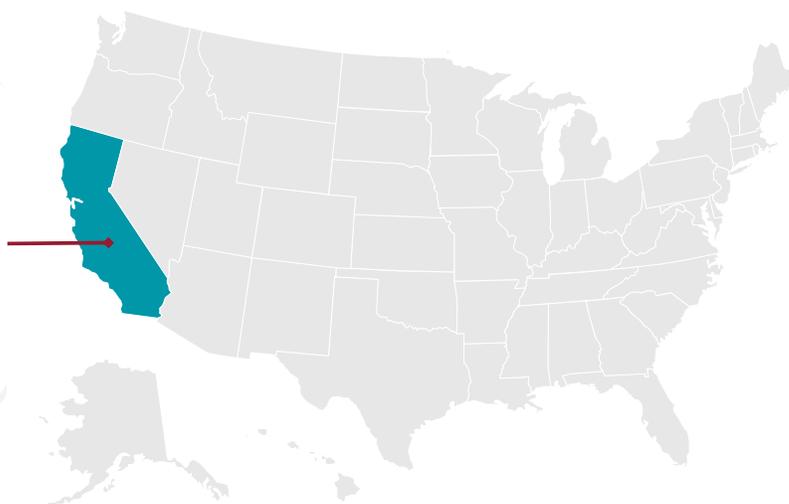
Business Activities Taxes

Business Activities Taxes

Undesired Consequences

California.

IRC §338(h)(10) election terminated entity and caused entire installment sale gain to be accelerated. *Matter of Amarr Company et al.*, 2022 OTA-041 (Dec. 9, 2021, nonprecedential)



Business Activities Taxes

Unforeseen/Undesired Consequences

Watch for it:
**Upcoming article on
hazards of state tax
planning and
unforeseen/undesired
consequences.**

Business Activities Taxes

NOLs

Delaware.

VeriSign®

Director of Rev. v. Verisign,
267 A.3d 371 (S. Ct. Del.
November 29, 2021)

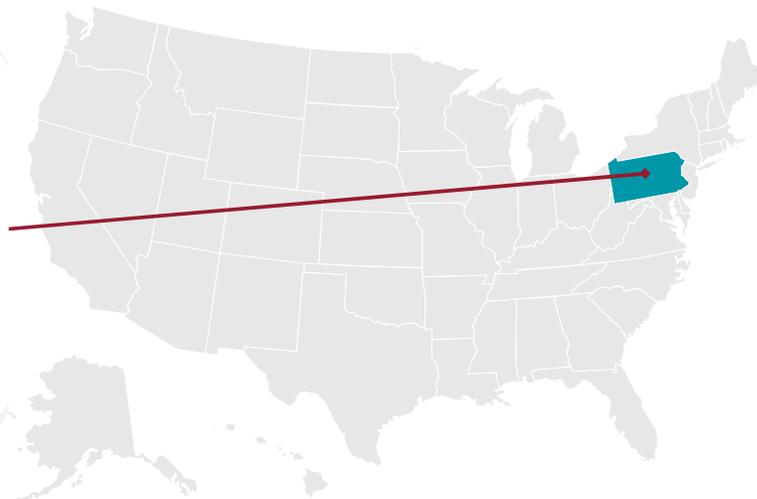


Business Activities Taxes

NOLs

Pennsylvania.

State Supreme Court declines severing unconstitutional cap on NOLs, instead eliminating NOL deductions for 2001 entirely. Still grants refund to General Motors.



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JUNE

22

Save the Date:

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Headline News and Trends”**

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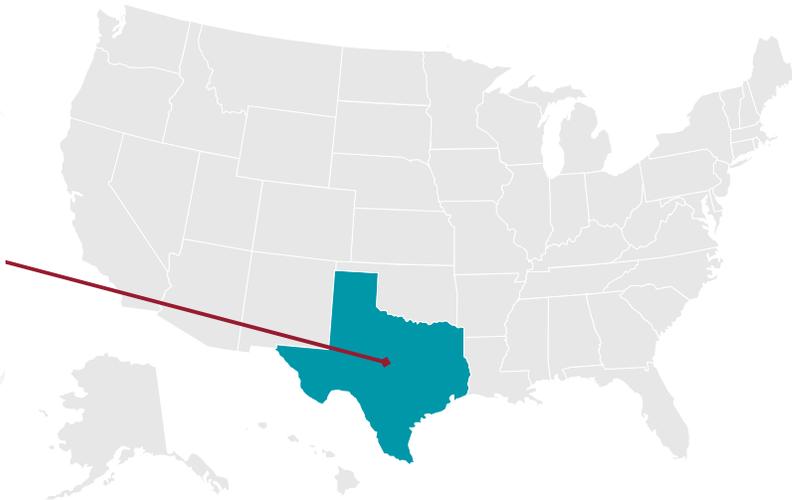
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Business Activities Taxes

Nexus

Texas.
Comptroller decision.
Wayfair blurred; *Pike v. Bruce Church* not considered.



Business Activities Taxes

Nexus

Frequently Asked Questions Regarding the Expiration of Philadelphia's Temporary Nexus Waiver

During the pandemic, the City temporarily waived the legal nexus threshold established under § 19-2603 of the Philadelphia Code and sections 101 of the BEE regulations, which restricted the presence of employees working temporarily from home within Philadelphia as an employee or contractor of a business based outside Philadelphia. This waiver expired on June 30, 2021 (i.e. the "old law").

This document is a list of **newly** Frequently Asked Questions.

1. If a business located outside the City has established a "remote workforce" in Philadelphia after June 30, 2021, will it have nexus for Business Income and Receipts Tax (BIRT) purposes?

An entity is considered to have nexus for BIRT purposes when it has one or more employees conducting business activities on behalf of Philadelphia. Business activity is determined by the City, which is determined to have a Philadelphia nexus employment involving both some part of the "old law" of the City's temporary nexus policy will have nexus in 2021 based on the activities of that remote workforce.

2. What does the City consider to be a "remote workforce"?

The determination of what constitutes a "remote workforce" in Philadelphia is based on facts and circumstances. We will consider such factors as:

- official company public registration records and assignments and
- the nature and regularity of business activity in Philadelphia.

3. What other remote employee(s) are engaged in activities in Philadelphia which are prohibited by P.L. 96-272?

P.L. 96-272 only applies to non-resident aliens, such as the Non-Resident portion of the BEE. Temporary nexus in Philadelphia will still apply to the City's Non-Resident portion of the BEE, even if their Philadelphia activities are prohibited under P.L. 96-272.

4. What does nexus for the Non-Resident Tax (NRT)?

The NRT is an income based tax imposed on non-resident entities. The NRT is imposed on the net profits from the operation of a trade, business, profession, occupation, or other activity by:

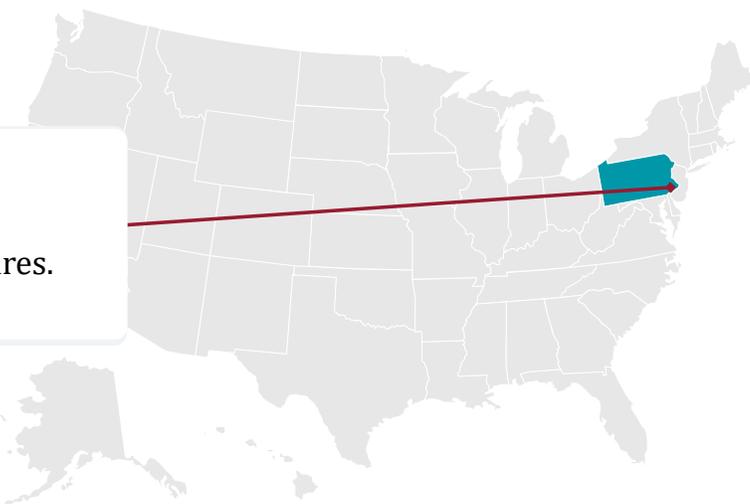
Philadelphia residents, except that it taxes a non-resident outside Philadelphia, and 2) Non-residents who conduct business in Philadelphia. The determination of whether an entity is a non-resident that

nexus to the City for NRT is that individual to be made on a case-by-case basis. P.L. 96-272 applies to the NRT since it is based on income for the period beginning January 1, 2015 and thereafter.

Non-resident taxpayers are governed by P.L. 96-272 for services businesses that have nexus under the Economic Nexus standard of BEE Regulation Section 101, with the provision to have nexus in the "old law".

5. If a business has a physical presence in the City by virtue of its remote workforce, but its Philadelphia gross receipts are less than \$100,000, does the business have nexus for BIRT?

Philadelphia.
C19 Relief expires.

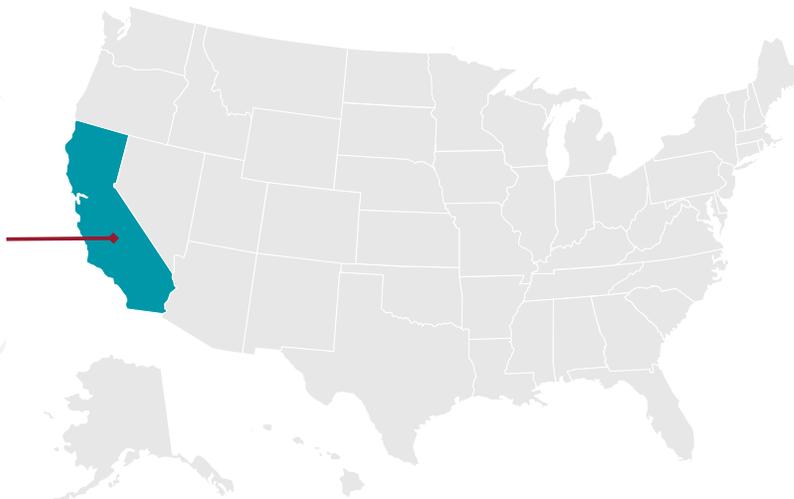


Business Activities Taxes

Nexus

California.

FTB issues example positions on P.L. 86-272



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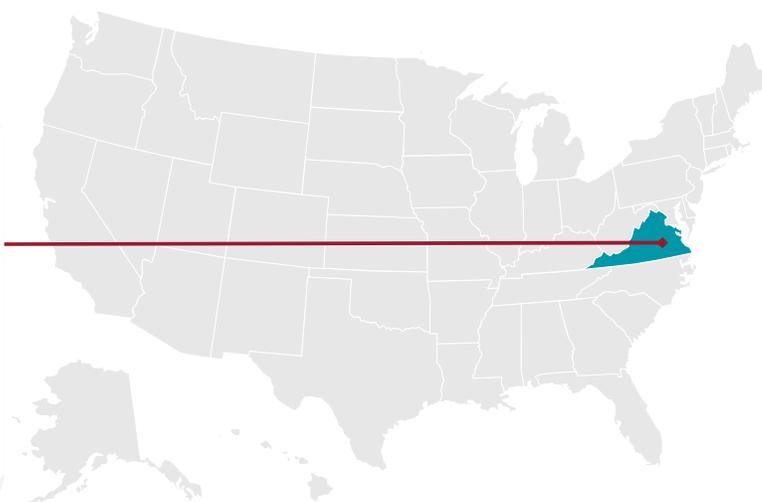
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Business Activities Taxes

Apportionment

Virginia.

Tobacco stored in warehouses for 13 to 23 months to age was not used to produce Virginia taxable income and not includable as in-state property.



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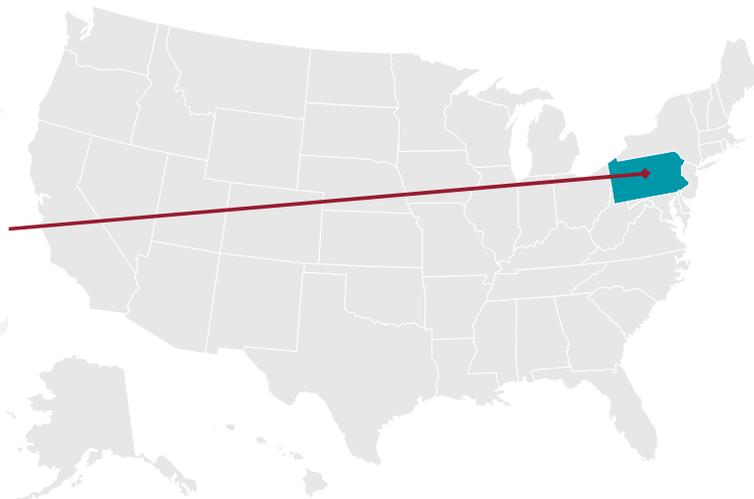
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Business Activities Taxes

Apportionment

Pennsylvania.

Bulletin Issued Regarding
Split-Factor Apportionment



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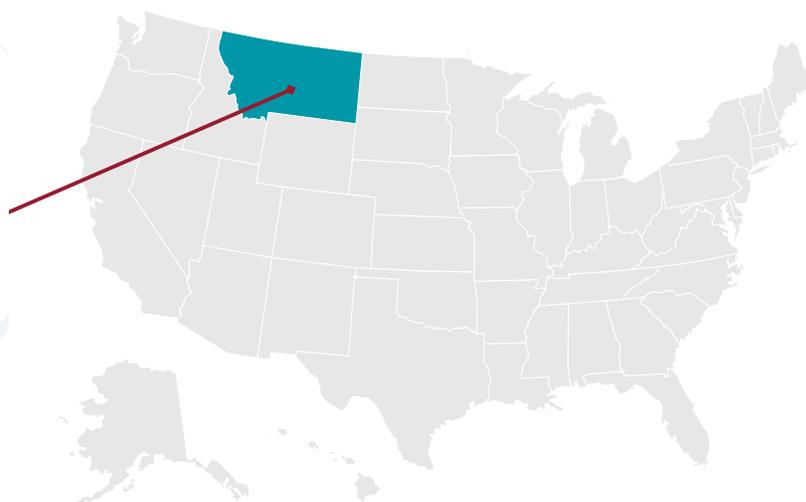
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Business Activities Taxes

Apportionment

Montana.

S corporation permitted
to apportion under the
Multistate Tax Compact



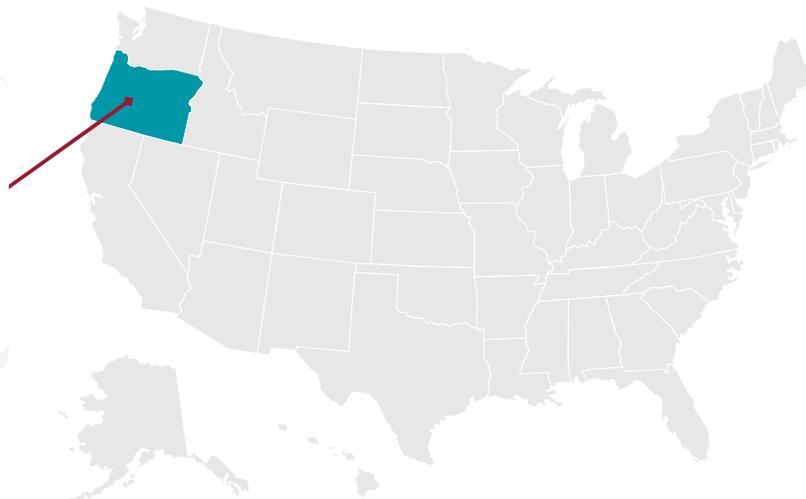
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Business Activities Taxes

Apportionment

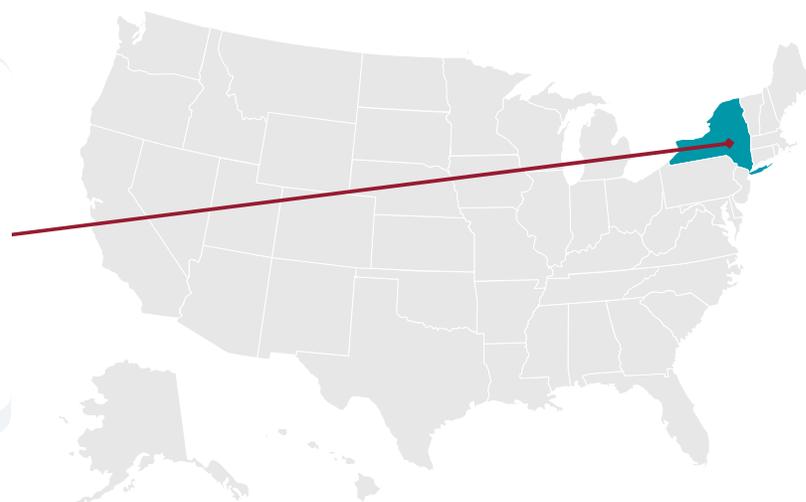
Oregon adopts regulation 150-317-1022 regarding unitary filings (effective January 1, 2022)



Business Activities Taxes

Apportionment

New York State: Appellate Court upholds denial of claimed right to have SMLLC use the same “broker-dealer” apportionment formula as its parent.



Transaction Taxes

Transaction Taxes

Nexus



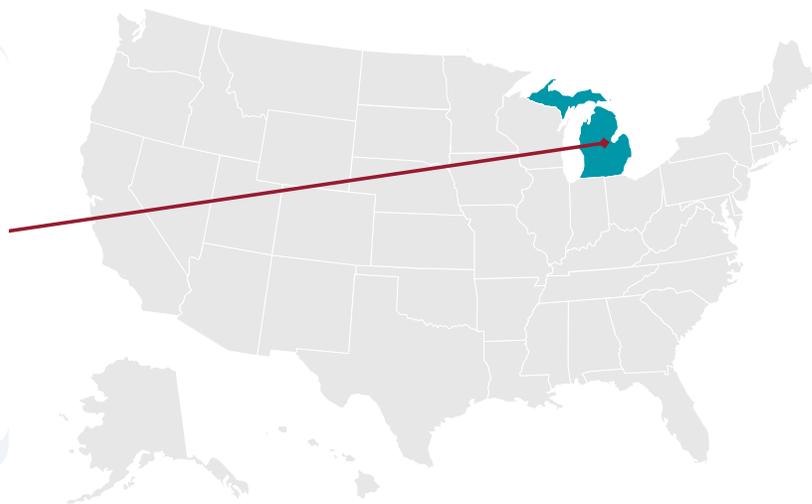
Oregon Supreme Court
concludes that VOIP vendor
had tax presence for 911 tax

Transaction Taxes

Nexus



Michigan Department of Treasury issues bulletin updating its sales and use tax nexus standards



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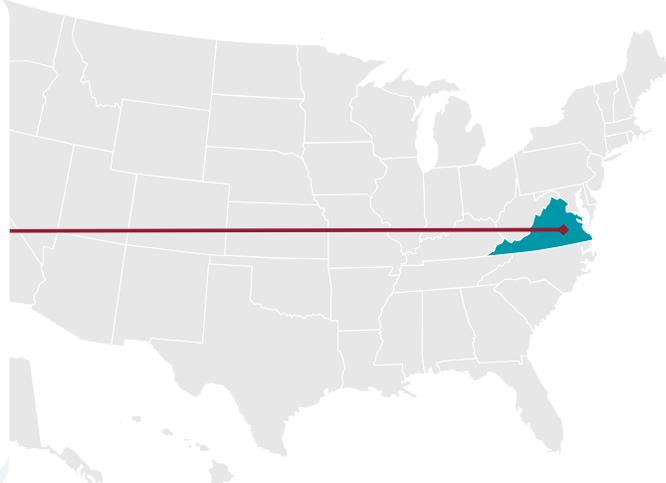
Transaction Taxes

Characterization



Virginia.

Security system included equipment, basic services, and optional services. True object was the sale of a nontaxable service.



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Transaction Taxes

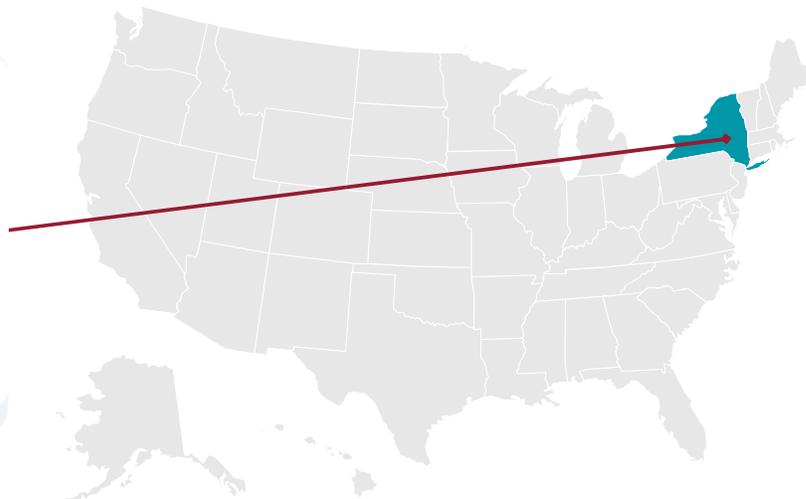
Monitoring Services

New York State:

Services of

- Managing
- Monitoring
- Threat-hunting

were taxable protective and detective services.



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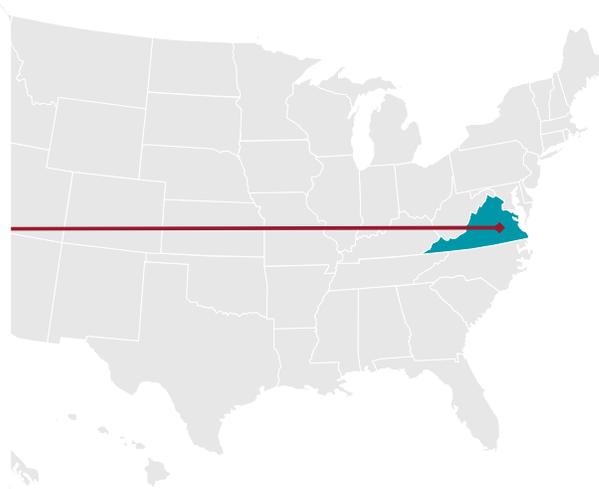
Transaction Taxes

Characterization



Virginia.

Sale of painted canvases installed in a train station was sale of TPP. **Query:** Not much doubt that the greater value is in the painting. What if purchaser provided canvases?



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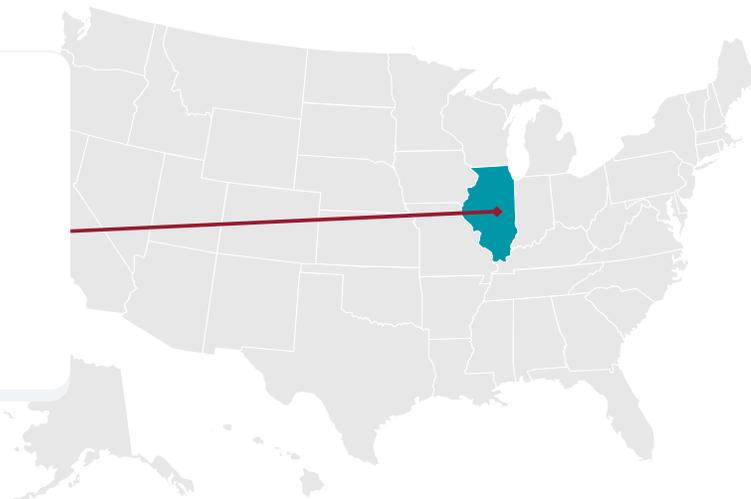
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Transaction Taxes

Tax Base

Illinois.

Use tax on free meals:
Presumed value of meals
increased from \$.75 to \$3.50.
86 Ill. Adm. Code 130.2050.

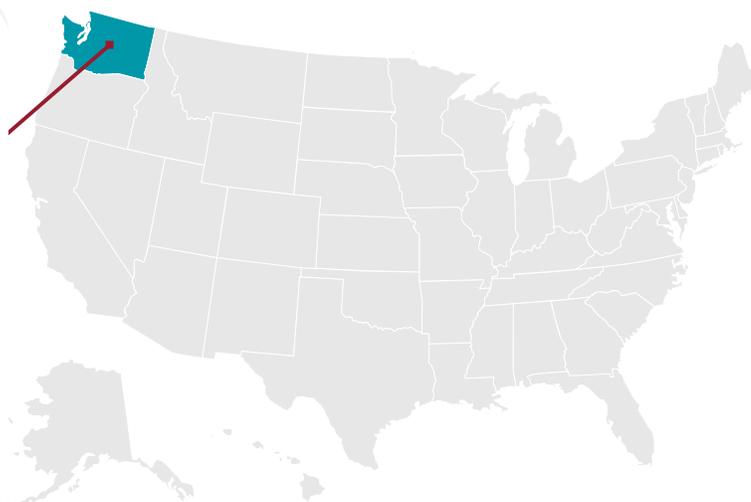


Transaction Taxes

Remote Vendors and Facilitators

Washington.

Remote wholesaler had B&O tax economic nexus for 2017 (i.e., the year before *Wayfair*). Sales are sourced to the location at which possession transfers to the customer. Remote delivery to the customer's third-party shipper is a Washington sale if the customer receives possession in Washington.



Transaction Taxes

Consignment Sales



Arkansas Revenue Legal Counsel opines that a consignment seller might be a marketplace facilitator.

(Query: With loss of ability to claim consignor's exemption?)

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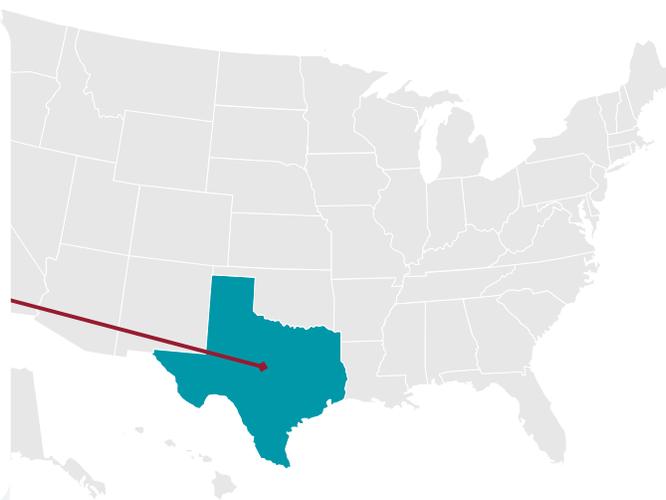
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Transaction Taxes

Manufacturing Exemption

Texas.

Printing of third-party advertising on the back of register tapes qualifies as manufacturing and is the predominant use of electricity at the location. Thus, electricity consumed at the location is exempt from sales tax. Summary judgement against taxpayer is reversed and SJ for it is granted.



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Transaction Taxes

Regressive Taxation

Oklahoma Governor Stitt supports elimination of 4.5% grocery tax. Matches S.B. 1495 which was introduced two weeks earlier.



Transaction Taxes

Car Sharing



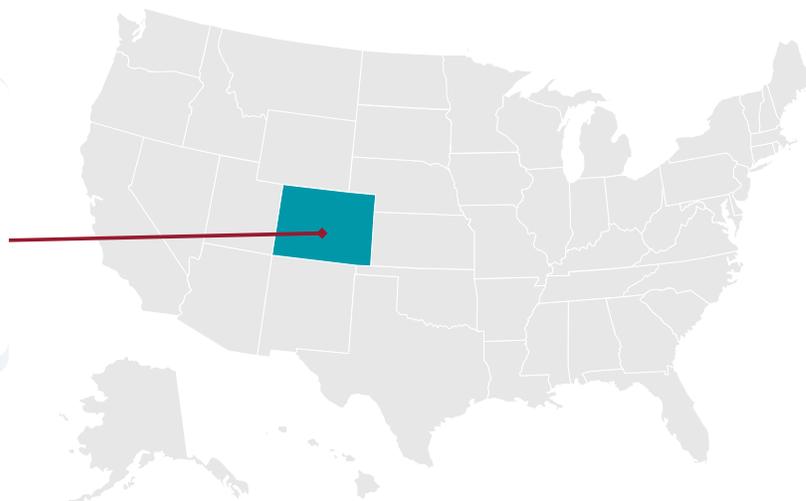
Maryland Comptroller published a **Tax Alert** regarding the need to collect sales tax on car sharing transactions. Information on sales tax registration is also provided. Maryland Comptroller Tax Alert (February 1, 2022)

Transaction Taxes

Bad Debts

Colorado.

Credit card company ineligible for bad debt relief on private credit cards.



Transaction Taxes

Transient Occupancy Tax

Los Angeles transient occupancy tax withstands equal protection and due process challenges.

Because there was no showing regarding the exempt federal program and taxable county program, so no basis for concluding that an improper distinction was drawn between them.

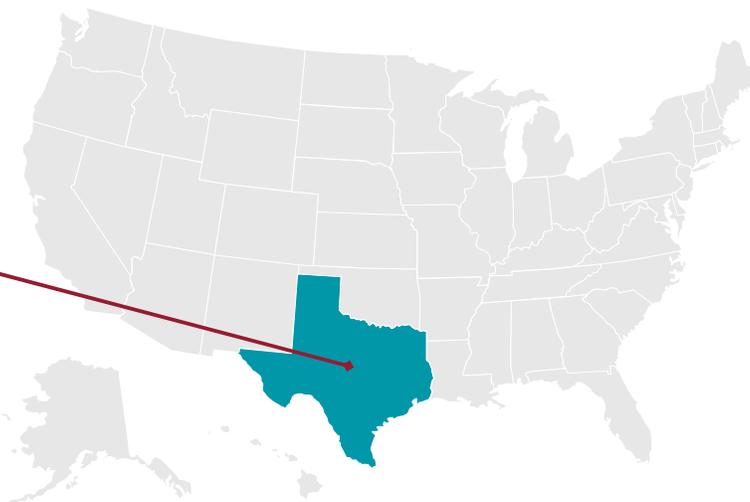


Transaction Taxes

Data Processing Services

Texas.

Law firm held to be purchasing taxable data processing services rather than nontaxable legal services.



Transaction Taxes

Multistate Tax Commission



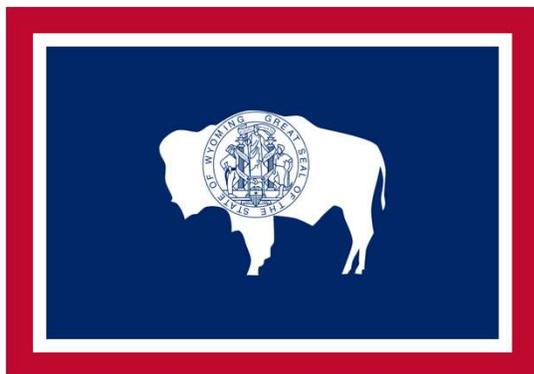
MULTISTATE TAX COMMISSION

Upcoming meetings in
Albuquerque, New Mexico:
April 19-22

Miscellaneous

Miscellaneous

Equal Protection



Wyoming Supreme Court holds that property tax exemption tied to years of residency (a “durational residency” requirement) is constitutional. *Martin v. Bd of Cty Comm. of Laramie Cty*, 503 P.3d 68 (Feb. 2, 2022)

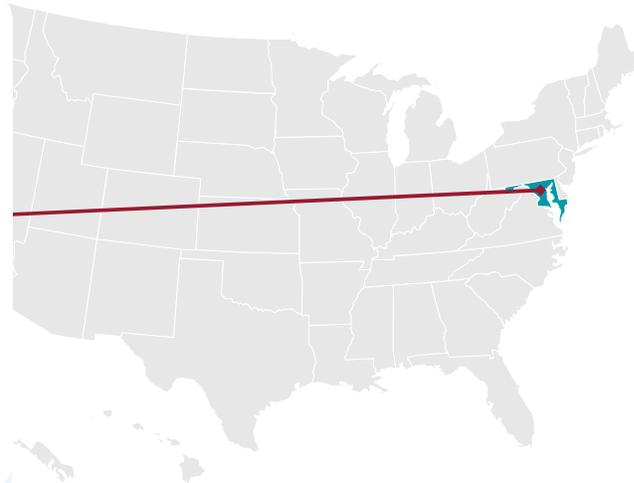
Miscellaneous

Composite Return

Maryland

Court approved refund:

- Payments of estimated taxes for a composite return were mere deposits and were refundable to the paying entity.
- Voluntary payment doctrine did not apply when payments are made due to a mistake of fact... here, in determining taxable income.



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Miscellaneous

Application of Unclaimed Property Procedures

Property owner's claim dismissed because she did not follow statutory procedures. (Her complaint that the holder should not have escheated the property was misdirected.)



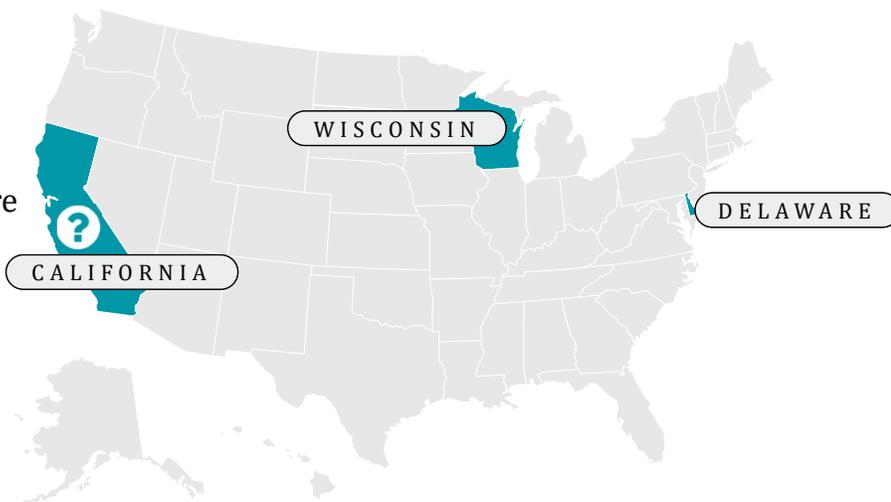
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Miscellaneous

Unclaimed Property

Voluntary Disclosure Programs:



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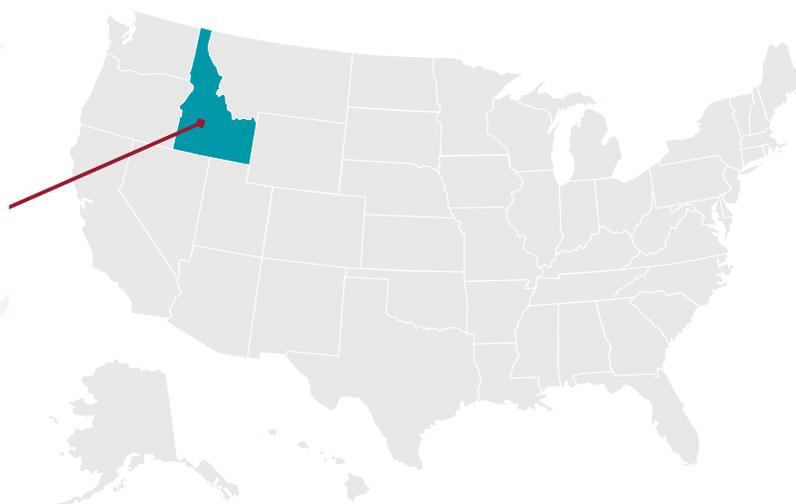
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Miscellaneous

Limitations

Idaho.

State Supreme Court rules that personal NOL carryback was time-barred.



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Miscellaneous

Minimum Tax

Taxpayer formed under California law required to pay minimum tax even though the taxpayer could not conduct business due to C19



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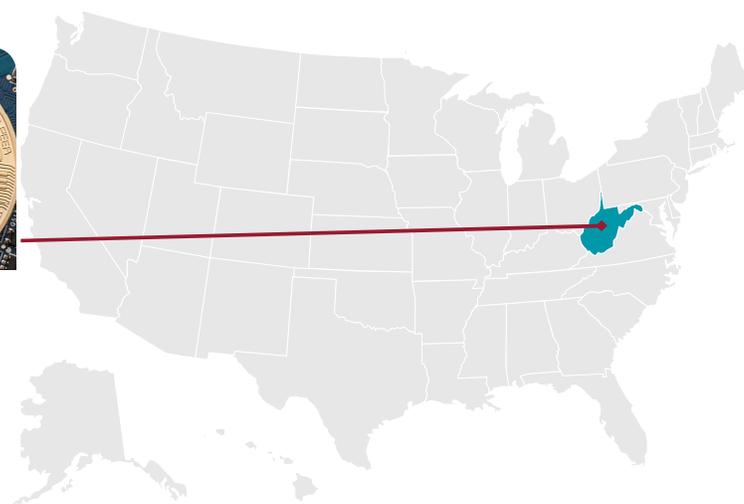
Miscellaneous

Cryptocurrency



West Virginia.

Bill to prevent local taxation of cryptocurrency. H.B. 4010, submitted February 3, 2022.



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Miscellaneous

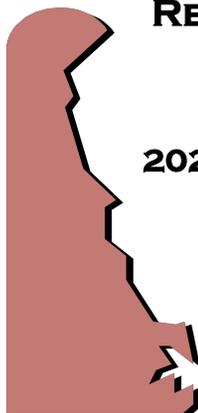
Tax Preferences

STATE OF DELAWARE

TAX PREFERENCE REPORT

2021 EDITION

**2021 Tax
Preference Report**
issued by Delaware
Department of Revenue



DEPARTMENT OF FINANCE
DIVISION OF REVENUE

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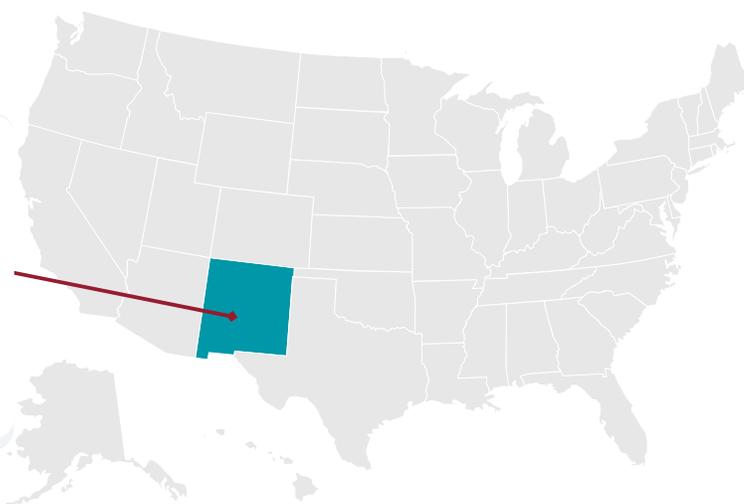
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Miscellaneous

Residency

New Mexico.

Assessment held proper because taxpayer was a statutory resident. *Wynne* held inapplicable because competing state does not impose a PIT



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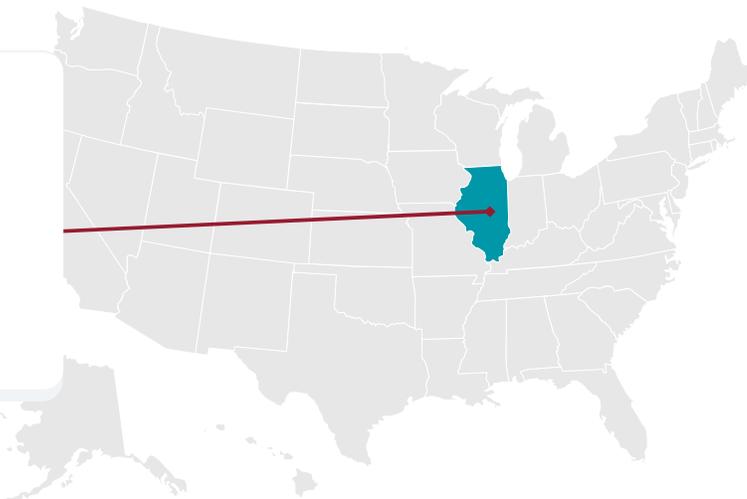
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Miscellaneous

Nonresident Withholding

Illinois.

Payment to a nonresident for wages earned when she was a resident of Illinois are taxable in Illinois.

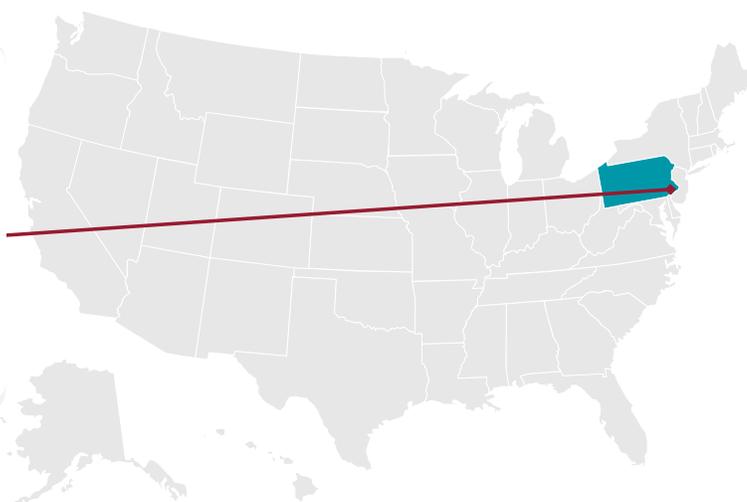


Miscellaneous

Local Taxes

Philadelphia wage taxes

Credit limited to taxes paid to another city (Wilmington) but not for taxes paid to another state (Delaware) was constitutional.



Questions????



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Mr. Ben Carmel provides state and local tax planning and controversy advice. He was the partner in charge of state and local taxation at two international law firms and was a Special Deputy Attorney General to the State of Hawaii.

His representations involve almost all subnational taxes for businesses and individuals, including income, franchise, sales, use, real property transfer, and a variety of other state and local taxes.

You can read Mr. Ben Carmel's full CV at www.349east.com

349 East Multistate Tax Planning LLC are state tax consultants providing direct-to-client services on matters not requiring attorney representation (or law firm rates).

Ben Carmel Law Offices provides state and local tax legal advice. Mr. Ben Carmel is admitted to the bars of New York, Illinois, the District of Columbia, and to the Israel bar as a foreign lawyer.

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Notes

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Virginia Department of Taxation P.D. 21-156 (December 29, 2021)

SLIDE 8

Chamber of Commerce v. Franchot, 21-CV-00410-LKG (March 4, 2022)

SLIDE 9

Akamai Technologies, Inc. v. Commissioner, Dkt Nos. C332360, 334907, and 336909 (Appellate Tax Board December 10, 2021)

Notes

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General Motors Corp. v. Commonwealth, J-9-2021 (S. Ct. of PA, December 22, 2021).

SLIDE 16

Comptroller Decision No. 114,533 (December 27, 2021)

SLIDE 17

Frequently Asked Questions Regarding the Expiration of Philadelphia's Temporary Nexus Waiver, Philadelphia Department of Revenue (February 10, 2022)

Notes

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FTB Technical Advice Memorandum Mo. 2022-01 (February 14, 2022)

SLIDE 19

Virginia Department of Taxation v. R.J. Reynolds Tobacco, Inc., Records No.201262 (Virginia Supreme Court February 10, 2022)

SLIDE 20

Pennsylvania Department of Revenue Corporation Tax Bulletin No. 2022-01 (February 17, 2022)

SLIDE 21

Pioneer News Group Co. and Subs v. Montana Department of Revenue, IT-2020-40 (Montana State Tax Appeals Board January 20, 2022)

Notes

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Matter of BTG Pactual NY Corporation v. New York State Tax Appeals Tribunal, 2022 NY Slip Op 01490 (Appellate Division, Third Department March 10, 2022)

SLIDE 25

Ooma, Inc. v. Department of Revenue, SC S067581 (Oregon S. Ct. December 23, 2021)

SLIDE 26

Michigan Department of Treasury 2021-21 (December 21, 2021) (replaces three bulletins)

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Virginia Department of Taxation P.D. 21-139 (November 9, 2021)

Notes

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Matter of Secureworks, Inc., DTA Nos. 828328 and 828329 (February 17, 2022)

SLIDE 29

Virginia Department of Taxation P.D. 21-157 (December 29, 2021)

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Determination No. 20-0128, 41 WTD 100 (Washington Department of Revenue Administrative Review and Hearings Division March 8, 2022)

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Ark. Rev. Legal Counsel Op. Nos. 20190820 and 20191004 (both February 16, 2022)

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RTU, Inc. v. Hegar, No. 07-20-00301-CV (Court of Appeals January 3, 2022)

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State of the State Address (February 7, 2022)

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Capital One N.A. v. Department of Revenue, 2022 COA 16 (Court of Appeals February 10, 2022)

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City of Los Angeles v. Patel, B306094 (California Court of Appeal February 18, 2022).

SLIDE 38

Hegar et al. v. Black, Mann, and Graham L.L.P., 03-20-00391-CV (Texas Court of Appeals February 25, 2022)

Notes

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Comptroller v. FC-GE Operations Investments, LLC, No. 0946, Case No. C-02-CV-20-001089 (Maryland Court of Special Appeals February 3, 2022) unreported opinion.

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Atlaf v. State Escheator, Dkt No. 1780 (Tax Appeal Board of the State of Delaware)

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Wisconsin available February 1, 2022 to February 28, 2023; California AB 2280 (introduced February 16, 2022)

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Idaho State Tax Commission v. James, Docket No. 47835 (Supreme Court of Idaho March 1, 2022)

Notes

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Appeal of Mrs. Lash & Beauty Bar LLC, OTA case No. 20127089
(November 16, 2021 nonprecedential).

SLIDE 49

Matter of Michael Miller, 22-03 (New Mexico Taxation and Revenue Department
Administrative Hearing decision and Order (February 10, 2022)

SLIDE 50

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