Multistate Taxation

By Phil Tatarowicz and Ted W. Friedman

Developments in Multistate Taxation

California

On November 6, 2012, California voters approved Proposition 39, which will implement single–sales-factor apportionment for most multistate businesses operating in California beginning on or after January 1, 2013. Proposition 39 also requires business taxpayers to use market-based sourcing for sales other than sales of tangible personal property beginning on or after January 1, 2013.

New Jersey

On remand from the Superior Court of New Jersey, Appellate Division, the Tax Court of New Jersey addressed whether a limited partnership or its foreign limited corporate partner was the actual taxpayer entity for purposes of claiming a Corporation Business Tax (CBT) refund.[1] The court held that the limited corporate partner, which had a 99-percent interest in the limited partnership, was entitled to a CBT refund because the New Jersey Division of Taxation's regulations made it "abundantly clear" that when a CBT payment is made on behalf of a nonresident partner, the partner is deemed to have paid it and is eligible to receive a refund, even though the funds were technically remitted to the state by a third party. Furthermore, the court found that the legislative history of New Jersey's statute addressing payments of CBT by nonresident corporate partners of limited partnerships demonstrated the Legislature's intention to have a partner receive any refund of taxes paid on its behalf by a limited partnership.

New Mexico

The New Mexico Taxation and Revenue Department ruled that a company selling various web-based services

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in New Mexico for a monthly fee was subject to New Mexico's gross receipts tax.[2] The company did not sell or license any software or tangible personal property to its customers but allowed its customers to access certain web services through the company's Internet Web site. The Department ruled that the subscriber fee charged by the company was a license, and therefore "a form of property" subject to the gross receipts tax. The Department reasoned that the location of each license was the location where it would normally be exercised and concluded that when a customer is located in New Mexico, with a computer located in New Mexico, the location of the license is in New Mexico. The Department found that when the location of the license is in New Mexico, the seller has gross receipts from licensing property employed in New Mexico. Accordingly, the Department ruled that the company's receipts from the sale of licenses to customers in New Mexico to access its Web site and use its Web services were gross receipts subject to the gross receipts tax.

Tennessee

The Tennessee Department of Revenue issued a notice regarding its new approval process to allow for the deduction of intangible expenses paid to an affiliated entity for excise tax purposes.[3] According to the Department, effective for tax periods ending on or after July 1, 2012, intangible expenses paid to affiliated entities may be deducted when the intangible expenses come within one of the following safe harbors: (1) the affiliate is in a foreign nation that is a signatory to a comprehensive income tax treaty with the United States; (2) the affiliate, during the same tax year, has directly or indirectly paid such portion to an entity that is not an affiliate; or (3) the affiliate is subject to a state's income tax and computes the appropriate portion using the allocation or apportionment rules of that state. In addition, the Department announced that deductions will be allowed for intangible expenses paid, accrued or incurred in connection with a transaction with one or more affiliates if the Department determines upon application by the taxpayer that the intangible expense did not have as its principal purpose the avoidance of the Tennessee excise tax. If the Department approves the intangible expense deduction, such determination will remain in effect for at least five years, so long as the taxpayer completes an annual certification that the facts and circumstances surrounding the transaction remain substantially unchanged.

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The Department ruled that whether a computer software maintenance contract is subject to Tennessee sales and use tax is determined by the location of the computers on which the computer software to which the contract applies is installed, regardless of whether the repairs covered under such contract are performed inside or outside of Tennessee.[4]

Virginia

The Virginia Department of Taxation ruled that an out-of-state company that did not own facilities or employ salespersons in Virginia nevertheless had sufficient nexus with the state to justify the imposition of a sales and use tax collection obligation.[5] The Department concluded that the company had nexus with Virginia because it leased or rented tangible personal property to customers in the state. In addition, the Department determined that a finding of nexus was further supported by the fact that the company made 11 occasional deliveries of goods into Virginia using its own vehicles during the audit period and that it provided repair services for equipment located in Virginia.

Endnotes

1 *BIS LP, Inc. v. Director, Div. of Tax'n*, N.J. Tax Ct., No. 007847-2007 (Oct. 25, 2012).
2 Ruling 401-12-2, N.M. Tax'n & Rev. Dep't (Sep. 28, 2012).
3 Franchise & Excise Tax, Tenn. Dep't of Rev., Notice #12-16, (Oct. 2012).
4 Rev. Rul. No. 12-20, Tenn. Dep't of Rev. (Oct. 15, 2012).
5 Rulings of the Tax Comm'r, Va. Dep't of Tax'n, 12-158 (Oct. 5, 2012).