National SALT Review

October 17, 2024

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Agenda

- Hot Topics
- COST Studies – Advocacy
- Nexus
- Tax Reform
- Apportionment
- Combined/Consolidated reporting
- Pass-throughs
- Net operating losses
- Trends and other
- 2024 election

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Hot Topics

California allows foreign dividends in sales factor

Facts

- For the 2018 tax year, Taxpayer received dividends from certain CFC entities that were not members of its water's-edge combined group.
- Pursuant to California law, Taxpayer deducted 75% of such foreign dividends from its pre-apportioned business income.
- Taxpayer argues that the full 100% of the foreign dividends it received should be included in its sales factor denominator.

July 2023 Office of Tax Appeals decision

- On appeal to the OTA, the FTB relied on its Legal Ruling 2006-01, stating that basic principles of apportionment provide that a taxpayer's base income is apportioned only by activities that gave rise to such income included in the base.
- The OTA disagreed and found in its July 2023 ruling that dividends qualify as gross receipts for sales factor purposes and there is no applicable exclusion in the plain language of California law. Quoting from its previous decision in *In re Southern Minnesota Beet Sugar*, [t]here is no language . . . to support FTB's position that unitary business activities are excluded from the apportionment formula if they relate to deductible income."
- The OTA also found that (1) California's substantial and occasional sales exclusion did not operate to exclude the deducted 75% foreign dividend and (2) alternative apportionment treatment was not warranted.
- *Continued on next slide*

California allows foreign dividends in sales factor (cont.)

February 2024 rehearing denial

- As noted on the prior slide, the OTA in July 2023 ruled that Taxpayer may include 100% of its foreign dividends in its sales factor.
- The FTB filed a request for rehearing, asserting that the OTA's three primary holdings were contrary to law.
- On February 14, 2024, the OTA in *In re Microsoft Corp. and Subsidiaries*, Case No. 2103736 denied the FTB's request for rehearing the OTA's July 2023, decision.
- The FTB released the decision on April 2, 2024.

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California OTA allows foreign dividends in sales factor, legislation reverses

Microsoft decision (recap from prior slide)

- On July 27, 2023, the OTA, in its decision in Microsoft Corporation & Subsidiaries, agreed with the taxpayer that foreign dividends, including dividends excluded from income under the dividends received deduction (DRD), are taken into account in computing the California sales factor of the apportionment formula.
- The FTB released the decision on April 2, 2024, as a nonprecedential opinion, meaning that it cannot be relied upon or cited by other taxpayers when filing an original return or a refund claim.

Law change

- Enacted on June 27, S.B. 167 prohibits taxpayers from including in their sales factor apportionment formula any income not included in California net income.
- This change effectively overrules the Microsoft decision.
- The legislative analysis released by the California Assembly and Senate indicates that this change is intended to be declaratory of existing law, signaling that this legislation will be applied retroactively as well as prospectively.

Click here for our Microsoft Alert
Click here for our S.B. 167Alert

Oregon

Microsoft can include Sec. 965 income in sales tactor

- Oregon allows taxpayers an 80% deduction for its Sec. 965 repatriated dividends.
- The Department disallowed the taxpayer's inclusion of the 20% Sec. 965 income that was included in its tax base.
- The Oregon Tax Court found that, as a matter of statutory construction, the deemed included amounts were included in the definition of "sales" because they derived from the primary business activity of the taxpayer.

Microsoft Corp. v. Department of Revenue, Or. Tax Ct. No. TC 5413 (8/29/24)

Tennessee franchise tax refunds

On May 10, Tennessee enacted Senate Bill (SB) 2103, which changes the method for computing state franchise tax.

- Prior to enactment, Tennessee imposed a tax on the greater of apportioned net worth (apportioned net worth measure) or the value of property owned or used in the state (property measure).
- In response to concerns about constitutionality, SB 2103 repeals the property measure, meaning that franchise tax is determined only based on apportioned net worth.

Refunds are allowed for tax periods ending on or after March 31, 2020.

- Claims must be filed between May 14, 2024, and Nov. 30, 2024.
- Taxpayers claiming a refund waive the right to challenge the franchise tax as unconstitutional.
- The Tennessee Department of Revenue will publish on its website the names of taxpayers receiving refunds along with a range of the amount of the refund each taxpayer received. The applicable ranges are $750 or less, more than $750 and less than or equal to $10,000, more than $10,000, and pending.
- The franchise tax change is effective for tax years beginning on or after Jan. 1, 2024.

For the 2023 tax year, taxpayers should continue to calculate their franchise tax using both franchise tax bases and request a refund, if applicable.

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Due Process

New York Appellate Court – Retroactive surcharge violates Due Process

- Enacted in April 2018, the Opioid Stewardship Act imposed a surcharge on certain prescription drugs.
  - The surcharge was imposed for sales made during the 2017 and 2018 calendar years.
  - The Court held that the retroactive tax violated taxpayer's substantive due process rights for the 2017 tax year, but not for 2018.
    - For 2017, the tax violated due process due to the "15½-month period of retroactivity and the lack of forewarning to plaintiffs."
    - The Court found no similar violation for 2018 because "for most of the year, plaintiffs were aware of the impending change.“

Amerisourcebergen Drug Corp. v. New York State Dept. of Health, N.Y. Sup. Ct., App. Div., No. CV-23-0150 (5/23/24)

Apportionment of Use Tax

U.S. Supreme Court 10/7 denied review of South Dakota *Ellingson* use tax case

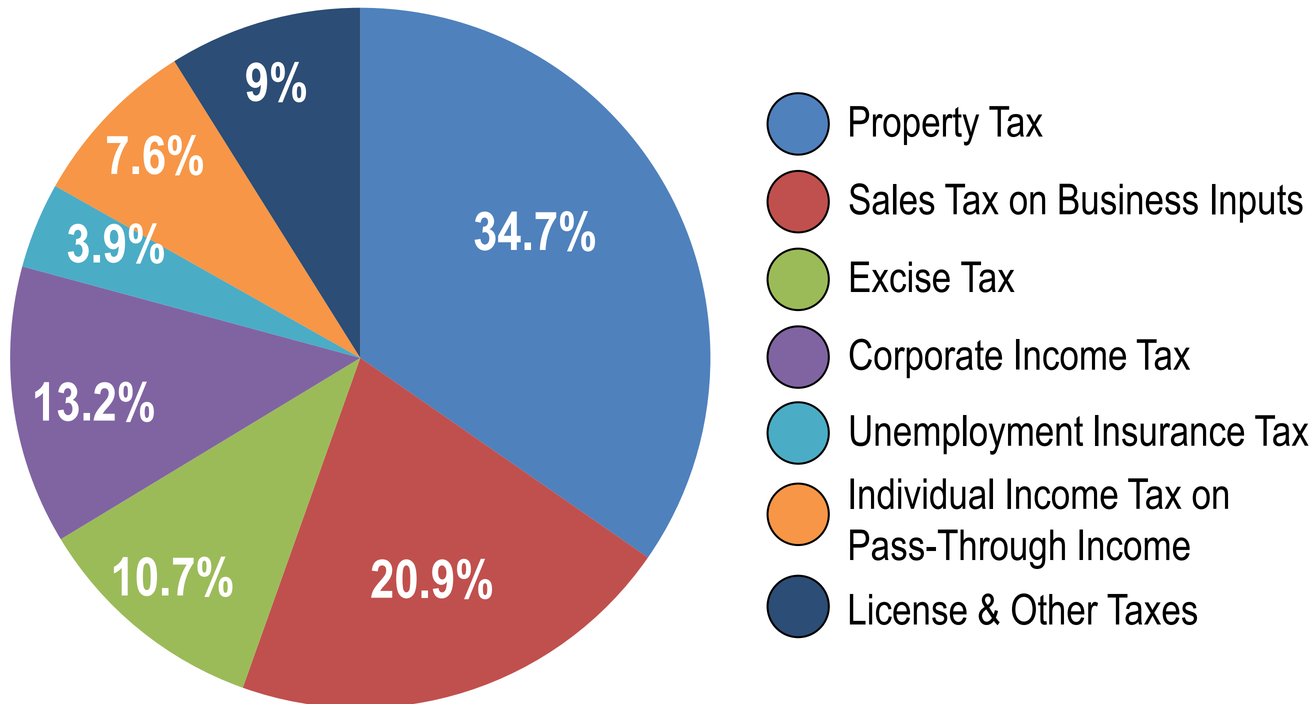
- Like other states, South Dakota imposes is full use tax on any product used or consumed in a state, even if the product is only used in a state for one day
- States do provide credit for previously paid sales taxes (application to use tax paid to another state is less clear)
  - Is that credit sufficient under external consistency?
  - Is a 1944 case, *Dilworth*, still good law requiring states to impose use taxes versus sales tax (NC *Quad Graphics*)?
  - Some states (*e.g.*, Massachusetts) are also going after rolling stock (trucks and trailers) that are located in the state for more than a couple of days
  - There are Pros and cons to apportioning use taxes

Thinking about constitutional challenges

- **Commerce Clause: Internal consistency**
  - Tennessee franchise tax, other taxes?
  - *IBM*
- **Commerce Clause: External consistency**
  - Microsoft, by extension.
  - Other treatment? Absence of factor representation? Apportioning use tax?
- **Commerce Clause: Fourth Prong, fair relation?**
  - Time for a challenge after *Wayfair*?
- **Due Process** and retroactive laws
- **Foreign Commerce Clause**
  - New federal provisions after TCJA expirations?
- **State Uniformity Clauses**

COST Studies - Advocacy

COST Business Tax Burden Study in Use

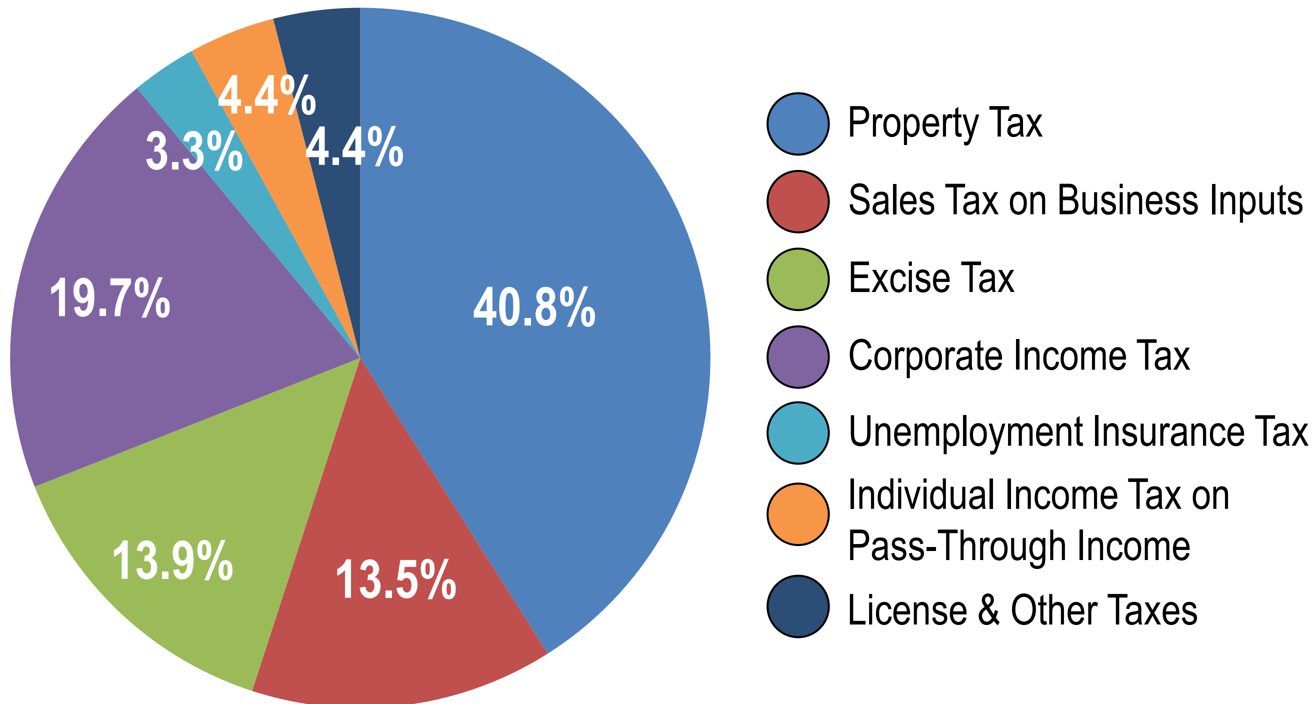


Source: Total State and Local Business Taxes: State-by-State Estimates for FY22, prepared by Ernst & Young for COST and STRI, December 2023

How Much Do Businesses Pay?

- Businesses paid more than $1.07 trillion in U.S. state and local taxes in FY22, an increase of 13.7% from FY21
- State business taxes increased by 18% and local business taxes grew by 9%
- Corporate income tax revenue increased by 26.7% in FY22
- In FY22, business tax revenue accounted for 44.6% of all state and local tax revenue
- Remarkably, the business share of SALT nationally has been within approximately 1% of 44% since FY03

FY 2022 State and Local Business Tax Burden Study

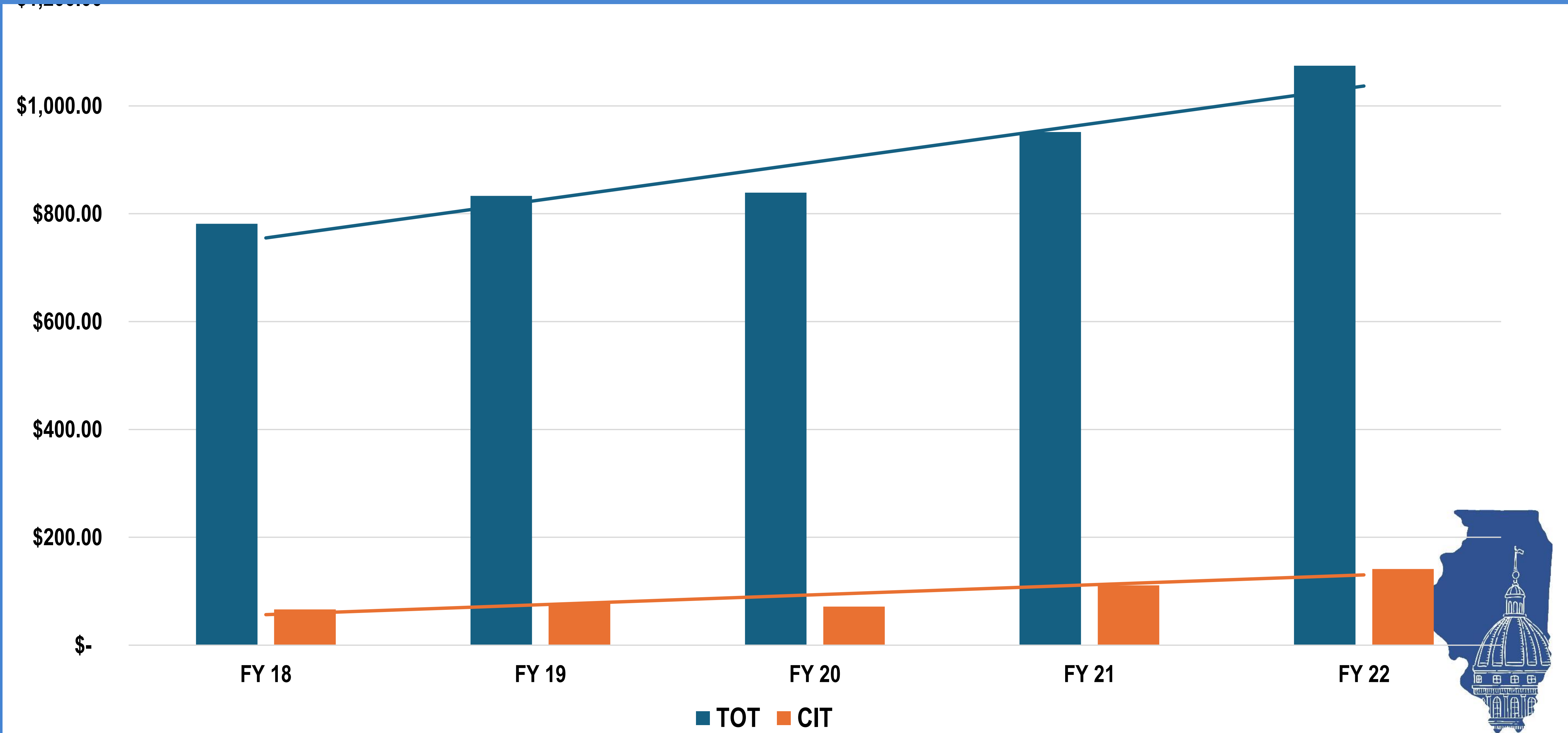


How Much Do IL Businesses Pay?

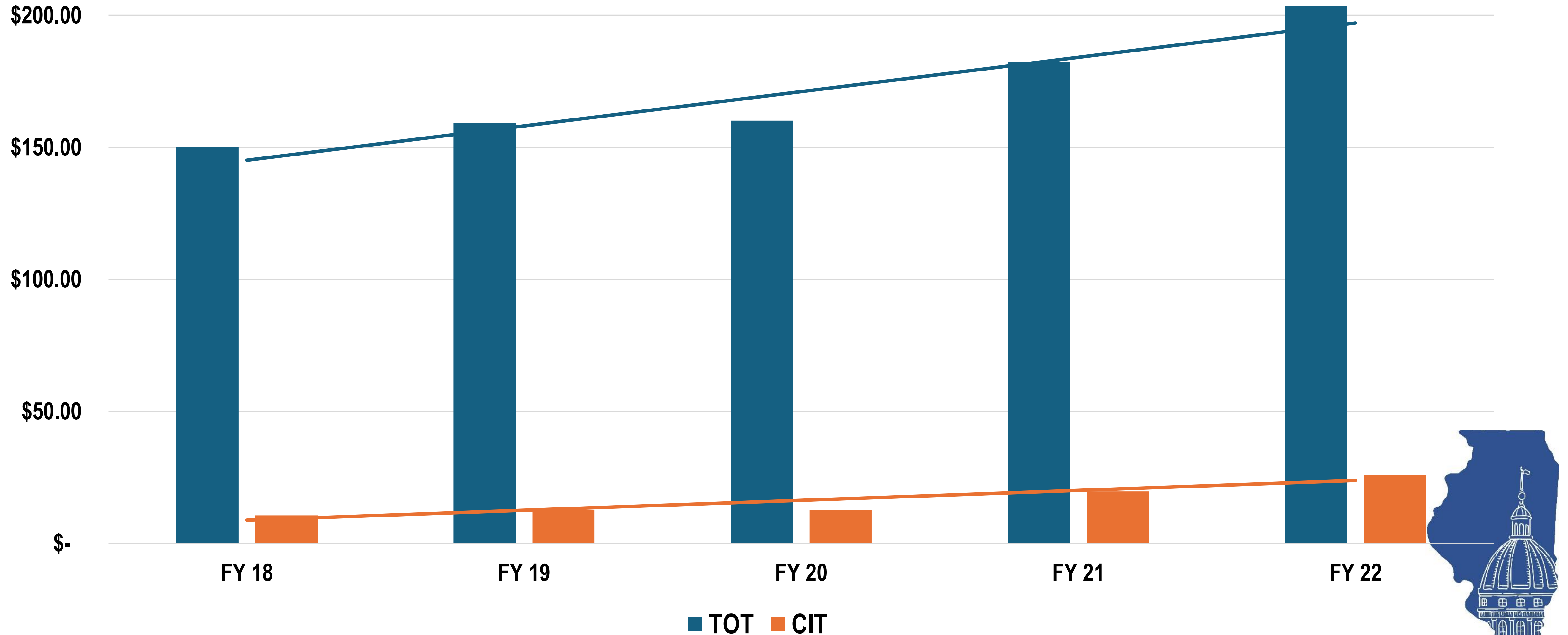
- Businesses paid more than $48.9 billion in Illinois state and local taxes in FY22, an increase of 17.3% from FY21
- In FY22, business tax revenue accounted for 46.4% of all state and local tax revenue in Illinois

Source: Total State and Local Business Taxes: State-by-State Estimates for FY22, prepared by Ernst & Young for COST and STRI, December 2023

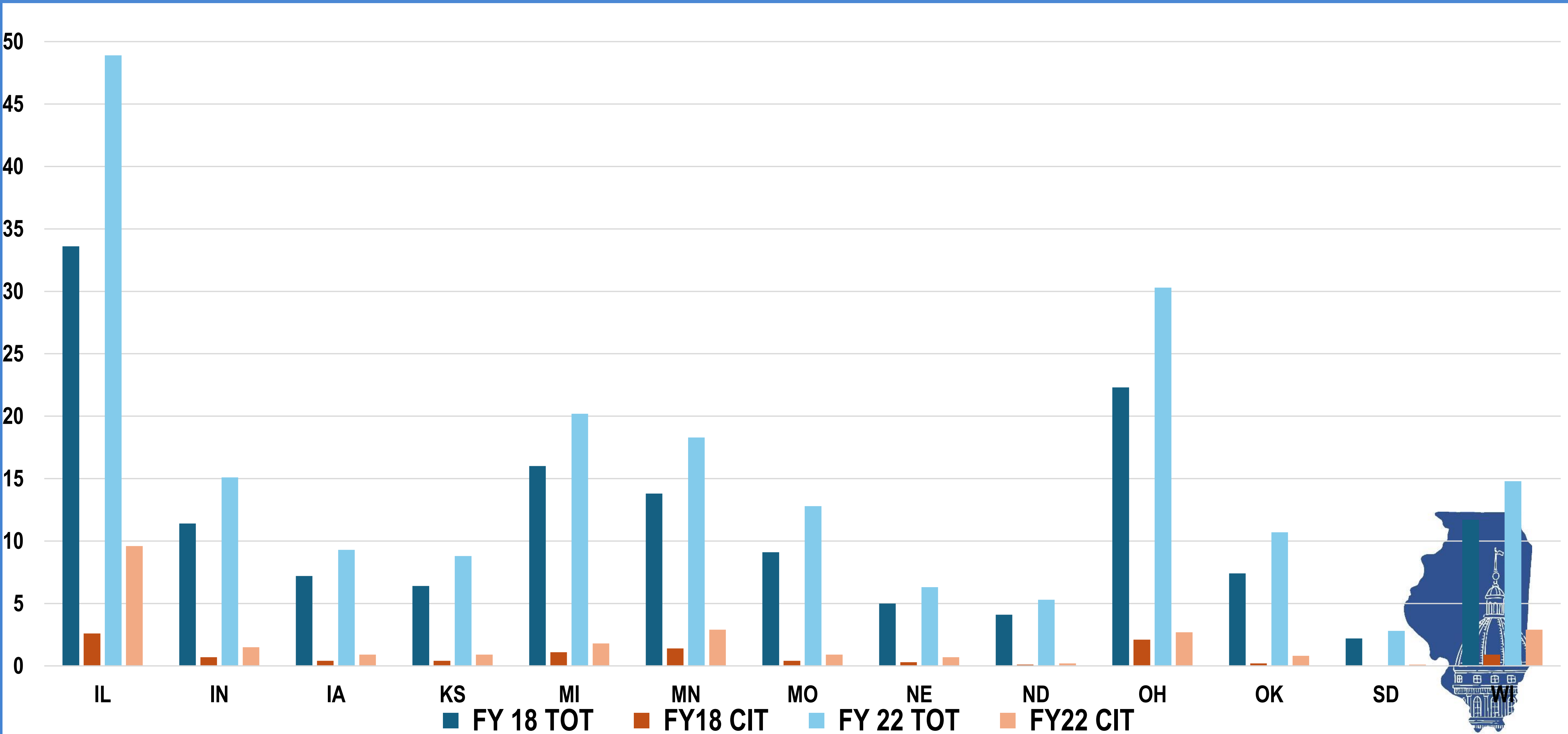
US: FY 2018 – FY 2022



MSATA States: FY 2018 – FY 2022



MSATA States: FY 2018 Compared to FY 2022



COST Business Tax Burden Study in Use

Oregon Initiative Petition 17 / Measure 118

- Changes corporate minimum tax by adding a 3% tax on sales in Oregon above $25 million
- Applies to C Corps and S Corps
- Separate from the CAT and CAT definitions, exclusions, etc.
- Revenue raised funds the "Oregon Rebate" (~$750) which redistributes proceeds in equal payments to eligible individuals
- 168,854 signatures submitted (just over 117k valid required)
- Certified on July 24, 2024

Legislative Revenue Office (LRO) report released July 3

- $6.8B in the first year
- 2,401 businesses directly impacted
- 28,000 fewer jobs

For business tax ranking, the shift is more pronounced. The annual COST study attempts to incorporate all state and local taxes that are initially paid by business. Unlike the Census data, this approach includes unemployment insurance taxes because they are paid by businesses. The largest taxes on a national basis are business property taxes, general sales taxes on business inputs, corporate income taxes and unemployment insurance taxes. COST includes business taxes based on gross receipts in the corporate income tax category. This includes taxes such as Ohio's Commercial Activity Tax, Washington's Business and Occupation Tax, and Texas' Margin Tax. Since IP 17 generates substantial revenue based on the sales or gross receipts of corporations, it appears to fit the method by which these taxes are considered.

Because Oregon does not have a sales tax on business inputs, Oregon's business tax burden had historically ranked relatively low according to the method used by COST. With the addition of the Corporate Activity Tax, Oregon has moved closer to the national average. In 2021-22, Oregon received an estimated 41.7% of state and local tax revenue from business entities compared to 44.6% nationally. Oregon's $12.8 billion in business tax collections in 2021-22 were 4.8% of the state's total personal income (one measure of the state's economy). Nationally, business taxes were 4.9% of total income.

Table 8 shows an estimate of how IP 17 would affect Oregon's business tax burden compared to other states. (This assumes other states have made no tax changes.) IP 17 moves the 2021-22 total business tax burden to an estimated $18.6 billion in Oregon. This increases the business tax share to 51%, above Washington's 50% and above the U.S. average of 45%. Idaho and California are below the national average. Under IP 17, Oregon business taxes as a share of state personal income rises from 4.8% to 7%. This would move Oregon above California's 5.6%, Washington's 5%, and Idaho's 3.9%, and the U.S. average (4.9%).

Table 8 Business Tax Rankings

State Fiscal Year (2021-22)	Total Business Taxes ($B)	Business Taxes as Percent of Total Taxes	Business Taxes as Percent of Total Income
Oregon (Actual)	$12.8	41.7%	4.8%
Oregon with IP 17	$18.6	50.9%	7.0%
Washington	$29.3	49.7%	5.0%
California	$167.2	41.8%	5.6%
Idaho	$4.3	41.9%	3.9%
U.S. Totals	$1,074.5	44.6%	4.9%

What Is a Fair Share for Business of State and Local Taxes?

Wearing Blinders in the Debate Over Business's "Fair Share" of State Taxes (April '24)

The central Bucks/Enrich/Mazerov/Shanske (BEMS) thesis:

1) Business does not pay its "fair share" of state and local taxes, with a particular emphasis on the corporate income tax as a microcosm of the whole
2) The "underpayment" of state and local taxes is the result of flaws in the design of tax statutes that favor businesses
3) These structural deficiencies reflect inordinate business political influence over state legislative and administrative processes

Problem/Concern: Corporate income taxes are not the only taxes paid by business, lots of complicated compliance/audit issues, and no other country imposes WWCR.

Recent COST Articles/STRI Studies

- **A State DAT Relabeled a 'Digital Barter' Tax is Still Bad Tax Policy** (Tax Notes State, August 5, 2024)
- **Is E-Invoicing Relevant in the US State Sales Tax Context?** (May 2024)
- **Wearing Blinders in the Debate Over Business's "Fair Share" of State Taxes (**April 2024)
- **Mandatory Worldwide Combined Reporting: Elegant in Theory but Harmful in Implementation** (March 2024)
- **Digital Business Input Exemptions: Lessons From Sales Tax History** (January 2024)
- **FY22 State and Local Business Tax Burden Study** (December 2023)
- **COST Scorecard on Tax Administration** (December 2023)
- **Minnesota's New Approach to Taxing Foreign Income Is Unfair and Unwise** (August 2023)
- **State Digital Services Taxes: A Bad Idea Under Any Theory** (April 2023)
- **Five State Tax Policy Changes That Would Modernize Laws and Ease Administration and Compliance** (April 2023)
- **COST Scorecard on Sales Tax Administration** (December 2022)
- **Down the Rabbit Hole: Sales Taxation of Digital Business Inputs** (July 2022)
- **Resisting the Siren Song of Gross Receipts Taxes: From the Middle Ages to Maryland's Tax on Digital Advertising** (July 2022)

https://cost.org/state-tax-resources/cost-studies-articles-and-reports/

COST
Council On State Taxation

State Tax Administration Scorecard: State Grades

- **COST presently has 4 Scorecards addressing the states' administrative practices**
  - Administrative Scorecard
  - Sales Tax Systems Scorecard
  - International Property Tax Scorecard (issued with IPTI)
  - Unclaimed Property Scorecard
- Focus is primarily on using objective criteria of important administration with bias towards issues of concern with business taxpayers
  - Scorecards do not grade subjective personalities of state tax administrators
- **Letter grading is for comparison purposes with goal to encourage tax policy makers (*e.g.*, legislators) to improve administrative practices**
  - It is acknowledged and understood that tax administration varies significantly state-by-state

State Tax Administration Scorecard: State Grades

- **Objective evaluation of state statutes and rules that govern the degree of a taxpayer's access to an independent appeals system.**
  - ***Elements of an effective and independent tax appeals system - Evaluated***
    - The forum must be truly independent;
    - Taxpayers must not be forced to pay the tax or post a bond prior to an independent hearing and resolution of the matter;
    - The record for further appeals must be established at the independent tribunal; and
    - The arbiter at the hearing must be well versed in state tax laws and concepts.
  - ***Procedural developments - Evaluated***
    - Even-handed statute of limitations;
    - Equal interest rates for refunds and deficiencies;
    - Due dates for corporate income tax returns are at least one month beyond the federal due date with an automatic extension based on the federal extension;
    - Adequate time to file a protest before the independent forum;
    - Reasonable and clearly defined procedure for filing amended state income/franchise tax returns following a federal audit;
    - Transparency in the form of published letter rulings (redacted) and administrative tribunal decisions.
- **Tool for policymakers seeking to improve tax administration and the business climate**

The Best and Worst of State Tax Administration

COST Scorecard on State Tax Appeals & Procedural Requirements

Douglas L. Lindholm
Fredrick J. Nicely
Priya D. Nair

December 2023

Executive Summary

The Council On State Taxation (COST) has long monitored and commented on state tax appeals processes and administrative practices. Part of that effort has resulted in the regular publication of a scorecard ranking the states. Our focus is on the states' adoption of procedural practices that impact the fairness of states' laws and regulations for the administration and appeal of state tax matters. Why are these issues so important? Although compliance with state tax statutes and regulations is subject to audit scrutiny, the percentage of taxpayers actually audited is small. As

State Tax Administration Scorecard: State Grades

A	3 to 5 points
B	6 to 8 points
C	9 to 11 points
D	12 to 14 points
F	15+ points

WA B
OR B
CA B
ID D
NV C
MT A
WY B+
UT B-
AZ A-
CO C+
NM A-
ND D-
SD D
NE D
KS B
OK B-
TX B-
MN B
IA C+
MO C+
AR B
LA B+
WI B+
IL A
MI B-
IN A
OH B+
KY B
TN C+
MS C
AL C-
GA B-
FL C
SC D
NC C
VA A-
WV C
PA B-
NY C
ME B-
VT
NH
MA
CT
RI
NJ
MD
DE
AK B-
HI: D

CT: C-
DE: D
DC: D-
MD: D-
MA: C-
NH: C+
NJ: B-
RI: C-
VT: B-

Source: COST's Scorecard on State Tax Administration, December 2023

Proactive Legislative Issues

- One Month Extension Beyond the Federal Extended Due Date for Filing Corporate Income Tax Returns
- 30-Day Safe Harbor for Nonresident Traveling Employees
- Reporting of Federal Adjustments (RAR)
- Participate in SSUTA

One Month Extension Beyond the Federal Extended Due Date for Filing Corporate Income Tax Returns

- Original or extended return deadline at least one month after federal
- Original or extended return deadline at least one month after federal for combined filers only
- Original and extended return deadline less than one month after federal
- States not impacted

* Original or extended return deadline one month after federal but extension is NOT automatic (CT, MD, NJ, TX, VT, DC)

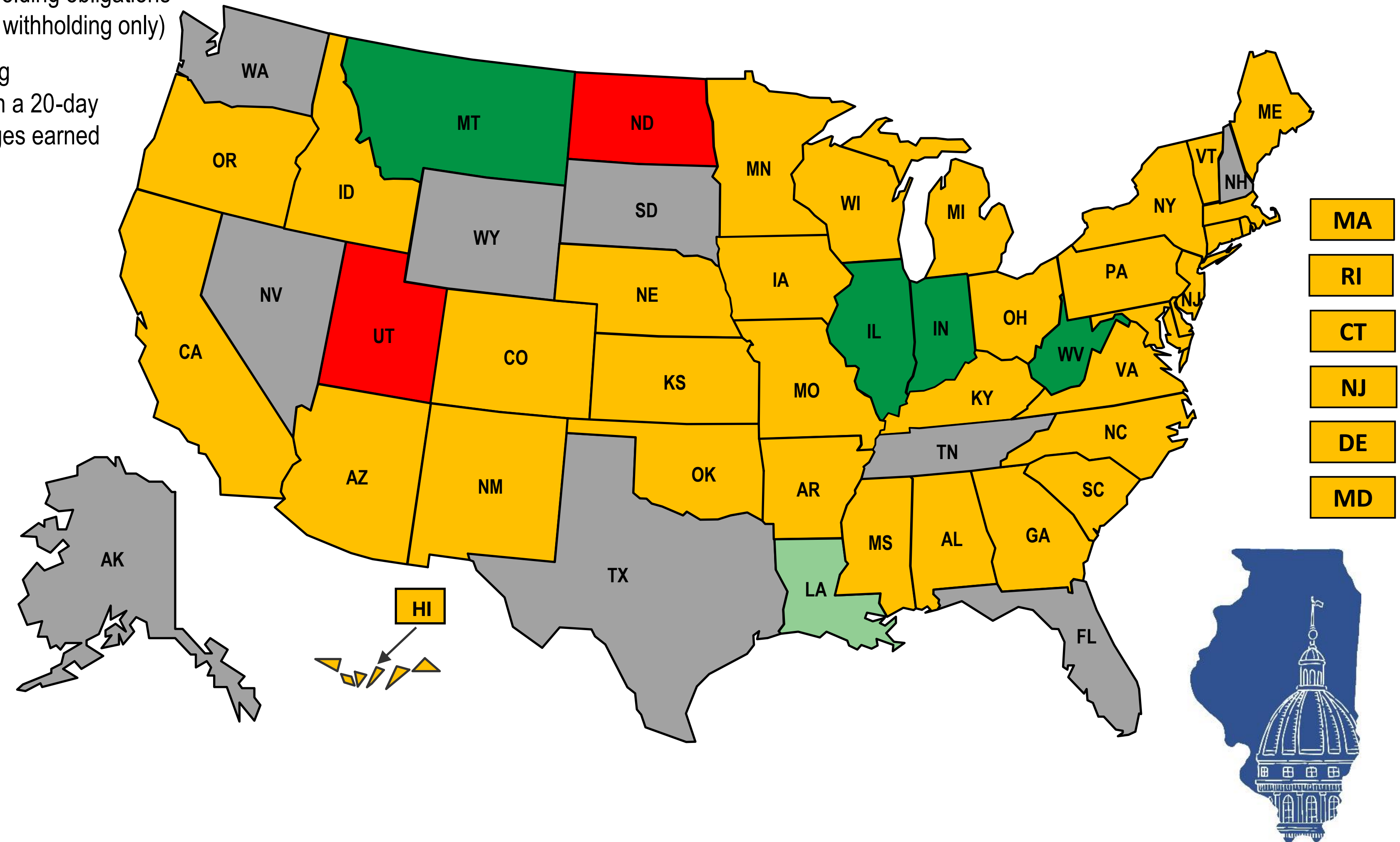
MA
RI
CT*
NJ*
DE
MD*
DC*

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

Source: Council On State Taxation (COST)

30-Day Safe Harbor for Nonresident Traveling Employees

- State has enacted a 30-day threshold for both filing and withholding
- State has enacted the COST model statute with a 25-day threshold for both filing and withholding
- States that need a 30-day safe harbor for both filing and withholding obligations (AZ and HI have a 60-day, and VT has a 30-day threshold for withholding only)
- States that need a 30-day safe harbor for filing and withholding obligations and they have enacted the MTC model statute with a 20-day threshold and additional complicated provisions based on wages earned
- No general state personal income tax



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

Source: Council On State Taxation (COST)

MTC Consensus Model for Federal Audit Change Reporting

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

SSUTA and Sales Tax Scorecard: States' Grades

State is a full member of the Streamlined Sales and Use Tax Agreement (SSUTA)

WA OR MT ID ND SD WY MN WI MI NV UT CA CO NE IA IL IN OH KS MO KY AZ NM OK AR TN TX LA MS AL GA SC NC VA WV PA NY ME VT NH MA CT RI NJ MD DE DC FL AK HI

Overall Sales Tax Scorecard Grades					
N/A	0-12	13-20	21-26	27-29	30+
N/A	A	B	C	D	F

Note: Because Alaska has no statewide sales tax, its was not given an overall grade

Nexus

P.L. 86-272

Minnesota Supreme Court finds activities exceed P.L. 86-272 protection

The Minnesota Supreme Court held that a catalog and internet-based distributor of tangible personal property (Uline) was not protected under Public Law 86-272.

The Commissioner found that the following activities exceeded 86-272 protection, but the Tax Court disagreed:

- Participation in job fairs for non-sales positions.
- Picking up defective merchandise.
- Collecting and reporting to the Hudson Branch information about customer complaints.

The Tax Court found that the following activity exceeded 86-272 protection:

- Collecting and reporting market data concerning competitors on a twice-monthly basis at minimum.
- The activities were not de minimis and served a separate business purpose independent from the solicitation of orders.

- On appeal to the Minnesota Supreme Court, the Court agreed with the Tax Court and found that "the preparation of Market News Notes by Uline’s sales representatives is not exclusively the “solicitation of orders,” and is consequently not protected from state taxation by [P.L. 86-272]."

Uline, Inc. v. Commissioner of Revenue, Mn. Sup. Ct., No. A23-1561 (8/7/24)

P.L. 86-272

Oregon Supreme Court rules taxpayer exceeded P.L. 86-272 protection

- During the 2010-2013 tax years, Taxpayer was a New Mexico corporation selling branded tobacco products to wholesalers, who in turn sell to Oregon retailers.
- Taxpayer representatives traveled to Oregon to persuade Oregon retailers to order Taxpayer's products.
- One activity the Court agreed was protected by P.L. 86-272 regarded a representative leaving with a retailer a "sell sheet order.“
  - This order was a form, prepared by Taxpayer, that included suggested products and quantities for a retailer to send to a wholesaler to purchase.
  - The Court provided that a sell sheet order was "a classic example of the type of solicitation that falls within the safe harbor of [P.L. 86-272].“
- However, providing retailers with a "prebook order" exceeded P.L. 86-272 protections.
  - A prebook order was immediately signed by the retailer and a Taxpayer representative would personally send the order to a wholesaler.
  - When a wholesaler received prebook order, the wholesaler was contractually obligated to fulfill the order.
  - The Court noted that the prebook order process was more like the facilitation of sales within Oregon as opposed to solicitation of orders that could be accepted or rejected by wholesalers.

Santa Fe Natural Tobacco Co. v. Department of Revenue, Or. Sup. Ct., No. SC S069820 (6/20/24)

Nexus

Detroit, Michigan – Holding company has nexus with Detroit

- Apex, a Delaware corporation, was a holding company whose sole purpose was holding the shares of another entity (Labstat). Apex possessed a Detroit mailing address.
  - Apex had no employees, owned no real or personal property, provided no services, and sold no goods, either in Detroit or elsewhere.
  - Various members and employees of Apex' ultimate parent were appointed to Apex's board of directors. Apex never held a board meeting.
- For the 2010 and 2012 tax years the City of Detroit assessed tax measured by Apex' income including receipt of dividend income and the sale of Labstat shares.
- Apex argued that it did not conduct business within Detroit and lacked the required nexus necessary for the assessment of taxes by Detroit.
- **Procedural history.** In a 2018 decision, the Michigan Court of Appeals agreed with the Tribunal's decision that Apex lacked constitutional nexus with Detroit. The City of Detroit appealed to the Michigan Supreme Court to consider the matter in light of the U.S. Supreme Court's *Wayfair* decision. On remand and ultimate appeal back to the Michigan Court of Appeals, the Court of Appeals found that Apex had nexus with Detroit for the following reasons.

- *Continued on next slide*

Nexus

Detroit, Michigan – Holding company has nexus with Detroit (cont.)

- On January 4, 2024, the Michigan Appellate Cout in *Apex Laboratories Int'l Inc. V. City of Detroit* found that Apex had nexus with Detroit for the following reasons.
- Factors that the Court reviewed to arrive at its conclusion included:
  - Apex listed in its Delaware filings that Detroit was its principal place of business'
  - Apex's officers and directors engaged in activities in Detroit to sell an asset that Apex owned. These officers and directors were employees of a separate entity (not Apex' parent) and engaged in activities in Detroit regarding the sale.
  - The Court determined that the officers and directors were "legally acting on behalf of Apex."
- The Court concluded that:

  Apex's officers and agents, located in the city of Detroit, took many actions on behalf of Apex in conjunction with the sale of the Labstat stock. These actions are sufficient to show that there was a nexus between Apex and Detroit. . . . the work was primarily done in Detroit . . . . Apex established a nexus with Detroit because it "avail[ed] itself of the substantial privilege of carrying on business in [Detroit]." *Wayfair."*

- **Apportionment.** Proceedings continue at the Tribunal level to determine proper apportionment/allocation of Apex' income to Detroit.

Nexus

Tennessee – REITs and REIT owners not subject to franchise and excise tax

Facts

- Pursuant to a letter ruling request, a group of limited partnerships owns a greater than 99% interest in a group of REITS.
- The Investment Manager and general partner of the limited partnerships is an LLC domiciled outside of Tennessee. Investment management activities are performed outside of Tennessee. Although, Investment Manager employees occasionally travel to Tennessee to evaluate projects.

Not doing business in the state

- A person must be both (1) doing business in Tennessee and (2) have substantial nexus with Tennessee to be subject to Tennessee franchise and excise tax.
- The limited partnerships and REITs qualified as **financial institutions**. Tennessee provides a safe harbor for certain activity, including activities "reasonably required to evaluate and complete the acquisition or disposition of the property, the servicing of the property or the income from it, the collection of income from the property, or the acquisition or liquidation of collateral relating to the property."
- The only in-state activity performed by the **limited partnerships,** or on behalf of them, were the in-state evaluations provided by Investment Manager. These in-state evaluations qualified for the safe-harbor exception and, therefore, the limited partnerships were not "doing business" in Tennessee.
- The **REITs** only business activities were owning mortgages, some of which were secured by Tennessee property with Tennessee borrowers. Such activity qualifies for a safe harbor applicable to financial institutions whose only in-state activity is an interest in property in which the payment obligations were solicited and entered into by an independent person.
- Because the limited partnerships and REITs were not doing business in Tennessee, analysis regarding substantial nexus was unnecessary.

Tennessee Department of Revenue Legal Ruling 24-01 (2/1/24).

Tax reform

Nebraska Denies DRD for Section 965 Income

- In August, the Nebraska Supreme Court ruled in *Precision Castparts Corp. v. Nebraska Department of Revenue* that income representing retained earnings of Precision Castpart's foreign subsidiaries that were included on its 2017 federal tax returns based on IRC Section 965 (IRC Section 965 income) did not satisfy Nebraska's DRD requirements.
- The court found that IRC Section 965 income is not a dividend or deemed dividend, but rather is pass-through income operating in the same basic way as the taxation of partnerships, S corporations, and Subpart F income.

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The Business Perspective: TCJA Had the Unintended Impact of Significantly Increasing State Corporate Income Taxes

- The TCJA resulted in a significant CIT decrease at the federal level, but had an **unintended** significant CIT increase at the state level.
- States do not conform to federal corporate tax cuts, but frequently conform to federal corporate income tax base broadeners.
- State CIT conformity with TCJA revenue raisers such as interest expense limitations, GILTI and amortization of research and experimentation expenditures far outweighed state CIT conformity with TCJA revenue reducers such as FDII and accelerated expensing/depreciation (many states decouple from federal accelerated depreciation).
- **State and local corporate income tax collections**, in part because of conformity to base broadening provisions in the TCJA: **increased from $66.2 billion (FY2018) to $141.4 billion (FY2022), or about 100% after accounting for inflation.**
- The state and local corporate income tax, as a share of all state and local taxes on business, increased from 8.5% in FY2018 to 13.2% in FY2022.

State Taxation of GILTI and Foreign Dividends

WA
OR 20%
CA* 25%
NV
ID# 7.5%
MT 20%
WY
UT
AZ
CO
NM
ND 30%
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
GA
FL
SC
NC
WV
VA
PA
NY
NYC
VT
NH
ME
MA
CT
RI
NJ
DE
MD
DC
AK
HI

Unless recipient is domiciled in OK

*** CA taxes 25% of foreign dividends**

States Taxing 5% of GILTI and/or Foreign Dividends (FDs)

States Taxing More Than 5% of GILTI or FDs:

- 7.5% - 30%
- 50% (Based on the State's Position)
- State Guidance is Unclear

States Taxing Both GILTI & FDs:

- MN: Taxes 50% of GILTI & FDs
- NH & VT Tax 50% of GILTI & 100% FDs

States Not Taxing GILTI or Subpart F or FDs

No Corporate Income Tax

***Disclaimer**: This map is based on the best available information, but several states do not have clear guidance on GILTI. Therefore, this information should be used for general guidance and not relied upon for compliance*

Source: Council On State Taxation (August 2023)

Apportionment

Apportionment - Sourcing service revenue

South Carolina sources service revenue to customer location

- South Carolina is unique among income-producing states because it does not reference the location of "costs-of performance" as a determining factor.

Mastercard's network

- Mastercard's service at issue is transaction processing, which is performed through the operation of a payment systems network ("Network").
- The Network exists in locations throughout the United States.

Income producing activity occurs in South Carolina

- The Administrative Law Court held that the income-producing activity is **providing access** to the Network, which facilitates cashless transactions between customers and merchants and occurs where the transaction is initiated between a merchant and cardholder.
- The Court determined that any revenue derived from transactions initiated in South Carolina should be included in the numerator of the sales factor.

Mastercard Int'l Inc. v. South Carolina Department of Revenue, S.C. Adm. Law. Ct., No 20-ALJ-17-0008-CC (6/3/24) (additional search required at linked website).

Apportionment - Sourcing service revenue

South Carolina - Bank receipts sourced to location of S.C. borrowers

- During the 2011 to 2016 tax years, Taxpayer received the following receipts at issue: mortgage loan interest, mortgage loan servicing fees, and credit card interest and fees from South Carolina borrowers. Taxpayer also received a gain from the sale of stock.
- Although banks are subject to a 4.5% bank tax in lieu of the state's corporate income tax, the bank tax apportions income consistent with the corporate income tax.
- Sales of non-tangible personal are sourced based on the location of a taxpayer's income-producing activity. South Carolina does not include costs-of-performance considerations in its statute (see Mastercard discussion above).
- Mortgage revenue Regarding revenue from mortgages, the Court found that they should be sourced to the borrower's location, not where the mortgage process takes place. The Court noted that "[w]hat is being paid for is the use of the loan funds to purchase and/or improve real property located in South Carolina."
- Credit card revenue Taxpayer argued that credit card activity primarily occurs outside the state because applications are processed in Wisconsin, cards and statements are sent from North Dakota, and collections activities are initiated from Missouri. The Court disagreed, stating that South Carolina merchants are paying for Taxpayer's delivery of the credit card approval/disapproval decision to their locations in South Carolina.
- Stock sale The Court found that Taxpayer's gain from the sale of stock should be included in income apportionable to South Carolina because ownership of the stock was directly connected to its banking business.

U.S. Bank Nat'l Assc. v. South Carolina Dept. of Rev., S.C. Admin. Law Ct., No. 20-ALJ-17-0168-CC (6/25/24, amended 8/19/24) (add'l search required at link)

Apportionment - Alternative apportionment

Illinois DOR Denies Alternative Apportionment Request

- Released in January 2024, IT-23-0018-GIL involves a taxpayer request for alternative apportionment.

- Taxpayer received royalties from foreign sources.
- Taxpayer was unable to include such royalty revenue in its sales factor denominator because Illinois statutes require royalties earned from licensing intangible personal property to comprise more than 50% of a taxpayer's total gross receipts in order to be included in the sales factor.
- Taxpayer argued that the standard apportionment formula, which operates to exclude Taxpayer's foreign royalties, does not fairly represent the market for its business income and requested an alternative apportionment method.
  - Taxpayer supported its position by providing the percentage of total gross income that royalties represented in the entity receiving the royalties and the percentage of total Illinois combined unitary income comprised of royalties.
  - Taxpayer also noted that the royalties' profit margin was higher than the profit margin of Taxpayer's other income.
- The DOR concluded that the facts presented by Taxpayer were not sufficient to satisfy the burden required of a taxpayer to receive an alternative apportionment.
  - The DOR stated that "[a]n alternative apportionment method may not be invoked, either by the Department or a by a taxpayer, merely because it reaches a different apportionment percentage than the required statutory formula. . . . Merely indicating separate accounting would effectuate equitable allocation and apportionment of . . . royalties, without any explanation of why these methods are more accurate than formulary apportionment, is insufficient to meet the burden of proof."
- Accordingly, the DOR denied Taxpayer's alternative apportionment request.

Apportionment - Alternative apportionment

Michigan – Taxpayer's alternative apportionment request denied.

- Taxpayer, headquartered in Minnesota, constructed, maintained, and repaired oil and gas pipelines.
  - Most of its operations were in states outside Michigan. In 2011 Taxpayer performed its first significant contract in Michigan to assist with a severe pipeline spill. On March 31, 2011, Taxpayer was sold to a third party as part of an asset sale.
  - Taxpayer's 2011 short-period Michigan Business Tax return included in its apportionment factor the gain from its sale of receivables, cash, inventory, and goodwill, resulting in a 15% sales factor.
- On audit, the Department denied the gain's inclusion because a "sale" for apportionment purposes includes property that is "stock in trade" that would be "included in the inventory" of a taxpayer. The denial removed such sale from the sales factor denominator, resulting in a 70% sales factor.
  - The Court of Appeals allowed Taxpayer an alternative apportionment methodology, stating that Taxpayer's value stemmed not from its Michigan activity, but from intangible assets built up in multiple other states over time. Applying the statutory apportionment method would lead to a grossly distorted result and, therefore, alternative apportionment was appropriate.
  - On appeal, the Michigan Supreme Court denied the use of alternative apportionment. The application of the statutory formula alone doesn't result in gross distortion. Taxpayer did not meet its burden of showing distortion.
  - This was a 4-3 decision with strong dissents supporting alternative apportionment. On November 30, 2023, the US Supreme Court denied review.

Vectren Infrastructure Services Corp. v. Department of Treasury, Mich. Sup. Ct., No. 163742 (7/31/23)

MMN Infrastructure Services, LLC, Successor in Interest to Vectren Infrastructure Services Corp. v. Michigan Department of Treasury, US Sup. Ct., Dkt 23-443, petition for certiorari denied (11/20/23)

Apportionment

California - Gain on LLC sale was apportionable business income

- In re Alvaco Trading Co., Cal. Office Tax App., Nos. 220410259, 220410261, 220410262, 220410263 (1/23/24, released April 2024)

Minnesota Tax Court approves Department's alternative apportionment

- E.I. DuPont v. Commissioner of Revenue, Mn. Tax Ct., No. 9485-R (6/24/24)

Oregon - Receipts of member with no Oregon nexus are excluded from sales factor

- *Apple, Inc. v. Department of Revenue*, TC 5416 (1/24/24) serves as a good reminder/example of how taxpayers can reduce a state's apportionment factor in Joyce states.

Pennsylvania provides market-based sourcing guidance

- On January 5, 2024, the Pennsylvania DOR issued *Corporation Tax Bulletin 2024-01, Sourcing Sales Other Than Tangible Personal Property and Services*.
.

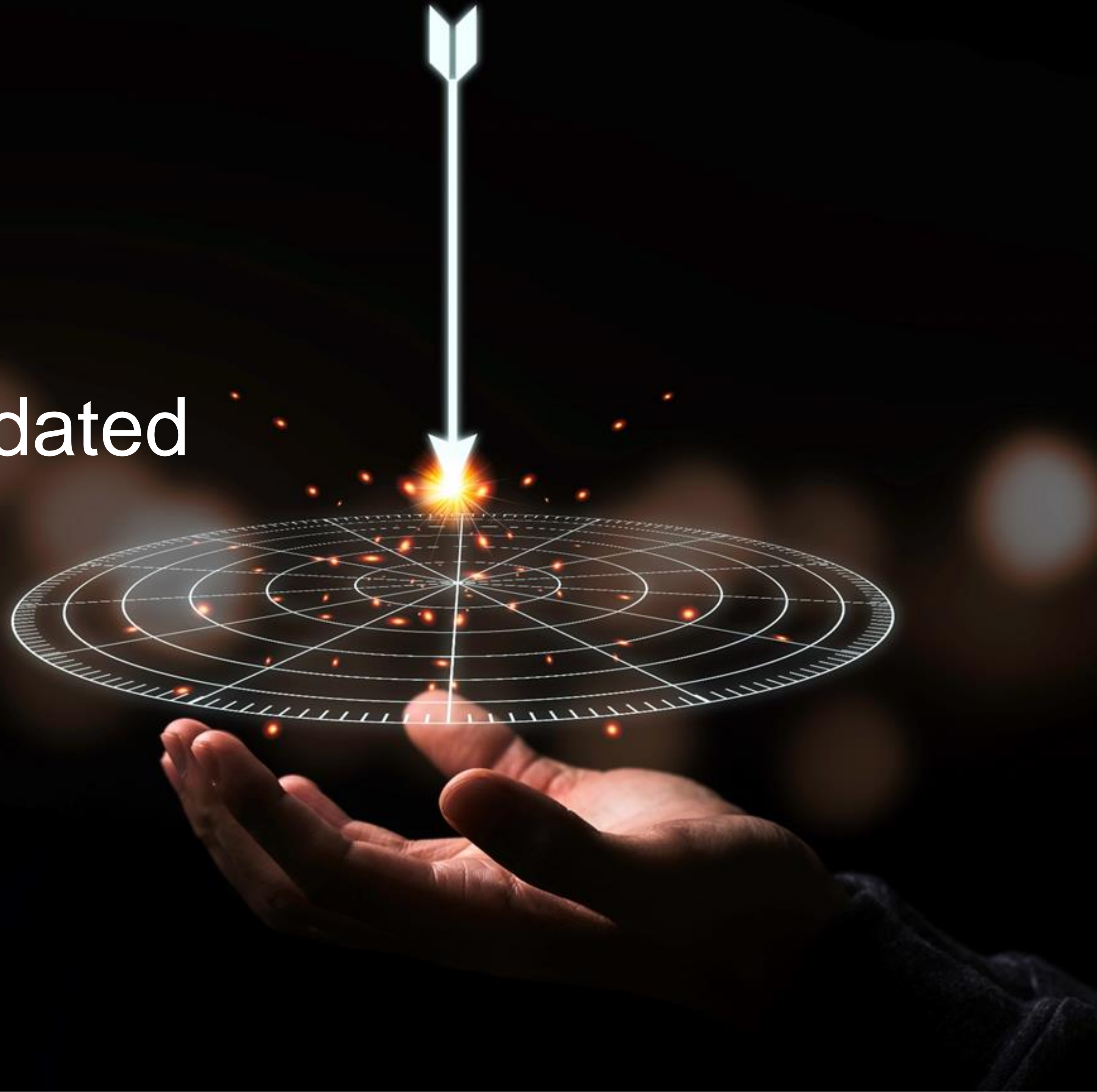
South Carolina – Sale of partnership interest

- The Department's February 21, 2024, Private Letter Ruling 24-1 concludes that a South Carolina resident who sold his interest in a multistate partnership should apportion his gain measured by the apportionment factor of the partnership.

Tennessee – Sales to wholesalers

- Ruling 24-06 (7/31/24) concludes that the taxpayer must source its sales to the location of the wholesaler, not to the wholesaler's customers.
- Tennessee has authority that supports sourcing sales to the location of the end-user, but the facts here did not support such a conclusion.

Combined/Consolidated reporting



New Mexico repeals 80/20 exemption; taxes Subpart F income

Enacted on March 6, 2024, H.B. 252 makes several significant New Mexico corporate income tax changes applicable for tax years beginning on or after January 1, 2025.

80/20 exemption for domestic entities repealed

- Prior to H.B. 252, New Mexico excluded from a water's-edge group all corporations with less than 20% of their property, payroll, and sales sourced to U.S. locations ("80/20 Corporations"). Applicable to tax years beginning on or after January 1, 2025, this exemption only applies only to foreign organized or incorporated entities. Accordingly, domestic 80/20 Corporations previously excluded from a New Mexico combined reporting group will be included.
- Taxing Subpart F income and removing the domestic 80/20 exemption is estimated to increase revenue to the general fund by approximately $1 million annually.

Subpart F income taxable

- Applicable to tax years beginning on or after January 1, 2025, New Mexico repeals its corporate income tax subtraction for "one hundred percent of the subpart F income" included in the income of a corporation.

Colorado enacts new treatment for unitary reporting

Enacted on May 14 and applicable to tax years beginning on or after Jan. 1, 2026, House Bill (H.B.) 24-1134 repeals the state-specific unitary tests and replaces them with a standard that is consistent with several other states that require combined reporting.

- The new treatment generally requires combined reporting for a group of C corporations that are "sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them."
- Colorado's existing treatment requires a unique method to determine which members of an affiliated group of companies are required to report corporate income tax on a combined basis. This method requires companies to analyze whether six Colorado-specific statutory tests are satisfied based on relationships between members of an affiliated group. A combined report is required for all members of the group that satisfy at least three of the tests in the reporting year and in the preceding two tax periods.
- Continuing complications with a Colorado combined group.
  - The existing definition of an affiliated group requiring a common parent C corporation remains in the new law.
  - A Colorado combined group excludes 80/20 corporations (generally, corporations with 80% or more property and payroll outside the U.S.).
  - A Colorado combined group includes affiliated corporations incorporated in a specified foreign jurisdiction for the purpose of tax avoidance.

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Combined reporting and transfer pricing

South Carolina Administrative Law Court upholds combined reporting

- **Background on South Carolina forced combined reporting**
  - Like many states, South Carolina has the statutory authority to require a taxpayer to report using an alternative apportionment method.
  - In 2010, the South Carolina Supreme Court in *Media General*, ruled that alternative apportionment authority allows the Department to require combined unitary reporting so long as the Department satisfies its burden of proving that the standard statutory method does not fairly represent the extent of a taxpayer's business activity in South Carolina.
  - In 2015, the Department issued *Revenue Ruling #15-5, Use of Alternative Apportionment Methods - Including Combined Unitary Reporting (Income Tax).*, which sets forth the Department's policy on the application of alternative apportionment methods, including facts that the Department may consider in evaluating whether the statutory formula fairly represents a taxpayer's in-state activity.
- **Tractor Supply**
  - Tractor Supply Company (TSC) engaged in a 2001 restructuring that made several changes to its business operations. One change involved the creation of a subsidiary, Tractor Supply Company of Texas, LP (Texas) that provided a procurement function for TSC and other affiliates.
  - The procurement services were provided at cost plus a 9.7% markup. The markup was based on an IRC 482 transfer pricing study by an accounting firm.
- **Audit and forced combination**
  - For the 2014-2016 tax years, TSC filed a separate South Carolina corporate income tax return
  - On audit, the Department concluded separate entity reporting did not fairly represent TSC's business activity in South Carolina because TSC was "shifting income" to Texas through the 9.7% markup.
  - The Department concluded that TLC and Texas operated as a unitary group and the Department required them to file a combined unitary South Carolina return

Continued on next slide

Combined reporting and transfer pricing

South Carolina Administrative Law Court upholds combined reporting

- **ALC August 2023 decision**
  - On appeal to the South Carolina Administrative Law Court, the ALC found in August 2023 that the 9.7% markup did not reflect an arm's length transaction because:
    - The transfer pricing study was flawed and unreliable
    - The 9.7% markup resulted in a transfer of income that is unreasonably large compared to the benefits received
    - Neither party presented sufficient evidence to support a transfer price that would reach an arm's length result.
  - The ALC ruled in August 2023 that:
    - "While no method of apportionment is perfect, I find that combined unitary reporting has the benefit of removing the unreliable transfer price(s) in this case while recognizing the value flowing between the Group and carving out only the income from retail sales associated with South Carolina"
  - The order was amended in December 2023 to provide additional facts and analysis without a change in the ultimate decision
- **January 2024 Motion for Reconsideration Denied**
  - TSC filed a Motion to Reconsider the ALC's December 2023 order, alleging that the ALC overlooked, misinterpreted, or failed to apply certain applicable evidence and laws.
  - The ALC disagreed with TSC and denied its Motion for Reconsideration.

Tractor Supply Company v. South Carolina Department of Revenue, S.C. Admin. Law. Ct., Doc. # 19-ALJ-17-0416-CC
(Direct link to orders is not available. Click here and search by docket number (19-ALJ-17-0416-CC) to access the August, December, and January orders).

Combined/Consolidated reporting

South Carolina ALJ requires combined reporting

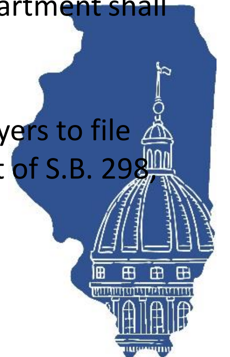
- CarMax entities included:
  - CarMax East – East Coast retail stores
  - CarMax West – West coast retail stores
  - CarMax Business Services (CBS) - Corporate operations, management, IP. Received **Management fee** from East and West.
    - CBS is a partnership, 93.5% owned by West, 6.5% owned by East
- CarMax East and CarMax West filed separate company South Carolina return.
  - The disproportionate share of CBS income to East and West reduced income reported to South Carolina.
- On audit, the Department forced CarMax to file a combined return, stating that CarMax East "shifted most of its federal net taxable income to CarMax West via a partnership with CBS hand the resulting apportionment did not fairly represent the extent of [CarMax East's] business activity in South Carolina."
- On appeal to the South Carolina Administrative Law Court, the Court agreed with the Department.
  - The Court found that the transfer of intangibles was not at arm's length.
  - The Court also found that certain elements of the transfer pricing study supporting the management fee were unreliable ("evidence shows the Management Fee, as a whole, is not reliable.")
- The Court ultimately held that the structure of the partnership (CBS) was not justified, separate reporting provided CarMax with a safe harbor, and requiring combined unitary reporting is reasonable and equitable.

CarMax Auto Superstores, Inc. v. Dep't of Revenue , S.C. Admin. Law Ct., No. 21-ALJ-17-0182-CC (7/12/24) (add'l search required on website).

Forced combination

South Carolina enacts standards for forced combination

- **Enacted on March 11, 2024,** S.B. 298 allows the Department to require a taxpayer to file a combined return if the Department "has reason to believe that any taxpayer conducts its trade or business in a manner as to fail to fairly represent the extent of the taxpayer's business activity in this State through the use of transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities."
  - A transaction has "economic substance" if:
    - the transaction, or the series of transactions of which the transaction is a part, has one or more reasonable business purposes other than the creation of state income tax benefits; and
    - the transaction, or the series of transactions of which the transaction is a part, has economic effects beyond the creation of state income tax benefits.
  - The bill provides additional guidance regarding what qualifies as a transaction with "economic substance"
  - The bill provides that " In determining whether transactions between members of the affiliated group of entities are not at fair market value, the department shall apply the standards contained in the regulations adopted under Section 482 of the Internal Revenue Code."
- As noted in prior slides, the Department had authority (as interpreted by South Carolina courts) under its alternative apportionment powers to require taxpayers to file combined returns, Prior to S.B. 298, there was no statutory framework providing guidelines for the Department to exercise such power. With the enactment of S.B. 298 the Department has certain requirements it needs to satisfy before requiring combined reporting.



Transfer pricing

State audits focus on transfer pricing

- The Louisiana Department of Revenue commenced an audit of Conoco in 2016 targeting Conoco's tax returns between 2008 and 2015.
- Conoco was later accepted into Louisiana's Transfer Pricing Managed Audit program, which allowed taxpayers to resolve controversies on an expedited basis without paying penalties.
- A conflict emerged in which the Department accused Conoco of failing to be fully responsive to the state's document requests, and the company was dropped from the program.
- In November 2023, the Department filed a lawsuit in Louisiana's 19th Judicial District Court seeking $390 million in unpaid taxes for the 2008-2011 tax years.
- With penalties and interest, attorneys for the state said the total liability could rise above $700 million.
- The case settled with no public details released.

Consolidated elections

Georgia Proposed Rule – Elective Consolidated Filing Starting in 2023

- **New Law.** Enacted on May 5, 2022, H.B. 1058 allows taxpayers satisfying certain requirements an election to file consolidated Georgia corporate income tax returns starting with tax years beginning on or after January 1, 2023.
  - Prior to H.B. 1058, taxpayers had to request permission from the Department to file a consolidated return.
  - H.B. 1058 provides several requirements and rules for a consolidated filing.
- **Existing Regulation.** Ga. Reg. 560-7-3-3.13, *Consolidated Returns*, provides taxpayers with guidance on filing an elective consolidated returns.
- **Proposed Regulation.** On January 16, 2024, the Department issued Notice IT-2024-1, which proposes changes to Reg. 560-7-3-3.13 to interpret H.B. 1058 and provide additional guidance for taxpayers electing consolidated filing. Guidance includes:
  - Separate company computation of taxable income/loss
  - Rules for earning, claiming, and assigning tax credits.
  - Rules of the net operating loss deduction for a consolidated return.
  - Transition rule for credit carryforwards for consolidated returns under prior grants of permission that are now filed under election.
  - Transition rule for NOL carryforwards for consolidated returns under prior grants of permission that are now filed under election.
- **Filing instructions.** On April 8, 2024, the Department issued *Instructions to File Consolidated Returns for Taxable Years Beginning on or after January 1, 2023*

Pass-Throughs

Pass-throughs - PTET

Alabama – Election due by extended due date

- Enacted on April 25, 2024, H.B. 187
- For additional guidance on the pass-through entity election, visit the Department's website and Electing Pass-Through Entity FAQ.

California issues FAQs

- On March 1, 2024, the FTB issued *Help with pass-through entity (PTE) elective tax (PTET)*

Maine new composite return form, partnership-level audit guidance

- In March 2024, Maine Revenue Services (MRS) issued Maine Tax Alert, Pass-through Entity Composite Filing and Reporting of Federal Partnership-Level Audit and Administrative Adjustments Updates for Tax Year 2023

Mississippi updates PTE FAQs

- On March 4, 2024, The Mississippi Department of Revenue issued its *Updated Electing Pass-Through Entity FAQs*

New York – Updated guidance

- The New York Department of Taxation and Finance maintains a Pass-through entity tax (PTET) FAQ page. On May 29, 2024, the page updated two sections of its page: Extension and PTET Credit.

Pass-through entity taxes

Rhode Island Pass-through entity tax (PTET) limited to 90%

- Enacted on June 17, 2024, H.B. 7225 provides that, for tax years beginning on or after January 1, 2025, the PTET "state tax credit" means "90% of the amount of tax paid by the pass-through entity at the entity level that is passed through to an owner on a pro rata basis.“

Oklahoma – PTET election may be made on an extended return

- Enacted on April 29, 2024, H.B. 3559 provides that the PTET election "may also be made by filing an income tax return prior to but not later than the due date of the applicable income tax return, including any extension."

Virginia releases elective pass-through entity guidance

- Guidelines for the Pass-through Entity Tax provides information on definitions, eligibility requirements, computation of PTET entity tax, and the credit for taxes paid to other states.

Virginia issues PTET FAQs

- On May 8, 2024, the Virginia Department of Taxation issued Virginia Pass-Through Entity Tax (PTET) Frequently Asked Questions.
- The FAQs reference another helpful Department document, Guidelines for the Pass-through Entity Tax (January 2024).

West Virginia - PTET regulations adopted

- On April 30, 2024, the West Virginia Secretary of State published Rules 110-21G-1 through 110-21G-12, Income Tax Paid at the Entity Level by Electing Pass-Through Entities

Net Operating Losses

California - NOL/Credit Suspension

On June 27, California enacted S.B. 167 and on June 29 California enacted S.B. 175

NOL Limitation

- NOL deduction suspended for corporate taxpayers with California net income of $1 million or more for tax years beginning on or after January 1, 2024, and before January 1, 2027.
- NOL deduction carryover period extended for up to three years for any NOL for which a deduction was denied during the suspension period.

Credit Limitation

- Annual $5 million limitation on the use of income tax credits, including the California Pass-Though Entity Elective Tax Credit, for tax years beginning on or after January 1, 2024, and before January 1, 2027.
- Any income tax credit not allowed due to the annual limitation is allowed an additional carryover period equal to the number of taxable years that the income tax credit was disallowed.

Refundable Credits

- For tax years beginning in 2024, 2025 and 2026, taxpayers are allowed an irrevocable annual election on a timely filed original return to receive a refund of 20% of most tax credits that would have been taken on their California income tax return filed for that year if the $5 million annual limitation on the use of tax credits was not enacted.
- Credits not eligible for this refundable election include the California pass-through entity elective tax, earned income, household and dependent care, renters, and low-income housing credits. Such refunds will occur beginning in the third taxable year after the taxable year in which the election was made.

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Net Operating Losses

Illinois NOL limitation guidance with penalty relief

- For the 2024 through 2026 tax years, an Illinois corporate income tax taxpayer is limited in its use of Illinois net loss deductions (NLDs) to $500,000 per year.
- Bulletin FY 2025-01 (July 2024) outlines a detailed procedure for taxpayers to report estimated payments using the annualized income installment method to “avoid or minimize” late-payment penalties.

Net operating losses

Rhode Island extends NOL carryforward from 5 to 20 years

- Enacted on June 17,2024, H.B.7225 provides that, for tax years beginning on or after January 1, 2025, net operating losses are allowable on a carryforward basis for the twenty succeeding tax years.
- Prior to H.B. 7225, the carryforward was five years.

Connecticut extends NOL carryforward from 20 to 30 years

- Enacted on June 6, 20254, H.B. 5524 provides a carryforward "for operating losses incurred in income years commencing on or after January 1, 2025, in each of the thirty income years following such loss.
- Prior to H.B. 5524, operating losses incurred in income years commencing prior to January 1, 2025, were carried forward in each of the twenty income years following such loss year.

Minnesota's 70% NOL limit delayed until 2024

- Enacted on May 25, 2023, H.B. 1938, decreases the state's NOL limitation from 80% to 70% applicable to tax years beginning after December 31, 2022.
- Enacted on April 8, 2024, H.F. 3769 amends the applicable date of the 70% limitation to tax years beginning after December 31, 2023.

Florida allows full federal NOL limitation

Following their acquisition by Verizon, two subsidiaries had NOL carryforwards for multiple years that were limited under federal and Florida law by Section 382. Verizon and the FDOR disagreed on the application of Florida's Section 382 limitation.

- The FDOR argued that the annual NOL deduction must "utilize a calculation that divides the federal limitation by the total federal NOLs for a company, then multiplies this number by the total Florida NOLs for that company."
  - This methodology is not provided in Florida statutes, regulations, or other published guidance.
- Verizon argued that a plain language interpretation of Florida statutes and regulations support a position that federal IRC Section 382 provisions are explicitly accepted under state law without modification.
- Florida's 1st District Court of Appeal agreed with Verizon, finding that "Florida's annual NOL deduction limit tracks the amount of the federal limit and can be similarly deducted each year."
- Florida Department of Revenue v. Verizon Communications Inc., Fl. App. Ct., No. 1D2022-2096 (2/27/24)

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Trends and other

Trends
Taxpayer Disclosure

Oklahoma expands disclosure of tax information

- Oklahoma allows the Tax Commission to release tax records to the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control pursuant to a court order.
- Enacted on April 29, 2024, H.B. 3458 expands such permitted release to a district attorney or the Attorney General.

Maryland expands tax information disclosure

- Maryland generally precludes the disclosure of tax information, with certain exceptions.
- Enacted on May 16, 2024, H.B. 454 expands the list of exceptions to a "tax compliance organization" for the purpose of assisting the Comptroller in tax compliance activity.

Maine Revenue Services report on taxpayer data

- Enacted on April 16, 2024, L.D.1337 requires Maine Revenue Services to report, on a biannual basis, of the 50 largest for-profit employers in the State, the number that paid zero state corporate tax.

California requires rebate disclosure

- Enacted on September 28, 2024, A.B. 2854 requires a locality to annually disclose information relating to payments or rebates made from such local tax revenue.

Tennessee

- Publishing company names that receive franchise tax refunds.

Trends:
Worldwide reporting proposals

Failed proposals

- Tennessee H.B. 2043/S.B. 1934 would have enacted worldwide combined reporting.
- Vermont House Ways and Means Committee studying worldwide combined reporting
- Maryland S.B. 362 would have enacted mandatory worldwide reporting.
- Nebraska L.B. 40 (special session) would have imposed mandatory worldwide combined reporting.

Massachusetts amnesty program

- Enacted on July 28, 2024, Massachusetts' FY25 budget, includes the creation of a one-time tax amnesty initiative during a 60-day window before June 30, 2025, which the state estimates could generate $75 million in revenue.
- The Department released detalis of its program on September 19, 2024, with the following general guidance:
  - An Amnesty Request must be filed on MassTaxConnect starting on November 1
  - All returns must be filed by December 30, 2024.
  - The filing period includes all filings with a return due on or before December 31, 2024.
  - An FAQ page is available

Federal judge allows False Claims proceeding

- A former Lyft driver filed a complaint in federal court alleging that Lyft knowingly misclassifies its drivers as independent contractors for the purposes of Nevada unemployment tax and has thus unlawfully avoided paying unemployment taxes to Nevada.
- The driver is seeking recourse under Nevada's False Claims Act (NFCA)
- In a September 30, 2024, order, the judge allowed the litigation to proceed under the NFCA.
- The proceedings are reminiscent of prior *qui tam* consumer fraud actions that individuals initiated against taxpayers alleging violations of sales and use tax laws.

Nevada Department of Employment Training and Rehabilitation, ex. Rel. Chaholla v. Lyft, Inc., U.S. Dist. Ct, Dist. of Nv., No. 3:23-cv-00442-ART-CLB.

2024 Election

What are states facing?

- State revenue volatility/uncertain economy
- End of pandemic funding
- Years of rate decreases from surpluses (some caused by pandemic funding)
  - 26 states cut personal and/or corporate income taxes over the last three years
- Revenue raising, spending freezes/cuts may be more likely

If states focus on revenue raising, where will it come from?

- After years of rate reductions, reluctance politically raise tax rates
- Raising revenue without rate increases
- Focus on taxing foreign income trickling to states

State government composition

- Trifectas – states with the same political party controlling governorship and both houses of legislature
  - Trifectas make it more likely for tax policy changes (fewer blockades)
  - New legislators and governors often bring new tax/policy initiatives to the table
- Current landscape
  - 23 Republication trifectas
  - 17 Democratic trifectas
  - 10 divided governments

2024 State Legislatures Map 2024

WA* OR* CA* NV ID* MT* WY* UT* AZ CO* NM* ND* SD* NE** KS OK* TX* MN* IA* MO* AR* LA* WI IL* MI* IN* OH* KY TN* MS* AL* GA* FL* SC* NC VA WV* PA NY* VT ME* AKᵀ HI*

NH*
MA*
RI*
CT*
NJ*
MD*
DE*
DC

Democrat
Republican
Split Legislature
(AK (coalition), PA)

*Trifecta
**Nebraska unicameral legislature included in trifectas
ᵀAlaska legislature has more R members but each chamber is coalition controlled

Source: RSM US LLP

11 vulnerable trifectas

- Democrats defending 7 vulnerable trifectas in 2024
  - Highly vulnerable – Oregon
  - Moderately vulnerable – Maine, Michigan, Minnesota
  - Somewhat vulnerable – Connecticut, Delaware, Washington
- Republicans defending 4 vulnerable trifectas in 2024
  - Highly vulnerable – New Hampshire and Texas
  - Moderately vulnerable – Georgia
  - Somewhat vulnerable - Iowa

Governor

- Arguably governor is the more important of the two trifecta elements.
  - Generally, tax policy is a major part of a governor's candidacy and a governor has some measure of political capital following the election and is generally responsible for submitting the state's budget.
- In 2024, 11 governors are up for reelection
- Toss-up: New Hampshire (Sunu (R) not running for reelection)
- Toss-up: North Carolina (Roy Cooper (D) not running for reelection)

Ballot initiatives

- **Oregon.** Increase minimum corporate income tax (Measure 118)
  - Essentially creating (another) gross receipts tax
- **Washington.** Repeal of the capital gains excise tax (Measure 2109)
- **California.** Decrease majority vote for localities to enact special taxes to fund infrastructure (Proposition 5)
- **Illinois** – Advisory question, whether to amend state constitution to create an additional 3% tax on income greater than $1M for property tax relief.
- **Louisiana** – Not on the ballot, but recent efforts to call a constitutional convention in part to move tax provisions from the constitution to statutes to make them easier to amend.
- **North Dakota** – Property tax repeal, except for certain bond levies.

Questions?

Thank You

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