



# SALT Alert!



## **SALT Alert! 2018-13: New Jersey Legislation Makes Changes to Corporation Business Tax; Addresses *Wayfair* and Marketplace Collection**

On October 4, 2018, New Jersey Governor Murphy signed legislation, [Assembly Bill 4495](#), that makes both technical corrections and substantive changes to the Corporation Business Tax (CBT) Act as revised earlier this year. The Governor also signed [Assembly Bill 4496](#) establishing an economic nexus threshold for remote sellers and requiring certain marketplaces to collect tax on sales they facilitate, effective November 1, 2018.

### **Corporation Business Tax Changes in Assembly Bill 4495**

On July 1, 2018, New Jersey enacted Assembly Bill 4202, which adopted mandatory unitary combined reporting and made a number of changes to the state's tax laws. See prior [KPMG SALT Alert! 2018-11](#) for discussion. The technical corrections in Assembly Bill 4495 relate primarily to coordinating effective dates and ensuring terminology consistency. Importantly, Assembly Bill 4495 does not include certain recommendations made by Governor Murphy when he conditionally vetoed an earlier technical corrections bill (Assembly Bill 4262). The changes not adopted include requiring inclusion of controlled foreign corporations and "tax haven" entities in the combined group and adopting the so-called *Finnigan* apportionment rule. The revisions in Assembly Bill 4495 are discussed in more detail below.

#### ***Revised Effective Dates for Mandatory Combined Reporting and Market-Based Sourcing***

Under Assembly Bill 4495, mandatory combined reporting and market-based sourcing are effective for tax years ending on or after July 31, 2019. As originally enacted, mandatory unitary combined reporting and market sourcing were effective for privilege periods beginning on or after January 1, 2019. Calendar year taxpayers are not affected, but certain fiscal year filers will experience an earlier shift to mandatory combined reporting and market-based sourcing, such as taxpayers having tax years beginning on or after August 1, 2018.

#### ***Dividends-Received Deduction Changes***

Another date change relates to the dividends-received deduction (DRD). As revised under Assembly Bill 4202, taxpayers were allowed a 100 percent DRD only for privilege periods ending on or before December 31, 2016. This meant that fiscal year filers with tax years beginning in 2016 could not claim the 100 percent DRD. The 100 percent DRD now applies to privilege periods beginning on or before December 31, 2016.

For privilege periods beginning after December 31, 2016, the new 95 percent DRD for 80 percent or more owned subsidiaries remains unchanged. However, for privilege periods beginning after December 31, 2016 and before January 1, 2019 only, Assembly Bill 4495 makes two substantive changes related to calculating the tax liability on the 5 percent dividend amount included in the tax base. First, base tax liability on the 5 percent dividend inclusion is determined using the lower of either the taxpayer's "three-year average allocation factor" from the 2014-2016 tax returns, or 3.5 percent. Previously, taxpayers were required to use the "three-year average allocation factor" from the 2015-2017 returns. Second, for the privilege periods involved, this calculation applies to both "paid and deemed paid dividends" included in taxable income.

For taxpayers reporting Mandatory Repatriation income under IRC section 965, Assembly Bill 4495 continues to disallow "any deduction, exemption or credit" permitted under IRC section 965. Further, the rule requiring use of a net operating loss carryover deduction before applying the DRD was reinstated, effective retroactively to January 1, 2017. This change was recommended by the Governor in his conditional veto of Assembly Bill 4262, the previous CBT technical corrections bill.

*On October 5, 2018, the New Jersey Division of Taxation released a new form [CBT-DIV 2017](#), which will be used to report dividends for the 2017 tax year. Taxpayers that already filed their 2017 return in New Jersey must nevertheless file this form by January 31, 2019, to reflect the changes in the treatment of dividends as passed by the legislature in lieu of filing an amended return.*

#### **Related-Party Expense Addback Changes**

The related party expense addback exception for amounts "paid, accrued or incurred" with a foreign related member retains the new 3 percentage points effective rate test, but now makes this change effective for tax years beginning on or after January 1, 2018 for both interest expense and intangible expenses. Assembly Bill 4495 also clarifies that when calculating the effective rate under the exception, the statutory rate (currently 9 percent) applies, and not the tax rate that applies if the taxpayer is subject to the new surtax. Recall, Assembly Bill 4202 adopted a so-called "surtax" on CBT taxpayers, except public utilities, having allocated New Jersey taxable net income in excess of \$1 million.<sup>[1]</sup> Assembly Bill 4495 makes clear that the related party expense disallowance rules "shall not apply to transactions between related members included in a combined group reported on a New Jersey combined return."

#### **Taxation of GILTI and FDII**

For privilege periods beginning on or after January 1, 2018, a CBT taxpayer is allowed a deduction "in the amount of the full value of the deduction" claimed under IRC section 250, to the extent the corresponding FDII and GILTI "amounts of income" were not "excluded or exempted" under the CBT Act. When signing Assembly Bill 4495, Governor Murphy [acknowledged](#) in a statement "that newly taxing GILTI may disproportionately impact certain New Jersey taxpayers" and further stated that "the Division of Taxation maintains the discretion under existing law to provide relief to individual CBT taxpayers when appropriate to ensure the taxpayer's CBT obligation fairly reflects its liability. I have instructed Treasury and Taxation to work with individual taxpayers to determine whether such relief may be appropriate in their individual cases."

#### **Minimum Tax under Combined Reporting**

For privilege periods ending on and after July 31, 2019, the minimum tax of each member of a combined group filing a mandatory or elective New Jersey combined return is \$2,000 for each member.

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<sup>[1]</sup> For the privilege periods beginning on or after January 1, 2018 through December 31, 2019, the surtax, which is actually an additional imposition of tax, is imposed at a rate of 2.5 percent. For privilege periods beginning on or after January 1, 2020 through December 31, 2021, the surtax rate is 1.5 percent.

## Wayfair and Marketplace Requirements in Assembly Bill 4496

[Assembly Bill 4496](#) represents the state's legislative response to the Supreme Court decision in *State of South Dakota v. Wayfair*. It establishes an economic nexus threshold for remote sellers and imposes a requirement on certain electronic and physical marketplaces to collect sales tax on sales that they facilitate. The bill becomes effective November 1, 2018. It also authorizes the Director of Taxation to take such anticipatory steps as are necessary to ensure timely implementation of the bill and allows the Director to promulgate emergency rules (to be effective for 360 days) without adherence to the state Administrative Procedures Act.

### **Economic Nexus Thresholds**

The bill provides that sellers not otherwise required to collect and remit New Jersey sales tax will be required to do so if the seller engages in 200 or more separate transactions involving the sale of tangible personal property, specified digital goods or taxable services for delivery into the state in the current or preceding calendar year or had gross revenue in excess of \$100,000 from such sales during the same period. The requirement to collect begins with the effective date of the bill.

Note that in August 2018, the New Jersey legislature had passed Assembly Bill 4261 containing substantially similar economic nexus thresholds with an October 1, 2018 effective date, and the Division of Taxation has issued a notice indicating that collection should begin on that date. AB 4261 was conditionally vetoed by Governor Murphy and then passed with amendments as AB 4496. The Division website now indicates that the economic nexus thresholds go into effect on November 1, 2018.

### **Marketplace Collection Requirements**

In addition, the bill imposes a requirement on electronic and physical marketplaces (defined expansively in the bill) to collect sales tax on taxable sales that they facilitate to purchasers in New Jersey, regardless of whether the seller involved has an obligation to collect tax or not.

The bill defines a marketplace facilitator as any person that "facilitates a retail sale" of tangible personal property, specified digital products, or taxable services and engages in at least one activity in each of two detailed and broad lists of activities. For example, a person is a marketplace facilitator if the person facilitates retail sales and 1) lists, makes available, or advertises such items for sale by a marketplace seller in a forum owned, operated, or controlled by the person, and 2) collects the sales price. The two lists include a number of other activities, such as providing fulfillment, storage, or branding services for a marketplace seller; setting the price for a marketplace seller; providing customer service to a marketplace seller; providing software development or R&D activities related to activities on the lists; branding sales as those of the marketplace facilitator; providing payment processing; or providing virtual currency that purchasers are allowed or required to use. A "marketplace seller" means "a seller that makes retail sales through any physical or electronic marketplace owned, operated, or controlled by a marketplace facilitator, even if such seller would not have been required to collect and pay sales tax had the sale not been made through such marketplace."

The marketplace collection requirement applies to transactions occurring on or after November 1, 2018. "To ensure accurate and timely collection of taxes due," however, the Director of Taxation is authorized, upon written application and for good cause shown, to suspend the collection obligation of a marketplace facilitator for up to 180 days. The bill provides that nothing in the bill is to interfere with the ability of a marketplace facilitator and a seller to enter into an agreement with each other regarding the collection of tax, and it further provides that if a marketplace is audited with respect to a transaction, the seller in that transaction may not also be audited with respect to the transaction. If a marketplace facilitator fails to collect the correct amount of tax because of incorrect information provided by a marketplace seller, despite reasonable efforts by the marketplace facilitator to obtain such information, then the facilitator may be relieved of liability.

Separately, the bill also clarifies that “transient space marketplaces,” which are generally required to collect and remit tax on behalf of persons engaged in and providing transient accommodations or hotel rooms, do not include “a travel agency or an online travel agency.” New Jersey had previously passed legislation requiring “transient space marketplaces,” defined as “an online marketplace through which a person may offer transient accommodations or hotel rooms to individuals,” to collect and remit tax on behalf of persons engaged in and providing transient accommodations or hotel rooms.

## Contacts

For information or questions on the corporation business tax changes, please contact [Jim Venere](#) at (973) 912-6349. For information or questions on the economic and marketplace requirements, please contact [Michael Kenny](#) at (212) 872-3414 or [Jim Bartek](#) at (973) 912-4590.

## Footnote

<sup>1</sup> For the privilege periods beginning on or after January 1, 2018 through December 31, 2019, the surtax, which is actually an additional imposition of tax, is imposed at a rate of 2.5 percent. For privilege periods beginning on or after January 1, 2020 through December 31, 2021, the surtax rate is 1.5 percent.