

SALT WATCH

Pennsylvania State Tax Updates

Summary

On December 22, 2017, the Pennsylvania Department of Revenue issued Corporation Tax Bulletin 2017-02 in which it announced it will disallow the deduction of federal 100% bonus depreciation for Corporate Net Income Tax purposes for an asset placed in service after September 27, 2017, until the year the asset is sold or otherwise disposed. On January 4, 2018, the Pennsylvania Supreme Court denied the taxpayer's petition for reargument in Nextel Communications, relating to the constitutionality of Pennsylvania's 2007 Corporate Net Income Tax NOL deduction limitation. And marketplace facilitators, referrers and remote sellers have until March 1, 2018, to elect for this year to either comply with Pennsylvania's new consumer use tax notification and reporting regime or to voluntarily collect and remit Pennsylvania sales-and-use tax. A \$20,000 penalty may apply for a consumer use tax reporting violation.

Details

Nondeductible 100% Bonus Depreciation

In Corporation Tax Bulletin 2011-01 (Feb. 24, 2011), the Pennsylvania Department of Revenue had announced that it would allow a corporate taxpayer to deduct federal 100% bonus depreciation on its RCT-101 (PA Corporate Tax Report) in the taxable year an applicable asset is fully depreciated for federal income tax purposes, (i.e., the year the asset is placed in service). In Corporation Tax Bulletin 2017-02 (Dec. 22, 2017), the Department announced that it would not allow a taxpayer to deduct such depreciation on assets placed in service after September 27, 2017, until the taxable year the asset is sold or otherwise disposed. This marks a complete reversal of the Department's prior policy. It is understood that legislation will soon be introduced, which, if enacted, would "fix" the Department's new policy.

Nextel Communications and Pennsylvania NOL Deductions

In Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth, No. 6 EAP 2016 (Pa. Oct. 18, 2017), the Pennsylvania Supreme Court, like the Commonwealth Court, held that the Corporate Net Income Tax NOL deduction limitation for 2007, which statutorily limits the use of NOLs to the greater of \$3 million or 12.5-percent of taxable income, is unconstitutional. Unlike the Commonwealth Court, however, which held that the appropriate remedy was to allow the taxpayer full use of its NOLs without being subject to either limitation, the Pennsylvania Supreme Court held that removing the \$3 million flat-dollar limitation was the only appropriate remedy. The taxpayer petitioned the Supreme Court for reargument as to the remedy, but, on January 4, 2018, the court denied that petition making the Supreme Court's decision final as of that date.



Pennsylvania State Tax Updates (continued)

Consumer Use Tax Notification and Reporting or Voluntary Tax Collection Annual Election and \$20,000 Penalty

H.B. 542 also includes provisions for a new consumer use tax notification and reporting regime that applies to marketplace facilitators, sellers, referrers and remote sellers that have at least \$10,000 in taxable sales of tangible personal property into Pennsylvania in the preceding 12-month period or delivered the same into the state. Importantly, this new compliance regime includes a requirement to make an election by March 1, 2018, and then by June 1 of each succeeding year, to either comply with the consumer use tax notification and reporting requirements or to elect to voluntarily collect and remit sales-and-use tax. In addition, the state will deem a failure to make the required election an election to comply with the consumer use tax notification and reporting requirements, and a violation of the reporting requirements may result in a penalty equal to the lesser of \$20,000 or 20% of Pennsylvania sales.

The following are pertinent definitions for purposes of applying these provisions:

- **Marketplace facilitator.** Generally, a vendor that advertises product for sale, and, via an arrangement with a third-party, collects the payment from the purchaser and transmits the payment to the person selling the property.
- **Referrer.** A vendor that, pursuant to an agreement with a marketplace seller or remote seller, agrees to advertise product of the marketplace seller or remote seller, receives consideration from the sale offered, refers the purchaser to the marketplace seller, remote seller or an affiliate thereof, and does not collect tax from the purchaser on the sale.
- **Remote seller.** A vendor that is not a marketplace seller, a marketplace facilitator or a referrer and does not maintain a place of business in Pennsylvania, but makes retail sales directly to purchasers in Pennsylvania.
- **Marketplace seller.** A person that has an agreement with a marketplace facilitator pursuant to which the marketplace facilitator facilitates sales.

Depending on the vendor's classification as a marketplace facilitator, referrer or remote seller, a vendor subject to the consumer use tax notification and reporting requirements may be subject to a requirement to: (i) notify each Pennsylvania purchaser of their obligation to report and pay tax on taxable purchases and/or post the same where sales occur; (ii) by January 31 of each year, mail a report of purchases to each Pennsylvania purchaser and remind the purchaser again of an obligation to report and pay tax; and/or (iii) by January 31 of each year, mail a report to the Department that includes a list of purchasers that received notice from the vendor. Forms and further guidance are expected from the Department.



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