RYP TAX ALERT

August 2019

2019 NEW HAMPSHIRE TAX LEGISLATION IN REVIEW

The 2019 legislative session promised to present substantive discussions about tax policy in the Granite State. Included within those discussions were proposals to: change the manner in which service receipts are taxed under the Business Profits Tax; differently weight the apportionment factor for Business Profits Tax; respond to the U.S. Supreme Court's *Wayfair* decision impacting sales and use taxes on in-state businesses who sell products to other states; and suspending or rescinding scheduled tax rate decreases. Chris Sullivan and Kathryn Michaelis of RYP's Tax Practice Group, both based in Concord, New Hampshire, provide a brief highlight of the key legislative changes enacted in 2019 as they affect both in-state and multistate businesses.

BUSINESS PROFITS TAX: SHIFT IN SOURCING RECEIPTS TO MARKET-BASED SOURCING (MAYBE)

With the Final Report of the Commission to Study the Apportionment of Gross Business Profits Under the Business Profits Tax ("BPT") issued on November 1, 2018, the business community expected the legislature to take up potential changes to the manner in which business profits are apportioned to the state. Front and center on the list included a potential shift in the way service receipts are sourced, changing from the cost-of-performance method (generally sourcing receipts to the location of the business' income-producing activities based on costs of performance) to a market-based sourcing approach that generally looks to the location of the business' customers. Also on the agenda was a potential shift in the state's apportionment factor from a three-factor formula based on in-state vs. out-of-state property, payroll and sales (double-weighted) to a formula consisting solely of a single sales factor, which ended up as an amendment to HB 2, discussed below. SB 190 became the primary vehicle to effectuate market-based sourcing. As of the time of this article, SB 190 has been passed by the legislature and is awaiting the Governor's signature.

SB 190 proposes to source sales "other than sales of tangible personal property" (e.g., receipts from services or intangibles) based upon the location of the business organization's "market," defined as follows:

- Service revenue is sourced to the location where the service is delivered;
- Revenue from the sale, rental, lease or license of intangible property is sourced to the location where the property is "used" in the state;
- Interest income is sourced to the location of the debtor or encumbered property;
- Dividend income is sourced to the business organization's commercial domicile;
- "Other income" is sourced to the state to the extent the income is "derived from sources in the state."

SB 190 further proposes a "throwout rule": if the taxpayer is not taxable in the state of assignment or if the state of assignment cannot be determined or "reasonably approximated," the sale is excluded from the denominator of the sales factor. The market-based sourcing rules are also duplicated in the Business Enterprise Tax (BET).

SB 190's effective date is set at January 1, 2021. The provisions of SB 190 were also adopted in HB 2. However, in an interesting development, SB 190 also established a legislative study committee on apportionment that will monitor other states' market-based sourcing legislation and issue recommendations for proposed legislation to the legislature and Governor on or before November 1, 2020. As a result, while market-based sourcing was passed in New Hampshire for 2021, it was done so with a footnote of "maybe." Businesses engaged in providing services and deriving receipts from intangible assets should closely monitor the study committee's activities and recommendations.

BUSINESS PROFITS TAX: SINGLE SALES FACTOR APPORTIONMENT

As discussed above, while initial apportionment changes focused on market-based sourcing, the Senate also took action to adopt, as have many other states, single sales factor. All states in New England but for New Hampshire and Vermont have adopted single sales factor for all or many industries, and New Hampshire runs the risk of losing jobs and capital to other states that do not increase the apportioned tax base based on property and payroll in the state. Accordingly, HB 2 included a provision to shift to single sales factor for taxable periods ending on or after December 31, 2022, subject to potential rescission by the legislative study committee by November 2020.

SALES AND USE TAX: THE STATE'S RESPONSE TO *WAYFAIR*

The 2018 special legislative session ended with a failed attempt at enacting legislation limiting the impacts of the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.* on New Hampshire businesses. The *Wayfair* decision allowed states to impose sales and use taxes on remote sellers (those not physically present in the state) to purchasers within those states under certain circumstances.

With numerous bills introduced in the 2019 legislative session as a "re-do," it was not if, but when, legislation would pass. Governor Sununu signed SB 242 into law in July (Ch. 280). SB 242 establishes the following:

- Foreign taxing authorities (e.g., other states or localities) are required to register with the New Hampshire Department of Justice (DOJ) prior to requesting private customer information or imposing a sales or use tax liability against a New Hampshire business that has no physical presence in the foreign taxing jurisdiction (a New Hampshire remote seller);
- The DOJ will make a determination as to whether the foreign taxing jurisdictions' laws meet the requirements of both the U.S. and New Hampshire Constitutions;
- If the DOJ determines a foreign taxing jurisdiction has violated SB 242's provisions, an action may be brought by the State of New Hampshire against the foreign taxing jurisdiction in the Superior Court of Merrimack County or any other court of competent jurisdiction. The foregoing does not preclude the New Hampshire remote seller from taking similar actions.
- If a New Hampshire remote seller is obligated to collect and remit sales or use tax to a foreign taxing authority, the seller is entitled to deduct the costs incurred in such collection and remission from the taxes collected.
- A Commission is established to study ways to protect the "New Hampshire advantage" for New Hampshire businesses, with the initial report due on or before November 1, 2019.

SB 242's unique provisions are expected to produce litigation with other states.

GOVERNOR'S BUDGET VETO

In addition to the foregoing, Governor Sununu vetoed the two-year budget, HB 1-A and HB 2, passed by the legislature. The budget contained proposals to repeal the tax rate reductions currently in effect for both the BPT and BET (from 7.7% to 7.9% and from .6% to .675%, respectively); increasing rates on electronic cigarettes; and partial conformity to the Internal Revenue Code as of December 31, 2018 (and to the Tax Cuts and Jobs Act). It is possible that further structural tax reforms will be the basis for compromise.

OTHER BUSINESS-RELATED ENACTMENTS

Numerous other business-related tax legislation was signed into law this year, including:

- *Education Tax Credit.* SB 270 (Chapter 247) established a tax credit against the BPT for donations to career and technical education centers, generally effective July 1, 2019.
- *RETT Exemption.* HB 600 (Chapter 136) added an exception to the Real Estate Transfer Tax for transfers of interests in certain low-income housing, effective July 1, 2019.
- *Insurance Premium Taxes.* HB 620 (Chapter 179) established a graduated fee schedule for payment of insurance premium taxes, effective January 1, 2020. Further, SB 189 (Chapter 141) established a flat rate on surplus lines policies for purposes of the premium tax, effective January 1, 2020.
- *Utility Property Tax.* HB 700 (Chapter 117), based on the recommendation of the commission to study utility property tax valuation in 2018, establishes a consistent method for property tax valuation for utility company assets, phased in over a five-year period.
- *Construction Property Tax Exemption.* SB 22 (Chapter 221) provides that for municipalities that have adopted the construction property tax exemption (RSA 72:81), the rate and duration of the exemption is on a per case basis, based on the public benefit generated by the commercial or industrial project.
- *Tax Incentive Study.* SB 154 (Chapter 237) established a committee to study the use of tax incentives for promoting development of dense workforce housing in community centers, with a report due on or before November 1, 2019.
- *Tobacco Tax.* HB 595 (Chapter 178) recodifies Chapter 78 (tobacco tax) relating to the definition of the wholesale sales price, sales between licensees, affixing stamps and administrative penalties against wholesalers.

For inquiries or comments relating to these New Hampshire tax law changes, please contact Chris at cjs@rathlaw.com or Kathryn at khm@rathlaw.com. Both Kathryn and Chris have extensive experience in state and local tax matters in New Hampshire, Vermont and Massachusetts. For more information about the RYP Tax Practice, please visit: www.rathlaw.com/practice-areas/tax..