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Proposed Colorado regulation would change "doing business" definition, adopt Finnigan approach

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Authored by: Kathryn Thurber

Update: The Colorado Department of Revenue withdrew the proposed amendment on July 8, 2011.

The Colorado Department of Revenue recently proposed an amendment to its "doing business" regulation that would change the sourcing of receipts for purposes of calculating the sales factor numerator from a *Joyce* rule to a *Finnigan* rule. A hearing on the proposal is scheduled for June 7, 2011. [[Colo. Prop. Reg. Sec. 39-22-301.1](#)]

Sales factor sourcing

The amendment would add a new paragraph to address the application of P.L. 86-272 to corporations that are part of a consolidated or combined group. Colorado would treat such group of corporations as a single taxpayer and "the activities of the group would determine whether the taxpayer exceeds the minimum standards of P.L.86-272." As a consequence, where the activity of any group member exceeds P.L.86-272 protection, Colorado would require the sales factor numerator to include the in-state sales of all group members, regardless of the activities of individual members (the *Finnigan* method). Arguably, Colorado currently uses the *Joyce* method for sourcing such receipts.

In its [Statement of Basis and Purpose](#), the Department cites *In the Matter of Disney Enterprises, Inc.* as authority for its proposed change to the "doing business" definition.



Other changes

The proposed amendment also addresses the interrelationship between P.L. 86-272 and Constitutional nexus requirements. Specifically, the amended regulation would remove the reference to P.L. 86-272 from the definition of doing business to clarify that, while Colorado may not impose tax on any corporation that falls within the protection of P.L. 86-272, such corporation may still be "doing business" in Colorado under Colorado law.

PwC observes

"This proposal seeks to interpret statutory changes adopted in 2008 (H.B. 1380), effective in 2009, providing that sales made by affiliated corporations into Colorado will be included in the sales factor numerator for a Colorado combined group if the corporation is merely 'doing business' in the state," observes Rhonda Sparlin, State and Local Tax Director with PwC in Denver. "Prior to the law change, such sales were included only when the affiliate's activities exceeded the protection of P.L. 86-272. The proposal would represent a change in approach by the Department regarding apportionment not necessarily apparent to taxpayers, as it is included in a change to the regulation's 'doing business' definition. The proposal also highlights the importance of properly determining the includable members in Colorado combined and consolidated groups, as these Colorado-specific standards for inclusion are often misapplied by taxpayers."

Todd Roberts, State and Local Tax Director with PwC in Denver, adds: "Clearly, the impact of this proposal could cut both ways for affected taxpayers. The legislative changes effective in 2009 also adopted single sales factor. While combined groups may have affiliates' sales pulled into the Colorado numerator as a result of this proposal, some Colorado-based taxpayers may be able to avoid throwback of sales if they are now deemed to exceed P.L. 86-272 protections by virtue of their affiliates' activities in other jurisdictions. The Department's upcoming hearing on the proposal may shed some light on this issue."

PwC will be attending the June 7 hearing in Denver.

For more information, please do not hesitate to contact:

Todd Roberts (720) 931-7222 todd.roberts@us.pwc.com

Rhonda Sparlin (720) 931-7539 rhonda.sparlin@us.pwc.com

Kathryn Thurber (202) 346-5122 kathryn.thurber@us.pwc.com

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