Grant Thornton

Top SALT stories of 2020

ALASKA
BRITISH COLUMBIA
ALBERTA
Calgary
Red Deer
Edmonton
Saskatoon
Regina
Lethbridge
Seattle
Portland
Salem
Eugene
Coos Bay
OREGON
Bend
WASH.
Spokane
Walla Walla
Boise
IDAHO
Missoula
Great Falls
Havre
Helena
MONTANA
Billings
Minot
Bismarck
N. DAK.
Fargo
S. DAK.
Aberdeen
Pierre
Sioux Falls
Minneapolis
St. Paul
Sacramento
Oakland
San Francisco
CALIFORNIA
Klamath Falls
Reno
Carson City
NEVADA
Salt Lake City
Pocatello
Great Salt Lake
Cody
WYOMING
Casper
Black Hills
NEBRASKA
Cheyenne
Las Vegas
Grand Canyon
UTAH
Provo
COLORADO
Pikes Peak
Denver
Colorado Springs
Lincoln
Omaha
IOWA
Madison
Milwaukee
Chicago
Los Angeles
Long Beach
San Diego
Tijuana
Riverside
Yuma
Flagstaff
ARIZONA
Phoenix
Tucson
Albuquerque
Santa Fe
NEW MEXICO
KANS.
Wichita
Topeka
Kansas City
OKLAHOMA
Oklahoma City
Tulsa
Springfield
Indianapolis
IND.
ILL.
Cleveland
Detroit
OHIO
Mexicali
Nogales
Ciudad Juárez
Las Cruces
El Paso
Hermosillo
Chihuahua
Odessa
TEXAS
Wichita Falls
Amarillo
Dallas
Abilene
Waco
Austin
San Antonio
Little Rock
ARK.
Memphis
MISSOURI
St. Louis
Jefferson City
Frankfort
Nashville
TENN.
Huntsville
Birmingham
ALA.
MISS.
Jackson
Baton Rouge
New Orleans
Houston
Galveston
Corpus Christi
Victoria
Laredo
Nuevo Laredo
Monclova
Torreón
Durango
Monterrey
Matamoros
Brownsville
Ciudad Victoria
Tampico
Sierra Madre Occidental
Sierra Madre Oriental
MEXICO
GEORGIA
Atlanta
Montgomery
Tallahassee
Savannah
Jacksonville
Columbia
Charlotte
Charleston
Greensboro
Raleigh
S.C.
N.C.
FLORIDA
Orlando
Tampa
St. Petersburg
Cape Canaveral
GULF OF MEXICO
Havana
CUBA
Nassau
Grand Bahama I.
BAHAMAS
JAMAICA
HAITI
CARIBBEAN SEA

Contents

1. CARES Act and state reactions 5

2. The remote workplace 8

3. Impact of the pandemic on state budgets 10

4. Shifting income tax deadlines 11

5. IRS approves workaround to TCJA's SALT deduction cap 13

6. State ballot initiatives 14

7. California NOL/credit suspensions 16

8. Wal-Mart and clarification of marketplace facilitator provisions 17

9. Addressing *Wayfair* and indirect tax issues 18

10. Meeting credits and incentives program requirements 20

Even the most die-hard state and local tax (SALT) experts won't remember the biggest SALT stories that happened in 2020. Instead, when we think about 2020, we'll remember the day in the second week of March when it became apparent that it was time to go home and stay in place until further notice, not having a clue that many of us would still be stuck there as of this writing. We'll think of how we plodded through three income tax compliance seasons in quarantine, caused by federal tax changes enacted with minimal thought as to how they would dramatically impact SALT.

During the gaps between filings, we constructed makeshift home offices and tried to ensure that interminably visual, virtual meetings weren't interrupted by distracting backgrounds, unintentional family interlopers, a rumbling washing machine, or a neighbor's barking dog. We unsuccessfully prayed that presentations wouldn't go awry because of technology. We thought about temporarily or permanently decamping to another state, and of course considered individual income tax residency rules before making the decision. We bought lots of items off the Internet, and assiduously checked to see whether the remote seller or facilitator properly charged sales tax on the products – because viewing everything through the lens of SALT was a mildly settling diversion from the pandemic.

Truth be told, the goal this year was to keep your job, your health and your sanity while dealing with forced separations from family members, canceled vacations, deferred dreams and endlessly unnecessary waits for medical tests. All in a tense nation wrestling with social unrest and a very contentious election. To those who've made it through relatively unscathed, let's be simultaneously thankful and wary. There's still some road left to traverse before life gets back to normal. To the many who have not been as fortunate, we feel for all you've gone through, and are hopeful that next year will be markedly better.

That said, many SALT issues were of critical importance to businesses in 2020, precisely because they were necessary responses to the pandemic. Continuing our long-standing tradition of summing up the year in SALT, our Grant Thornton SALT team in the Washington National Tax Office tried to track the chaos by closely evaluating and ranking the 10 most important SALT stories of 2020 in order of perceived importance. Of course, it's not surprising that nearly everything that happened in 2020 revolved around the effects of the pandemic, and so it went with this list. We can only hope that the coming year will give us an effective vaccination strategy, and some level of healing and normalcy on so many levels.

1. CARES Act and state reactions

On March 27, 2020, the federal government enacted the Coronavirus Aid, Relief and Economic Security (CARES) Act, which provided over $2 trillion in economic relief to both businesses and individuals in response to the pandemic.[1] The CARES Act contained significant tax provisions, many of which provided taxpayer-favorable changes to the Tax Cuts and Jobs Act of 2017 (TCJA).[2] The major corporate income tax provisions contained within the CARES Act included changes to the net operating loss (NOL) carryback rules, modifications to the business interest expense deduction limitation, and the reclassification of qualified improvement property (QIP) to be eligible for 100% bonus depreciation. These modifications affect state corporate income tax regimes using some measure of income determined by the Internal Revenue Code (IRC), such as federal taxable income, as the starting point for state taxable income computations. Taxpayers initially should consider whether a state conforms to the IRC post-CARES Act or if the state specifically decouples from these provisions. The state-specific impact of the CARES Act depends largely on whether a state uses a rolling, static or selective conformity method to incorporate changes to the IRC.[3]

The CARES Act changed the business interest expense deduction limitation. As background, in late 2017, the TCJA modified IRC Sec. 163(j) to limit business interest deductions to 30% of a taxpayer's adjusted taxable income (ATI).[4] The CARES Act increased the percentage threshold from 30% to 50% of a taxpayer's ATI for tax years beginning after Dec. 31, 2018, and before Jan. 1, 2021.[5] Taxpayers may also elect to use their 2019 ATI to calculate their allowable interest expense deduction in 2020.[6] The state implications depend on whether a state conforms to the TCJA amendments to IRC Sec. 163(j), and whether the state conforms to the IRC on a rolling basis. Rolling conformity states that conform to IRC Sec. 163(j) automatically adopt the CARES Act changes. In contrast, static conformity states that adopt the IRC in effect after the TCJA but before enactment of the CARES Act continue to apply the less favorable 30% deduction limitation, without the beneficial election. The numerous states that decoupled from the IRC Sec. 163(j) interest deduction limitation in response to the TCJA continue to decouple unless special action is taken.

[1] P.L. 116-136 (2020). See GT SALT Alert: "First state income tax responses to CARES Act."
[2] P.L. 115-97 (2017).
[3] "Rolling" conformity states automatically tie to the IRC as changes are adopted. "Static" or "fixed date" conformity states adopt the IRC as of a specific date and must decide whether to update their conformity through subsequent legislation. "Selective" conformity states selectively conform to certain provisions of the IRC while decoupling from others.
[4] IRC § 163(j)(1).
[5] IRC § 163(j)(10)(A).
[6] IRC § 163(j)(10)(B). This election is potentially significant for taxpayers that have a reduction in their 2020 ATI as a result of government-mandated closures or a reduction in services due to the pandemic. Using 2019 ATI may result in a larger allowable interest expense deduction in 2020 than would have otherwise applied.

The CARES Act also amended the federal NOL provisions. Previously, the TCJA imposed an 80% limitation on the use of NOLs generated after 2017. The CARES Act temporarily suspended this limitation to allow federal NOLs to be fully deductible for tax years beginning in 2018 through 2020.[7] Federal law continues to allow the indefinite carryforward of NOLs enacted in the TCJA.[8] The TCJA eliminated the carryback of NOLs, but the CARES Act allows the carryback of any NOL generated in a tax year beginning in 2018 through 2020 for up to five years.[9] Most states do not conform to the federal NOL provisions.[10] However, in rolling conformity states that generally adopt federal NOL concepts, the suspension of the TCJA's 80% taxable income limitation should be available.

The third major change made by the CARES Act concerning state corporate income tax was the reclassification of QIP for depreciation purposes.[11] Specifically, the CARES Act included a retroactive technical correction to make QIP eligible for the TCJA's 100% bonus depreciation provision.[12] State conformity to the QIP provision in the CARES Act is particularly complex. Conformity depends on whether a state is a rolling conformity or static state, as well as the state's historic position on bonus depreciation conformity. Approximately one-third of the states both have rolling conformity to the IRC and conform to the bonus depreciation provisions of IRC Sec. 168(k). These states automatically adopt the CARES Act's technical correction to include QIP as property eligible for bonus depreciation. For the significant majority of states that do not conform to the TCJA's bonus depreciation rule, the distinction between whether a state follows a rolling, static or selective conformity approach matters greatly.[13]

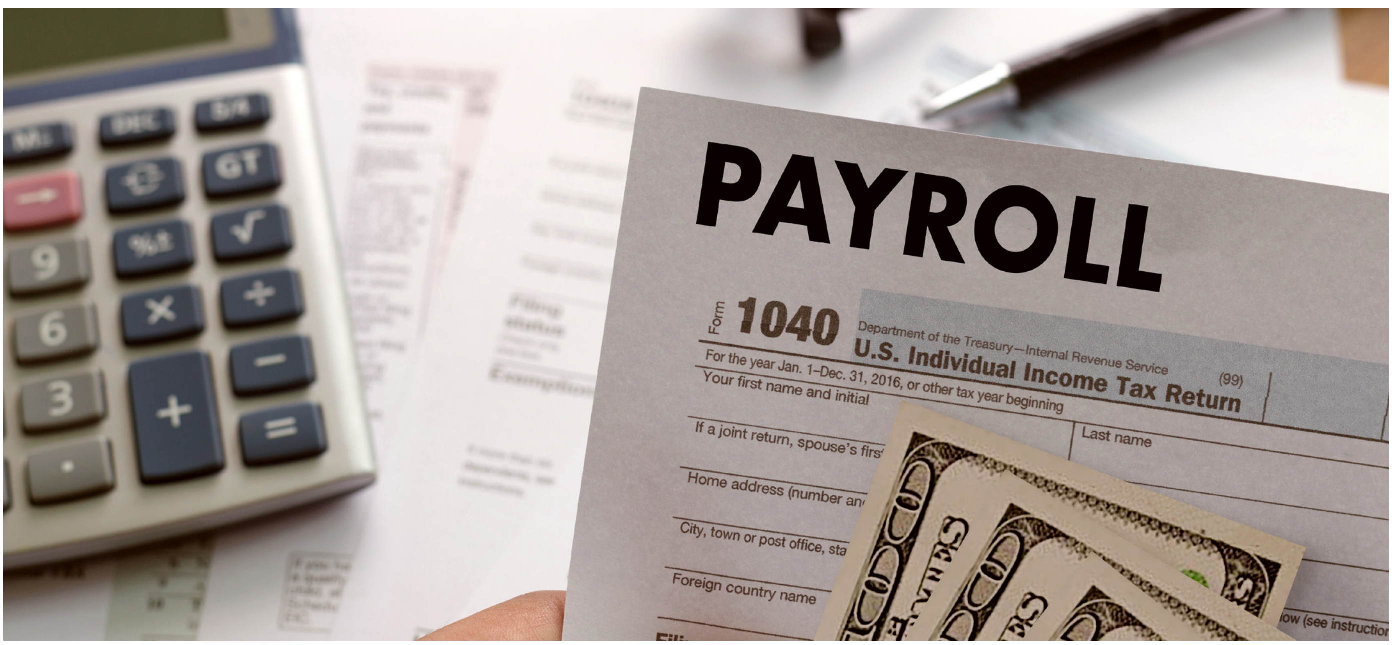
States have taken a variety of approaches to address the CARES Act provisions.[14] The unique reactions to federal conformity and the CARES Act by Colorado and Iowa merit special consideration. During June and July 2020, Colorado enacted legislation,[15] promulgated a new regulation[16] and released detailed guidance[17] on the state's conformity to various CARES Act provisions.[18] Colorado adopts the IRC on a rolling basis,[19] but under the new regulation, Colorado's definition of "IRC" does not incorporate federal statutory changes enacted after the last day of the tax year.[20] Thus, the regulation adopts the IRC on a prospective basis. The legislation decouples from the increase of the business interest expense limitation percentage under IRC Sec. 163(j).[21] For losses incurred after Dec. 31, 2017, the 80% limitation on NOL deductions continues to apply.[22] The technical correction to the treatment of QIP is effective on a prospective basis only.[23]

There are several issues raised by the Colorado Department of Revenue's interpretation of the state's conformity statute, along with the decoupling provisions that were enacted. First, the regulation that prospectively adopts the IRC appears to conflict with the conformity statute and may provide taxpayers with an opportunity to challenge the Department's interpretation. In its administrative guidance, the Department indicates that any federal deductions resulting from the retroactive application of the CARES Act will be disallowed for Colorado purposes. Because there will be no future subtraction, this will create a permanent difference between federal and taxable income. Also, the Department's position that federal IRC changes apply only to taxable years ending after the federal enactment date may create conformity scenarios that are difficult to track for both calendar and fiscal year-end taxpayers.

[7] IRC § 172(a)(2)(A).
[8] IRC § 172(b)(1)(A)(ii)(II).
[9] IRC § 172(b)(1)(D)(i). The NOL carrybacks are not allowed to offset the IRC Sec. 965 inclusion for the one-time repatriation tax. However, NOLs are still allowed against other income in the inclusion year, and taxpayers may elect to forgo applying the carryback to that particular year. IRC § 172(b)(1)(D)(iv), (v).
[10] For example, some states use taxable income before the NOL deduction to determine state taxable income, and then provide a different state-specific NOL. Other states initially include the federal NOL in the tax base, but require the federal NOL to be added back, with a state-specific NOL subtraction. A larger number of states, even those that generally conform to federal NOL concepts, disallow NOL carrybacks and do not always conform to federal carryforward provisions.
[11] QIP is generally an improvement to an interior portion of a building that is nonresidential real property if the improvement is placed in service after the date the building was placed in service.
[12] IRC § 168(e)(3)(E)(viii), (e)(6)(A), (g)(3)(B). The amendments are retroactive to the date of the TCJA's enactment on Dec. 22, 2017. The temporary 100% bonus depreciation enacted by the TCJA applies to property acquired and placed in service after Sept. 27, 2017, and before Jan. 1, 2023.
[13] For rolling conformity states that do not conform to IRC Sec. 168(k), but adopt the federal deduction for MACRS depreciation, the changes reducing the useful life of QIP may still take effect because the CARES Act amended IRC Sec. 168(e) and (g) rather than Sec. 168(k). For static or selective states, the change reducing the useful life of QIP does not take effect until their conformity dates to the IRC reach March 27, 2020.
[14] Note that static conformity states such as Florida, South Carolina, and Vermont enacted legislation during 2020 that advanced their IRC conformity dates to Dec. 31, 2019, or Jan. 1, 2020. As a result, these states have not yet adopted the CARES Act provisions, though conformity may be enacted in next year's legislative sessions.
[15] H.B. 1420, Laws 2020.
[16] Colo. Code Regs. § 39-22-103(5.3).
[17] *CARES Act Tax Law Changes & Colorado Impact*, *Colorado Department of Revenue*, June 2020, revised Sept. 2020.
[18] See GT SALT Alert: "Colorado decouples from some CARES Act provisions." Colorado also enacted separate legislation returning the state's NOL carryforward period to 20 years, effective for NOLs generated in tax years beginning on or after Jan. 1, 2021. H.B. 1024, Laws 2020.
[19] Colo. Rev. Stat. § 39-22-103(5.3).
[20] Colo. Code Regs. § 39-22-103(5.3).
[21] Colo. Rev. Stat. § 39-22-304(2)(i). A corresponding provision applies to personal income tax.
[22] Colo. Rev. Stat. § 39-22-504(1)(b). Note that the carryback of NOLs is not allowed. Colo. Rev. Stat. § 39-22-504(3).
[23] While the Colorado legislation does not address this provision, the Department's regulation provides that the correction to the depreciable life of QIP is effective on a prospective basis only.

On June 29, 2020, Iowa enacted legislation, H.F. 2641, amending corporate income tax provisions and decoupling from certain TCJA and CARES Act provisions.[24] Effective for tax years beginning on or after Jan. 1, 2019, the legislation: (i) requires taxpayers to subtract global intangible low-taxed income (GILTI) amounts included in federal taxable income;25 (ii) conforms to the IRC Sec. 163(j) interest expense limitation of 30% of ATI (2019 tax year only);26 and (iii) conforms to the Paycheck Protection Program (PPP) provisions of the CARES Act for tax years beginning on or after Jan. 1, 2019, and for tax years ending after March[27], 2020.27 Effective for tax years beginning on or after Jan. 1, 2020, prior legislation shifts IRC conformity from static to rolling – creating automatic conformity to the CARES Act (for the 2020 tax year, but not the 2019 tax year).[28] Also, the legislation allows an irrevocable election to waive NOL carrybacks[29] and decouples from the IRC Sec. 163(j) interest expense limitation rules beginning with the 2020 tax year.[30]

Due to the enactment of H.F. 2641 and the previously enacted change to rolling conformity, the Iowa IRC conformity provisions are complex and differ between the 2019 tax year and tax years beginning on or after Jan. 1, 2020. Many Iowa corporate taxpayers were relieved to find out that Iowa does not conform to the GILTI provision of the TCJA for any tax years, and will only subject Iowa taxable income to the IRC Sec. 163(j) limitation for one tax year. Furthermore, this legislation does not change Iowa's conformity to the deduction allowed under IRC Sec. 250 for foreign-derived intangible income (FDII) for tax years beginning on or after Jan. 1, 2019.



[24] H.F. 2641, Laws 2020. See [GT SALT Alert: "Iowa addresses federal conformity provisions."]
[25] Iowa Code § 422.35.27.26 *Iowa Nonconformity: Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020*, Iowa Department of Revenue, updated July 14, 2020.27 H.F. 2641, Div. XIV, § 109. The PPP authorizes small business loans. Under the terms of the federal program, the debt may be forgiven in whole or in part if the business meets specific requirements. The CARES Act treats the forgiven portion of the loans as excluded from gross income for federal purposes.
[28] Iowa Code § 422.32.1.h(2).
[29] Iowa Code § 422.9.3.c, d.
[30] Iowa Code § 422.35.26.

2. The remote workplace

With the spread of the pandemic and the issuance of state and local emergency declarations and stay-at-home orders, many employers were forced to close their physical locations, resulting in massive disruption to employees' lives. In many instances, employees who kept their jobs began to work from their homes or other remote locations in states different than their traditional work location. Given the circumstances of the pandemic, these shifts in location have created significant state and local tax issues for both employers and employees alike.[31] Realizing the magnitude of these issues, many states have issued and revised temporary guidance regarding the income tax treatment of teleworking employees and business tax nexus policies during the pandemic. However, some of the more aggressive policies are inviting litigation from individuals and even other states.

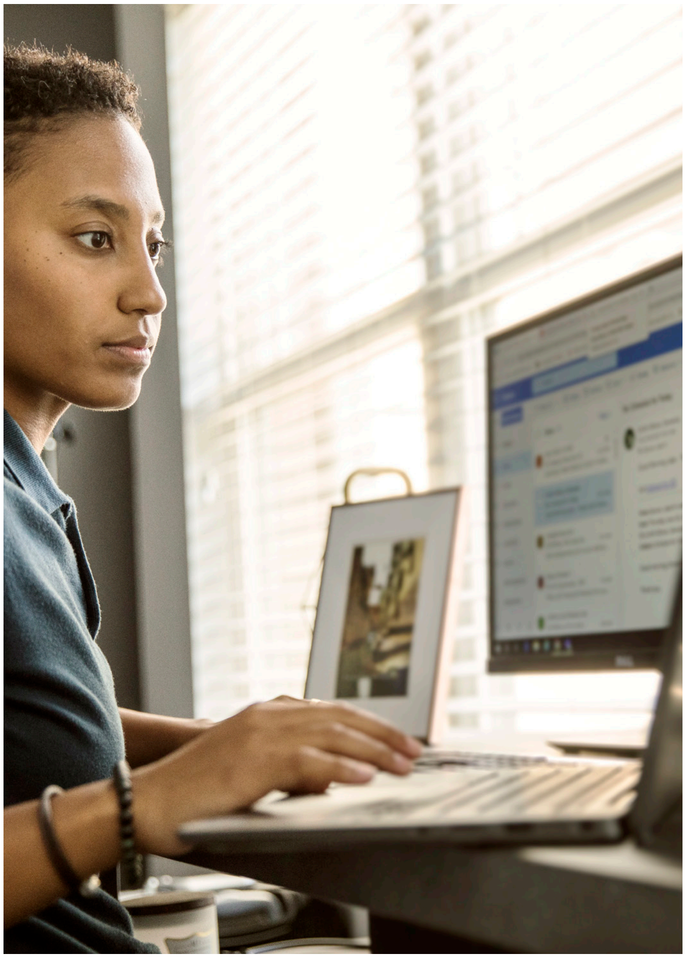
With respect to payroll taxes, many states have released guidance addressing the income tax withholding treatment of telecommuting employees working remotely from a different state as a result of the pandemic. Several states have indicated that employer state withholding obligations will not change during the time that employees are working remotely, meaning that wages paid to non-resident employees normally working in one state before the pandemic are considered to be income earned in that state and subject to withholding. Other states, however, have been more aggressive as they grapple with the long-term impact of a remote workforce on their budgets and overall fiscal health. For example, Massachusetts recently finalized an emergency regulation providing that compensation received by a nonresident who previously worked in the state, but is now working outside the state due to the pandemic, will continue to be treated as Massachusetts source income subject to tax.[32] Similarly, after months of silence on the issue, New York released guidance clarifying that a nonresident with a primary office located in the state but telecommuting during the pandemic is considered to be working in New York for income sourcing purposes unless the employer has established a bona fide office at the nonresident's telecommuting location.[33]

The aggressive telecommuting policies adopted in Massachusetts and New York have received attention from their neighboring Northeastern states, to the extent that several states have begun challenging these rules in court. For example, New Hampshire recently brought an action in the U.S. Supreme Court, arguing that the Massachusetts income sourcing regulation unconstitutionally imposes income tax on New Hampshire residents lacking a connection with the state during the pandemic, in violation of the Due Process and Commerce Clauses.[34] Other states, including Connecticut, New Jersey, Rhode Island and Vermont, are also considering intervening in the litigation, based on the high number of residents now working remotely in their states. New Jersey is also considering whether to study New York's taxation of its residents that traditionally worked in a New York office in order to better understand the long-term fiscal impact on the state, given the possibility that residents may continue to work remotely long after the pandemic.[35]

In addition to payroll tax concerns, employers also face the prospect of additional business tax filing obligations resulting from employees working from states in which the employer does not otherwise have a physical presence or nexus. In response, approximately one-third of the states have issued guidance providing for the temporary suspension of corporate income tax and/or sales and use tax nexus thresholds where the pandemic has forced certain employees to work remotely in a state in which the company would otherwise not have nexus. Similarly, states have also released guidance providing that they would not consider temporary changes in an employee's physical work location to alter the apportionment of income during the periods in which temporary telework requirements are in place. Some states have provided a specific end date to their nexus and apportionment waivers, while others have said that the waivers will remain in effect for the duration of their state of emergency declarations.

[31] For further discussion, see GT SALT Alert: "COVID-19 impact on remote work and state tax policy" and GT SALT Alert: "State tax impact for telecommuting employees."
[32] Mass. Regs. Code tit. 830, § 62.5A.3, effective Oct. 16, 2020. While the original regulation was valid from March 10, 2020 through the earlier of Dec. 31, 2020 or 90 days after the end of Massachusetts' state of emergency declaration, the Massachusetts Department of Revenue recently announced that it will extend the regulation by eliminating the Dec. 31 end date. Technical Information Release 20-15: *Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic*, Massachusetts Department of Revenue, Dec. 8, 2020.
[33] *Frequently Asked Questions about Filing Requirements, Residency and Telecommuting for New York State Personal Income Tax*, New York Department of Taxation & Finance, updated Oct. 19, 2020. The guidance is considered to be a rigid application of New York's "convenience of the employer" rule, under which a nonresident employee is subject to New York personal income tax on income earned when the employee works from a nonresident location at the employee's convenience, rather than as a requirement of the employer. See *Zelinsky v. New York Tax Appeal Tribunal*, 801 N.E.2d 840 (N.Y. 2003).
[34] *New Hampshire v. Massachusetts*, U.S. Supreme Court, No. 22O154, filed Oct. 19, 2020.
[35] S.B. 3064, A.B. 4897.

While most states and localities issued guidance generally providing for a "status quo" method of taxation for non-resident employees traditionally working in their states, the experiences of Massachusetts and New York show that others are struggling with the longer-term effects of telecommuting employees who no longer physically work within their jurisdictions. The prolonged effect of the pandemic raises the question of how long the states will continue to adhere to temporary tax withholding policies or business tax nexus waivers, even after state emergency declarations are lifted. States facing substantial budget deficits are looking for ways to maintain revenue collections, including from nonresident employees who remain an important source of revenue for states like New York. However, the aggressive taxation of nonresidents raises important questions regarding the ability of states to tax the income of employees working beyond their borders during the pandemic and beyond. At the same time, taxpayers are looking for clarity and certainty as to the duration of the temporary guidance, so that they have sufficient time to adjust their employee tax withholding and business tax filing policies and processes. In addition, increased remote work has created new challenges for employers who may lack the proper resources and systems to track employee work locations for purposes of accurate tax reporting. In the absence of federal legislation providing more uniformity in this area, the proliferation of remote working in 2020 and the differing response by the states will give employers plenty to ponder from a state and local tax perspective well beyond the end of the pandemic.



3. Impact of the pandemic on state budgets

Prior to the pandemic, many states were experiencing strong tax revenue collections and had budget surpluses.[36] State and local governments experienced a large reduction in tax revenue beginning in the second quarter of 2020 as a result of the pandemic, but the downturn was not as severe as initially predicted. According to the Center on Budget and Policy Priorities (CBPP), the estimated state budget shortfalls of approximately $22 billion during the 2020 fiscal year were less than anticipated at the beginning of the pandemic.[37] Another source, Moody's Analytics, estimated that state and local governments experienced a shortfall between $70 billion and $74 billion during the 2020 fiscal year.[38] However, there are strong signs that these shortfalls will pale in comparison to the fiscal situation that will be faced in the near future, as states and localities are very likely to experience a more drastic decrease in tax revenue due to the pandemic. The CBPP predicts that states, localities, tribal nations and U.S. territories will have budget shortfalls between $480 billion and $620 billion through 2022.[39] Moody's Analytics also estimates that state and local governments will experience substantial budget shortfalls during the next two fiscal years.[40] The predicted shortfalls may be even greater if the effects of the pandemic produce a "double dip" recession.[41]

Due to the economic effects of the pandemic, state and local governments were forced to eliminate jobs and reduce spending. In fact, state and local governments are estimated to have furloughed or laid off 1.2 million workers.[42] State and local governments also have implemented budget reductions that reduced public services such as education.[43] The financial impact of the pandemic was less drastic because many states and localities had reserves when the pandemic struck.[44] During the 2020 fiscal year, at least 17 states authorized the use of "rainy day" funds.[45] State and local budgets also benefitted by federal legislation that provided $150 billion to state and local governments to cover expenses related to the pandemic.[46] The pandemic caused substantial unemployment in the service industries, but the decrease in income tax revenue was mitigated to some extent because many office workers were able to continue their employment by working remotely.[47] Also, an increase in unemployment benefits earlier in the year helped to support consumer spending and limit the reduction in sales tax revenue.[48] Furthermore, the fairly recent imposition of a sales tax collection responsibility on remote sellers and marketplace facilitators by many states, in response to the *South Dakota v. Wayfair, Inc.* decision,[49] likely bolstered sales tax collections.

Based on the predictions, the financial condition of states and localities may grow substantially worse over the next two years. States may become increasingly aggressive in enforcing their tax statutes to collect revenue and may implement new taxes to help address budget shortfalls. Also, state and local governments may be forced to further reduce services and eliminate additional jobs. As long as the pandemic continues to have a substantial effect on the economy, the fiscal health of many states largely will be dependent on prospective funding by the federal government, a prospect that as of this writing remains relatively uncertain.

[36] *Fiscal 50: State Trends and Analysis*, The Pew Charitable Trusts, Nov. 5, 2020.
[37] Michael Leachman and Elizabeth McNichol, *Pandemic's Impact on State Revenues Less Than Earlier Expected But Still Severe*, Center on Budget and Policy Priorities, Oct. 30, 2020.
[38] David Harrison, *State, Local Governments Slashed Spending After Covid. Next Year Could Be Worse.*, The Wall Street Journal, Nov. 29, 2020.
[39] Leachman, supra.
[40] Id.
[41] Id.
[42] Id.
[43] Id.
[44] Harrison, supra.
[45] Fiscal 50: State Trends and Analysis, The Pew Charitable Trusts, Nov. 5, 2020.
[46] Harrison, supra. The CARES Act established the $150 billion Coronavirus Relief Fund. P.L. 116-136 (2020).
[47] Id.
[48] Id.
[49] 138 S. Ct. 2080 (2018).

4. Shifting income tax deadlines

With the onset of the pandemic generally coinciding with spring income tax due dates, jurisdictions across the country scrambled to provide taxpayer relief. The IRS extended the filing and payment deadlines for federal corporate and individual income taxes from April 15, 2020, to July 15, 2020.[50] Most, but not all states followed suit by granting similar extensions. In certain cases, the state filing due date and payment deadlines were separated by several weeks. For example, Florida extended the original due date for filing a corporate income tax return from May 1 to Aug. 3, with the corresponding payment deadline extended to June 1.[51] In addition, Arkansas, Minnesota, Montana and New Hampshire disconnected from the federal extensions to the original time for filing corporate income tax returns and making payments.

Even when states eventually correlated to the federal income tax filing and payment deadlines, uncertainty and complexity often reigned supreme. A perfect example of the problems faced in this area was reflected in New Jersey's response. Providing taxpayers and preparers more suspense than perhaps necessary, New Jersey Gov. Phil Murphy signed legislation on April 14 — just one day prior to the original due date of April 15 — extending the state's filing and payment deadlines to July 15, 2020 for purposes of the Corporation Business Tax (CBT) and Gross Income Tax (GIT).[52] The enacted legislation granted calendar-year taxpayers filing CBT and GIT returns having an original due date of April 15, 2020, an automatic extension to file such returns and pay the corresponding tax due until July 15, 2020.[53]

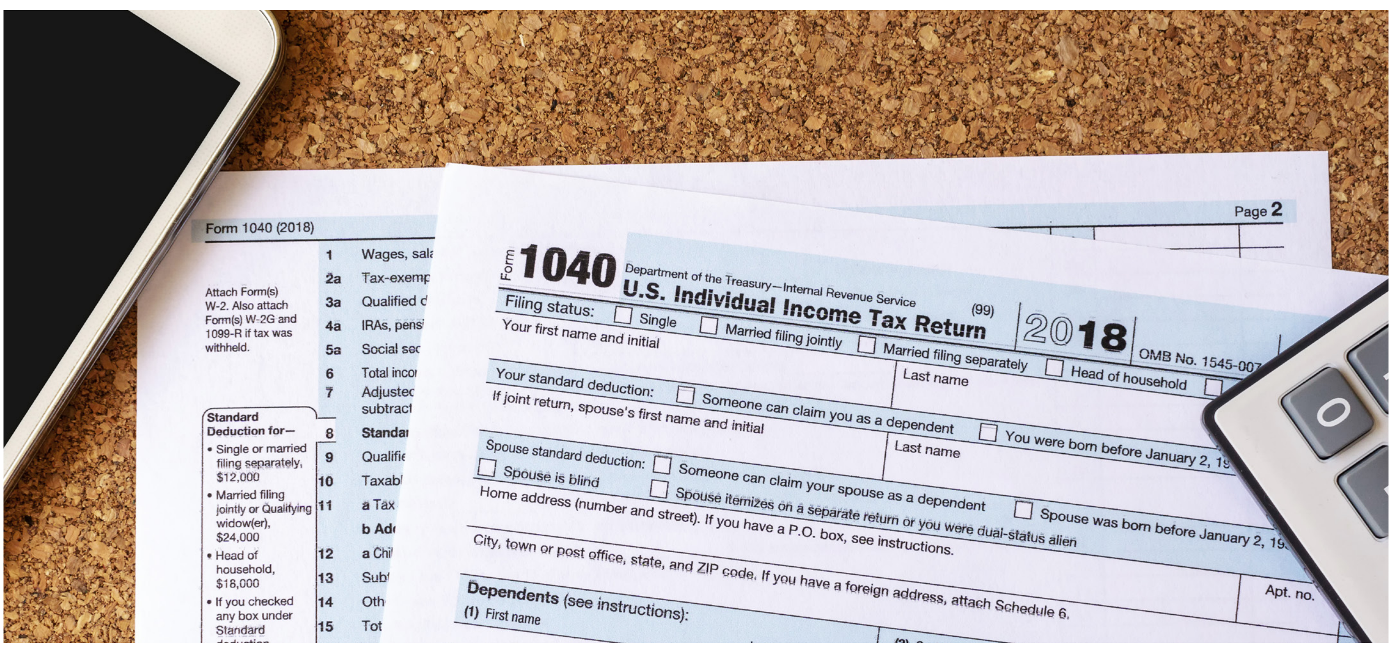
Specifically, taxpayers qualifying for the extension were not subject to penalty or interest for returns filed and tax paid on or before the extended due date.[54] Further, the legislation extended the provisions governing the payment of interest for tax refunds by the later of: (i) six months after the conclusion of the state of emergency declared by the governor in a recent executive order; or (ii) six months after the return is filed.[55] Finally, in accordance with the filing and payment due date extensions, the law extended the statute of limitations for the New Jersey Division of Taxation to assess taxes by 90 days after the conclusion of the state of emergency.[56] The 90-day extension applies to both the original assessment time period and the extended assessment time period, if consented to by the taxpayer.[57] Following enactment, the Division released guidance clarifying that the extensions also applied to first quarter 2020 estimated tax payments.[58]

In order to account for the financial impact of the extended income tax filing and payment deadlines, New Jersey became the first state to react to the pandemic by extending its fiscal year beyond a twelve-month period. Specifically, New Jersey took the extraordinarily rare step of extending the duration of its 2020 fiscal year by three months to end on Sept. 30, 2020, and consequently reducing the duration of the 2021 fiscal year by three months to begin on Oct. 1, 2020, and end on June 30, 2021. In conjunction with these changes, the legislation required that any additional spending required to support state operations from July 1 through Sept. 30, 2020, be made through the enactment of a general law amending or providing for a supplemental appropriation to the annual appropriations law.[59]

[50] Notice 2020-18, *Relief for Taxpayers Affected by Ongoing Coronavirus Disease 2019 Pandemic*, Internal Revenue Service, March 20, 2020. The IRS later expanded the automatic extension relief to all taxpayers having a filing or payment deadline, falling on or after April 1 and before July 15, whether originally or pursuant to a valid extension. This relief includes second quarter estimated tax payments. Notice 2020-23, *Additional Relief for Taxpayers Affected by Ongoing Coronavirus Disease 2019 Pandemic*, Internal Revenue Service, April 9, 2020.
[51] *Order of Emergency Waiver/Deviation (Order) # 20-52-DOR-003 (Corporate Income Tax)*, Florida Department of Revenue, April 27, 2020.
[52] COVID-19 Fiscal Mitigation Act, P.L. 2020, c.19 (S. 2238), Laws 2020. See GT SALT Alert: "New Jersey extends tax filing, payment deadlines."
[53] S. 2338, § 1.a.
[54] S. 2338, § 1.c.
[55] S. 2338, § 1.b; Executive Order No. 103 of 2020, Gov. Phil Murphy, March 9, 2020.
[56] S. 2338, § 2.
[57] Per Division guidance, if either the original assessment time period or the consent period ends on or after April 14, 2020, the Division may make an assessment on or before the expiration of the extended 90-day period under the new law. If the original assessment time period or the consent period ends before April 14, the Division would be out of time to make an assessment for the returns that are beyond the original limitations period.
[58] *COVID-19 Related Tax Information*, N.J. Division of Taxation, published at https://www.state.nj.us/treasury/taxation/covid19.shtml.
[59] S. 2338, § 3.b.

As the year progressed and the pandemic failed to show any signs of slowing, second quarter estimated income tax payment dates were impacted. California,[60] along with many states, followed the lead of the federal government, which granted a reprieve from related penalties and interest for payments made by July 15. However, cash flow issues prevented some states from offering this relief on their own. Finally, as fall compliance season got into full swing, many states recognized the unique challenges facing taxpayers and modified their extended due dates to allow taxpayers additional time to file income tax returns. Significant efforts to achieve this result were made by the AICPA, various state CPA societies and the Council On State Taxation (COST).[61] In the end, many states provided corporate taxpayers with an additional month to file beyond the federal Oct. 15 deadline. For example, Delaware, Kansas and New Jersey provided blanket extensions to Nov. 16 through administrative action. Further, many states expressed a willingness to consider relief on a case-by-case basis upon request (which in some cases may require a valid federal income tax extension), including Missouri and North Carolina. Finally, several states, including Iowa, Pennsylvania and Texas, revised their extended due dates into 2021.

As the pandemic continues to rage, taxpayers should continue to be aware of the potential for changes to income tax return due dates. Perhaps the pandemic has proven that it is a good idea for states to decouple their filing due dates from the federal income tax due dates as a means to provide taxpayers some time to ensure they can file accurate state tax returns based off federal data that may not be confirmed until the last moment. Further, taxpayers should expect in the pandemic environment that states desperate for revenue typically will be more flexible with filing deadlines than payment dates – though of course, penalty relief is never a guarantee.



[60] *COVID-19 Extensions to File and Pay*, California Franchise Tax Board, published at https://www.ftb.ca.gov/about-ftb/newsroom/covid-19/extensions-to-file-pay.html#Estimated-tax-payments-due-dates.
[61] The AICPA has also developed a tracking tool available on its website, State Tax Filing Guidance for the Coronavirus Pandemic. 62 IRC § 164(b)(6)(B).

5. IRS approves workaround to TCJA's SALT deduction cap

The SALT deduction limitation for individuals continued to receive considerable attention during 2020 for several reasons. Where the itemized deduction for SALT paid was previously unlimited, the TCJA capped the deduction at $10,000 for individuals and most married couples for the 2018-2025 tax years.[62] The limitation applies to any SALT liability, including tax on income received from a partnership or S corporation.

In response to the limitation, states evaluated several ways to respond, and in 2018 began enacting laws adopting pass-through entity (PTE) tax regimes. Under these regimes, the imposition of tax on PTE income is shifted from the owner to the entity. As a result, the entity is allowed to deduct its state and local income taxes as a tax on the business at the federal level, followed by a deduction for the PTE tax on the distributive share of the owners' income. Depending on the structure of the taxing regime, the owner is then permitted to claim a corresponding individual tax credit or an exclusion on the portion of the owner's pass-through income that was subject to the entity tax. Seven states have enacted PTE taxes to date, with New Jersey[63] and Maryland joining the list during 2020.[64] Connecticut is the only state that imposes a mandatory PTE tax, while the other six states follow elective PTE tax regimes.

Without specific input from the IRS, considerable uncertainty remained regarding whether the state PTE tax regimes would be respected for federal income tax purposes as a matter of policy and therefore provide an acceptable legal framework for partnerships and S corporations to deduct the tax at the entity level, or whether the tax should be a separately stated flow-through item to owners subject to the SALT limitation.

In November, however, the IRS broke its silence on the question with the issuance of Notice 2020-75, confirming that PTE businesses may claim an entity-level deduction for state and local income tax paid under state laws that shift the tax burden from individual owners to the business entity.[65] According to the notice, the IRS intends to issue proposed regulations providing guidance supporting a PTE's deduction of amounts qualifying as "specified income tax payments," or an entity's tax liabilities imposed by a state or local taxing jurisdiction. Until the issuance of proposed regulations, taxpayers may rely on the guidance provided in the notice for payments made beginning with the 2018 tax year and before the publication of the proposed regulations.

The IRS's acceptance of entity-level taxes on PTEs is a significant development for state PTE tax regimes as a workaround to the SALT deduction limitation, having the potential to offer significant benefits to PTE owners having income in the applicable states. However, it is important to note that the benefits outlined in the notice do not necessarily extend to state income tax withholding or composite tax payments made on behalf of the PTE. To the extent such payments do not impose liability directly on the PTE, they are likely not "specified income tax payments" as defined in the notice. Given the IRS's guidance, additional states are likely to enact laws adopting similar regimes, especially those states imposing comparatively high personal income tax rates on residents that are disproportionately affected by the SALT deduction cap. While some modification or the full repeal of the SALT deduction limitation remains a possibility under a Biden administration and pending the final makeup of Congress in 2021, states nonetheless have the blessing of the IRS in enacting entity-level taxes for as long as the limitation remains in place.

[62] IRC § 164(b)(6)(B).
[63] For an in-depth discussion of New Jersey's Business Alternative Income Tax, see GT SALT Alert: "New Jersey enacts SALT deduction cap workaround."
[64] Connecticut, Louisiana, Oklahoma, Rhode Island and Wisconsin enacted PTE-level taxes prior to 2020.
[65] Notice 2020-75, *Forthcoming Regulations Regarding the Deductibility of Payments by Partnerships and S Corporations for Certain State and Local Income Taxes*, U.S. Department of Treasury & Internal Revenue Service, Nov. 9, 2020. For further discussion, see GT Tax Flash: "IRS permits SALT deduction pass-through workarounds."

6. State ballot initiatives

On Nov. 3, the 2020 general elections provided an opportunity for voters to cast ballots on a variety of significant SALT issues in addition to the federal, state and local executive and legislative races. Voters decided major ballot initiatives in California[66] and Illinois,[67] along with several other measures in various states.[68]

In California, voters considered several important ballot initiatives. Most notably, the 2020 initiatives included a split roll property tax system that would have taxed commercial and industrial properties at fair market value, and an initiative to confirm the treatment of app-based drivers as independent contractors (as opposed to employees). Concerning the split roll property tax system, voters rejected Proposition 15,[69] which would have amended California's Constitution to create a "split roll" system where commercial and industrial properties would be assessed annually at fair market value, while residential property would have continued to be assessed based on its purchase price.[70] The initiative would have provided an exception for business owners that have $3 million or less in property within the state, and the "split roll" would have been phased-in beginning with the 2022-2023 fiscal year. Also in the property tax realm, California voters approved Proposition 19,[71] which allows certain homeowners over 55 years old or disabled to transfer their property tax basis between counties.

To offset the impact of this benefit, the bill also limits the special rules that allow certain "inherited property" to pass to children or grandchildren without a property tax reassessment to fair market value. Specifically, the rules allowing a carryover property tax basis will no longer apply to inherited property unless it is used as a home or for farming by the inheriting child or grandchild. Proposition 19 also expands existing tax benefits for certain individuals who are disabled or whose homes were destroyed by disaster or wildfire by permitting them to transfer their primary residence's tax basis to a replacement residence. Homeowners who are over 55 years old or disabled can use these special rules up to three times.

California voters also approved Proposition 22,[72] which allows app-based transportation/rideshare and delivery drivers to be classified as "independent contractors" rather than "employees." Proposition 22 effectively exempts app-based ride-hailing and delivery services companies from Assembly Bill No. 5 (A.B. 5),[73] which beginning in 2020 created a new California standard for determining when someone is an "employee" versus an "independent contractor" not subject to various state employment laws such as minimum wage, overtime, unemployment insurance, and workers' compensation. Although voters have sided with app-based ride-hailing and delivery services companies, it is still important to note that Proposition 22 does not address the broader implications of A.B. 5. Because Proposition 22 is limited to app-based drivers, other freelance and "gig economy" workers may potentially still be subject to the provisions of A.B. 5 causing them to be recharacterized as "employees" in California despite retaining independent contractor status for federal purposes.

[66] For a discussion of the California ballot initiatives, see GT SALT Alert: "California decides major ballot initiatives."
[67] For a discussion of the proposed Illinois Fair Tax (graduated income tax) that was rejected by voters, see GT SALT Alert: "Illinois rejects graduated income tax amendment."
[68] For a discussion of ballot measures decided by voters in other states, see GT SALT Alert: "Ballot questions impact tax rates, sports betting."
[69] California Secretary of State, California General Election Tuesday, Nov. 3, 2020, Unofficial Election Results (as of Dec. 1, 2020).
[70] For residential property, annual valuation adjustments may not increase by more than 2% under Proposition 13, as approved by California voters in 1978. See Cal. Const. art. XIII-A.
[71] California Secretary of State, California General Election Tuesday, Nov. 3, 2020, Unofficial Election Results (as of Dec. 1, 2020).
[72] Id.
[73] A.B. 5, Laws 2019, was enacted on Sept. 18, 2019. 74 Illinois Top Races, Chicago Tribune, Nov. 4, 2020 (unofficial election results).

In Illinois, voters rejected the Illinois Fair Tax, a constitutional amendment to allow a graduated income tax.[74] The proposed amendment was intended to increase the tax rate on high-income individuals and produce revenue to address the state's large budget deficit. As background, the Illinois Constitution provides that "[a] tax on or measured by income shall be at a non-graduated rate."[75] At any given time, only one income tax may be imposed on individuals and one income tax imposed on corporations. The rate of an income tax imposed on corporations may not exceed the rate imposed on individuals by more than a ratio of 8 to 5.[76] The proposed amendment would have removed the non-graduated rate and single income tax provisions and provided the General Assembly with the responsibility to determine "the rate or rates of any tax on or measured by income imposed by the State." Beginning Jan. 1, 2021, the Illinois corporate income tax rate would have increased from 7% to 7.99% if voters approved the constitutional amendment.[77] Combined with the 2.5% replacement tax, the new corporate rate would have been 10.49%.

Finally, certain ballot initiatives in several other states addressed tax rate changes, along with the adoption of several "sin taxes."[78] Colorado and Arizona voters approved changes to income tax rates. Colorado's Proposition 116 reduces the flat corporate and personal income tax rate from 4.63% to 4.55% and applies retroactively to tax years beginning on or after Jan. 1, 2020.[79] Arizona voters enacted Proposition 208, which imposes a 3.5% tax surcharge on taxable annual income over $250,000 (single filers) or $500,000 (joint filers). Under existing law, the highest Arizona personal income tax rate is 4.5%. The surcharge will be imposed beginning with the 2021 tax year.[80] Voters in Louisiana,[81] Maryland,[82] and South Dakota[83] authorized sports wagering, while voters in Nebraska approved gaming operations at racetracks and a corresponding tax.[84] Arizona, Montana, New Jersey and South Dakota voters all approved legalization of marijuana sales. Finally, Colorado voters approved a constitutional amendment that will allow residential property taxes to increase.

Many of the decisions made by voters with respect to the state ballot initiatives at issue in the 2020 general elections comport with recent state tax trends. In some respects, the continuing willingness of the electorate to adopt "sin taxes" makes further legislation and ballot initiatives addressing these issues more likely in states that may never have envisioned such policies to become the law of the land. In many cases, these changes will be helpful from a revenue standpoint, which is especially important as states try to survive in and ultimately recover from the pandemic.

[74] Illinois Top Races, Chicago Tribune, Nov. 4, 2020 (unofficial election results).
[75] Ill. Const. art. IX, § 3(a).
[76] Id.
[77] 35 Ill. Comp. Stat. 5/201(b)(14), (15).
[78] For a detailed discussion, see GT SALT Alert: "Ballot questions impact tax rates, sports betting."
[79] Colorado Secretary of State, 2020 General Election, Official Results.
[80] Arizona Secretary of State, 2020 General Election, Unofficial Results (as of Dec. 1, 2020). This adds Ariz. Rev. Stat. § 43-1013.
[81] Louisiana Secretary of State, 2020 General Election, Official Results.
[82] Question 2, Maryland State Board of Elections, Unofficial 2020 Election Results (as of Dec. 1, 2020).
[83] Authorizing the legislature to allow sports wagering in the City of Deadwood. South Dakota Secretary of State, 2020 General Election, Unofficial Results (as of Dec. 1, 2020).
[84] Initiative Measures 430 and 431, Nebraska Secretary of State, Unofficial Results: General Election – Nov. 3, 2020 (updated Nov. 23, 2020).

7. California NOL/credit suspensions

On June 29, 2020, California enacted legislation that temporarily suspends the use of NOLs for most taxpayers, and limits the utilization of most business credits to $5 million for tax years beginning in 2020, 2021 and 2022.[85] The legislation suspends a taxpayer's use of NOL deductions, but provides a small business exemption for corporations that have income subject to tax under corporation tax law of less than $1 million for the tax year.[86] The legislation also limits a taxpayer's use of business tax credits, including credit carryovers, to $5 million per year.[87] This limitation applies to all credits allowed under the tax credit provisions except the low-income housing credit, which is specifically excluded. Also, the same dollar limitation applies to combined reporting groups in the aggregate (as opposed to separately for each taxpayer member). The legislation also increases the credit carryforward period by the number of tax years any portion of the credit is disallowed as subject to the limitation. However, an exception is provided for research and development tax credits that have indefinite carryforward periods.

The legislation, which is projected to raise $9.2 billion in tax revenue over the three-year period to help close California's sizable projected budget shortfall due to the pandemic, may significantly impact many taxpayers. The small business exemption to the NOL suspension is narrow because it appears to be based on pre-apportioned income, rather than apportioned state taxable income. Also, the legislation's approach to defining the $1 million threshold seems to be inconsistent with California's historical approach of computing NOLs, which has traditionally proceeded on a post-apportioned basis for each taxpayer.[88] As for the legislation's use of a $5 million ceiling for the use of certain credits, when viewed on a single corporate taxpayer basis, a significant amount of state taxable income would appear to be needed to meet this threshold.[89] However, in the context of a combined group of corporations, it is expected that the $5 million threshold may be more commonly triggered once spread across members of the combined group. For affected corporate taxpayers, the credit limitations may have wide-ranging impact due to the breadth of frequently utilized credits included in the $5 million annual limitation, such as the research and development credit[90] and the new employment credit.[91]

[85] Ch. 8 (A.B. 85), Laws 2020. See GT SALT Alert: "California restricts NOLs, credits for three years." Similar provisions also were enacted for personal income tax purposes.
[86] Cal. Rev. & Tax. Code § 24416.23. The NOL carryforward periods are extended as follows: (i) three years for losses incurred in taxable years beginning before Jan. 1, 2020; (ii) two years for losses incurred in taxable years beginning on or after Jan. 1, 2020, and before Jan. 1, 2021; and (iii) one year for losses incurred in taxable years beginning on or after Jan. 1, 2021, and before Jan. 1, 2022.
[87] Cal. Rev. & Tax. Code § 23036.3.
[88] See Cal. Rev. & Tax. Code § 24416.
[89] For example, under the 8.84% corporate tax rate, apportioned income from California sources in excess of $56.5 million would be needed before the limitation is triggered.
[90] Cal. Rev. & Tax. Code § 23609.91 Cal. Rev. & Tax. Code § 23626.
[91] CAL. REV. & TAX. CODE § 23626. 92 Georgia, Louisiana, Mississippi and Tennessee all adopted marketplace provisions in 2020.

8. Wal-Mart and clarification of marketplace facilitator provisions

Over two years after the *Wayfair* decision, nearly all states imposing a sales tax have rushed to adopt provisions generally requiring marketplace providers or facilitators to collect and remit sales tax on third-party transactions facilitated through their platforms, with four additional states having done so in 2020.[92] Despite the adoption of such marketplace provisions in the wake of *Wayfair*, certain states and localities have attempted to impose sales tax collection obligations on online marketplaces for tax periods prior to the enactment of marketplace facilitator provisions, resulting in challenges that are being litigated.

In the first marketplace provider case to reach a state high court, the Louisiana Supreme Court ruled in *Normand v. Wal-Mart.com USA, LLC* that an online marketplace was not a "dealer" required to collect and remit sales tax on third-party sales.[93] After an attempted audit, the Jefferson Parish tax collector alleged that Wal-Mart.com was required to collect tax on sales made through its website by third-party retailers from 2009-2015 because it was a "dealer" in the third-party retail sales transactions. After several appeals, the court reversed the lower court decisions that sided with Jefferson Parish, finding that Wal-Mart.com was not a "dealer" as defined under Louisiana law.[94] In examining the statutory language at issue, the court reasoned that the actual participants in the sale were the purchaser and the third-party retailer that actually sells the goods, while the online marketplace is a facilitator of the sale rather than a party to the underlying transaction. Further, the court determined that Wal-Mart.com did not contractually assume the obligation of a third-party retailer to collect and remit sales tax, based on its reading of the marketplace retailer agreement.

As the first state high court decision to consider the sales tax collection obligations of marketplace providers, the *Wal-Mart* case is significant for several reasons. First, the decision may serve as a deterrent to states that attempt to pursue collection and remittance requirements on marketplace providers for tax periods preceding the *Wayfair* decision or the enactment of a state's specific marketplace provision.[95] Second, the decision was instrumental in Louisiana's decision to enact its own marketplace provision earlier this year, becoming effective on July 1, 2020.[96] Finally, the case serves as a reminder of the challenges faced by states in enacting workable marketplace provisions with clear definitions of what constitutes a marketplace facilitator, and what is required of a marketplace seller in order to be relieved of a collection responsibility. Unfortunately, the rapid adoption of these provisions has created a wide range in definitions and collection responsibilities from state to state, causing compliance difficulties for marketplaces attempting to determine sales tax collection obligations as they navigate the relationship with the third-party retailers selling on their platforms. The *Wal-Mart* decision highlights the continued need for clearer guidance from the states on the resolution of conflicts when more than one party may conceivably be responsible for sales tax collection.

[92] Georgia, Louisiana, Mississippi and Tennessee all adopted marketplace provisions in 2020.
[93] *Normand v. Wal-Mart.com USA, LLC*, Louisiana Supreme Court, No. 2019-C-00263, Jan. 29, 2020.
[94] La. Rev. Stat. Ann. § 47:301(4).
[95] For example, a South Carolina lower court held that an online marketplace facilitating sales for third-party merchants was required to collect sales tax on sales made to South Carolina customers in 2016, prior to the effective date of South Carolina's marketplace facilitator law. The case is currently on appeal to the South Carolina Court of Appeals. See *Amazon Services, LLC v. South Carolina Department of Revenue*, S.C. Administrative Law Court, No. 17-ALJ-17-0238-CC, Sept. 10, 2019. For further discussion of this decision, see GT SALT Alert: "South Carolina: Amazon liable for Q1 2016 sales tax."
[96] Act 216 (S.B. 138), Laws 2020.

9. Addressing *Wayfair* and indirect tax issues

As mentioned at great length above, state and local governments are running significant budget deficits due to the pandemic. However, with respect to sales tax collections, the fiscal picture is not necessarily as dire as one would have expected. To be sure, sales tax collections suffered during the second quarter of 2020, as state and local stay-at-home orders caused consumers to substantially scale back spending on goods and services. And at least one think tank has concluded that in the aggregate, sales tax collections are expected to decline by approximately $49 billion in 2020, $45 billion in 2021 and $46 billion in 2022, due to the prolonged change in consumer spending habits resulting from the pandemic.[97] Those are large numbers, but still comprise a small part of the overall budget gap to be faced by states and localities, in part because of the changes in how consumers are shopping, along with the mitigating impact of *Wayfair*.

Stay-at-home orders and the desire to remain healthy appear to have curbed the demand for certain in-person services, like hair and nail salons and travel, that are often subject to the sales tax. At the same time, demand for certain taxable goods that can be delivered or that came in handy, like furniture, motor vehicles and home and yard improvement products, have surged.[98] These spending habits could bode well for sales tax collections in many states and localities, especially if the pandemic extends well into next year.

States and localities have also experienced better than expected sales tax collections in recent months in part due to the lingering impact of the *Wayfair* decision, which allows states to collect sales tax on sales by remote sellers and marketplace facilitators exceeding certain sales and/or transaction thresholds. In general, the pandemic has changed consumer spending habits to the extent that it has accelerated a shift to e-commerce shopping and spending, at least for the time being.[99] As a result, states that have adopted sales and use tax economic nexus provisions in response to *Wayfair* have fared better than those that have not. Both Texas and Florida rely heavily on sales tax revenue due to the lack of a personal income tax, but Texas has adopted remote seller and marketplace provisions while Florida has yet to do so. While Texas saw sales tax revenue drop only 6.5% in June 2020 compared to the previous June,[100] Florida has experienced a more than 19% decrease in sales tax revenue in June 2020 as compared to June 2019.[101] While remote seller and marketplace laws have provided increased sales and use tax revenue for states that continue to navigate budget deficits in 2020, federal legislative action in the form of a future stimulus package that supports the states as well as individuals may further affect consumer spending habits and amplify sales tax revenue collections in the near future.

[97] *How much is COVID-19 hurting state and local revenues?*, The Brookings Institution, Sept. 24, 2020.
[98] Consumers spent 7.2% less on services and 6.9% more on goods in the third quarter of 2020 compared to the prior year. Monthly Economic Update, Pennsylvania Independent Fiscal Office, Nov. 2020.
[99] For example, e-commerce sales comprised approximately 14.3% of total retail sales in the third quarter of 2020, compared with 11.8% in the first quarter of 2020, but down from 16.1% in the second quarter of 2020. *E-Commerce Retail Sales as a Percentage of Total Sales*, Federal Reserve Bank of St. Louis, Nov. 19, 2020.
[100] *State Sales Tax Revenue Totaled $2.7 Billion in June*, Texas Comptroller of Public Accounts, July 1, 2020.
[101] Maria Koklanaris, *Wayfair Offers Lifeline for Some State Coffers Amid Pandemic*, Law360, Oct. 7, 2020.

A consideration of indirect taxes would not be complete without a couple of thoughts on property taxes. While property tax collections have remained relatively stable since the beginning of the pandemic, the public health crisis has created a "tale of two cities" for commercial and residential property owners from a property valuation perspective. The prolonged closure of offices and the move to remote work has caused certain tenants of commercial properties to question whether they will require the same amount of office space that they occupied before the pandemic. The potential decrease in demand for commercial property could result in a decrease in commercial property values should they be reassessed in the coming months or years, leading to benefits for property owners, but further pressure on state and local budgets. This could set the stage for substantial property tax increases in 2021 to deal with retrenchment from commercial properties. At the same time, demand is picking up in many residential markets, which could mitigate the immediate need for revenue from property taxes. The remote work environment has caused many individuals to re-evaluate where they will live, in turn increasing the demand for household space in places often far away from major cities. As a result, existing home sales have reached a new 14-year high, and the sale price of a median single-family home in the third quarter of 2020 increased by approximately 12% from the year before.[102]

[102] *Existing-Home Sales Jump 4.3% to 6.85 Million in October*, National Association of Realtors, Nov. 19, 2020.

10. Meeting credits and incentives program requirements

State and local tax credits and incentives programs have not escaped the pandemic unscathed. While it lingers, questions abound regarding how to treat existing incentive agreements and the pursuit of new contracts, as well as the authority and ability of state and local agencies to adapt accordingly. To date, we have witnessed governments adding new incentives to alleviate reopening expenses as well as amending existing incentive programs and providing administrative relief.

On a limited scale, state and local governments are developing incentives to aid struggling businesses. For example, Arkansas allocated $55 million in government spending to its Ready for Business grant program. Eligible businesses will receive grant funding for personal protective equipment, no-contact thermometers, no-contact point-of-sale payment equipment, and other items necessary for a safe reopening.[103] Further, New York and Wisconsin have established similar programs. New York is using the New York Forward Loan Fund to provide small business and nonprofit companies with funding as they reopen and make purchases to comply with new health and safety guidelines.[104] Wisconsin implemented the We're All In grant program, a $50 million initiative providing direct assistance to small businesses with 50 or fewer full-time employees that have been affected by the pandemic. The grant money may be used to cover operating costs incurred by businesses, including wages, rent, and inventory.[105]

Rather than introducing new programs, most states have focused on administrative corrections, statutory filing extensions, and extended project commitments covered under previously negotiated agreements. For example, Nebraska issued guidance to help companies unable to meet requirements of the Nebraska Advantage Act because of the pandemic.[106] Nebraska businesses that do not meet the job creation requirements will not be penalized under the act if they can show that their failure was a direct result of the pandemic. Similarly, North Carolina attempted to minimize defaults in its Job Development Investment grant program by extending the reporting deadline. Grantees may request to shift the first grant year forward by one year, and to include home-office locations for the 2020 and 2021 grant years. Grantees have until Jan. 31, 2021, to take the compliance relief.[107] Further, Oklahoma has granted forgiveness to companies unable to meet the payroll requirements of the Oklahoma Quality Jobs Program Act. Under the recent Oklahoma legislation, businesses will still receive benefits under the act, even if an employee is working from home in another state.[108]

[103] Arkansas Economic Development Commission, "Arkansas Ready for Business': Arkansas Department of Commerce Announces Grant Program," May 4, 2020.
[104] New York Empire State Development, "New York Forward Loan Fund."
[105] Wisconsin Department of Revenue, "We're All in Small Business Grant — Phase 2" (updated Oct. 20, 2020).
[106] Nebraska Department of Revenue, General Information Letter 29-20-1 (Apr. 22, 2020).
[107] North Carolina Department of Commerce, "JDIG Compliance Relief" (updated Aug. 19, 2020).
[108] S.B. 1075, Laws 2020. See GT SALT Alert: "Oklahoma OK's leniency to jobs program participants."

State and local governments have also begun to allow businesses to renegotiate their incentive agreement requirements to provide additional time to reach the required employment thresholds. For some businesses, this means amending the definition of eligible employees to include those working from home. For others, it is an informal extension of the deadline to meet employment thresholds. Ultimately, the government will take into consideration the benefit the business is bringing and the realistic expectations for growth in the current economic climate. Several jurisdictions are indicating a willingness to assist companies through this process, and many economic development agencies are inundated with requests at this time because of the economic conditions and the amount of employee furloughs that were put in place during the second quarter of 2020.

Notably, several state and local incentive programs require employees to work on-site for a period of time to be eligible for benefits. The current work-from-home environment created by the pandemic could significantly impact those participating in such programs. For example, the Texas Enterprise Zone Program (EZP) generally provides companies a sales tax rebate of $2,500 per eligible employee.[109] The EZP requires all qualifying jobs to be filled by employees working on-site at the qualified business location for at least 50% of the time.[110] In 2020, most participants are not expected to be able to meet these commitments. Program applicants and participants are reconsidering retaining or are postponing hiring new employees (which would have previously met program requirements for benefits) until employees can return to working on-site safely at the qualified facility. Most of these issues could be alleviated if the EZP allowed as eligible jobs those that would be on-site if not for restrictions. For now, many businesses are forced to reconsider the value of the EZP, though Texas might provide further direction on this point in the upcoming legislative session. Meanwhile, dozens of companies are delaying filing for benefits, thus losing significant dollars that would be helpful to sustain operations during the pandemic.

Similarly, programs like Illinois's economic development for a growing economy tax credit[111] and Pennsylvania's Keystone Opportunity Zone[112] program may be affected by alternative work policies. An employee directed to work remotely after restrictions are lifted may not receive the same treatment and would need to rely on the business's base of operations, or from where the work is directed or controlled. Like many other situations, a relatively simple analysis becomes more nuanced as mandated restrictions are gradually replaced with business-specific changes stemming from an evolving work environment.

While most state and local governments continue to work in triage mode, it is helpful to step back to better understand what comes next. As a direct result of the pandemic, many businesses were forced to evaluate the most effective way to manage their workforce. When they are able to emerge from the pandemic and enter a "new normal," companies will evaluate real estate needs, work-from-home arrangements, and take a long, hard look at where their employees either may be, or must be located to perform their jobs. All these considerations should be evaluated not only by businesses applying for state incentives, but also government policymakers. The next struggle for policymakers is how to balance the two competing ideas of business and job creation with an understanding of rapidly evolving workforce needs and requirements.

[109] The incentive amounts are larger for some "double jumbo" or "triple jumbo" projects. Tex. Gov't. Code Ann. §§ 2303.001 et seq. See also Texas Economic Development, "Texas Enterprise Zone Program."
[110] Tex. Gov't. Code Ann. § 2303.003(7).
[111] 35 Ill. Comp. Stat. 10/5-20. See also GT SALT Alert: "Illinois EDGE tax credit program revised and extended to June 30, 2022."
[112] 73 Pa. Stat. §§ 820.101 et seq. See also Pennsylvania Department of Revenue, "Keystone Opportunity Zone."

Contacts

Jamie C. Yesnowitz
Principal, SALT
Washington, DC
T +1 202 521 1504
E jamie.yesnowitz@us.gt.com

Chuck Jones
Director, SALT
Chicago
T +1 312 602 8517
E chuck.jones@us.gt.com

Lori Stolly
Director, SALT
Cincinnati
T +1 513 345 4540
E lori.stolly@us.gt.com

Patrick Skeehan
Manager, SALT
Philadelphia
T +1 215 814 1743
E patrick.skeehan@us.gt.com

We want to hear from you

Please take this quick survey and
tell us what you thought of this content.

Grant Thornton

GT.COM