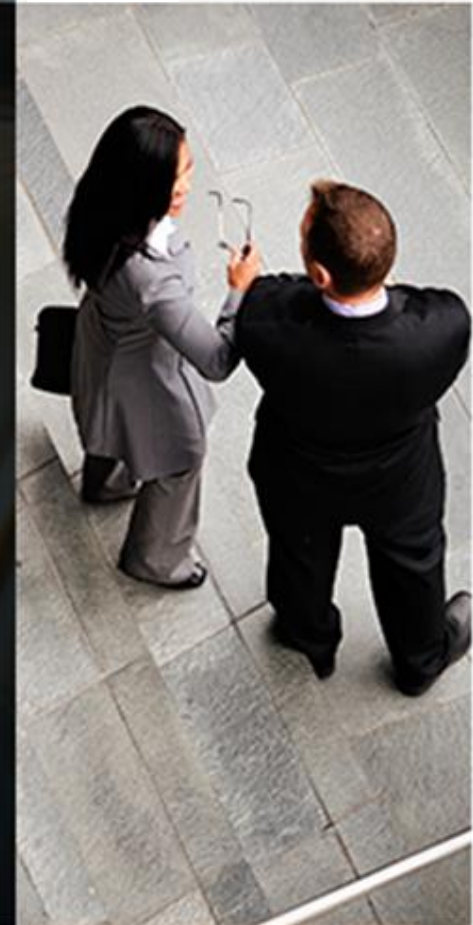


# New York Tax Update 2019-2020

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# 2019-2020 BUDGET BILL HIGHLIGHTS (SIGNED INTO LAW APRIL 12 AND JUNE 24, 2019)

## Personal Income Tax

- Millionaire's tax extended to 2024. Currently 8.82% for MFJ with NYS AGI in excess of \$2,155,350
- Itemized deduction limitation for charitable contributions extended to 2024 (25% limitation for NYS AGI of more than \$10,000,000).
- E-file mandate extended to 2024
- NYS gambling winnings are NY source income
- Trusts decoupled for itemized deduction limitations and 199A rules
- 529 plans limited to qualified higher education expenses, not K-12 tuition

# 2019-2020 BUDGET BILL HIGHLIGHTS (CONT.)

## Sales Tax

- Vendors can advertise that they will pay the sales tax
- NY uses \$500,000 and 100 transactions for nexus
- Marketplace providers are vendors
- Elimination of tax exemption for transportation, transmission, and distribution of gas and electricity
- Commissioner may require habitually delinquent taxpayers to deposit sales taxes in segregated accounts

# 2019-2020 BUDGET BILL HIGHLIGHTS (CONT.)

## Other Stuff

- 2% property tax cap made permanent
- Additional NYC real property transfer tax for residential properties valued at over \$3M and non-residential properties valued over \$2M. Extra \$2.50/\$1,000 of sales price
- 20% supplemental tax on vapor products
- Exceptions for driver's license suspension for people on public assistance who can demonstrate hardship
- Credit for employer-provided child care - effective January 1, 2020
  - 25% of qualified child care expenditures
  - 10% of child care resources
  - \$150,000 per employer max

# 2019-2020 BUDGET BILL HIGHLIGHTS (CONT.)

- Gifts made within three years of death are included in the decedent's NY estate – effective January 16, 2019 through 2025
- 95% of global intangible low-taxed income (GILTI) is excluded from a corporate taxpayer's business income base (effective January 1, 2019). Does not affect NYC taxes.
- Government contributions to a corporation's capital (economic development incentives) are not income (contrary to federal)
- Bonus depreciation not considered to determine if business is a qualified manufacturer (which increases basis of qualifying assets)
- Opioid excise tax (20%) effective July 1, 2019

# CHANGES TO SCHOOL TAX RELIEF (STAR) PROGRAM

<u>Income</u>	<u>Star</u>
over \$500,000	0
\$250,000 to \$500,000	Tax credit instead of reduction of property tax
under \$250,000	Option for exemption (which will remain static) or credit (which can increase 2%/year)

Information and registration at  
[www.tax.ny.gov/pit/property/star/default.htm](http://www.tax.ny.gov/pit/property/star/default.htm)

# 2019-2020 BUDGET BILL HIGHLIGHTS (CONT.)

## What Didn't Pass

- NYC pied-a-terre tax (4% on properties worth over \$5M)
- [www.taxthehell.com](http://www.taxthehell.com)
- Close the carried interest “loophole”
- Cannabis regulation and taxation
- NY IRC 1031 “loophole”
- Federal S conformity
- 90-day/50-mile abode rule



# MAJOR CHANGES FROM LAST YEAR

- Pre-TCJA itemized deductions (IT-196)
- Can itemize even if standard deduction for federal
- Alimony and moving expenses decoupled
- Childcare credit based on 2017 IRC
- No 199A deduction
- New York State Workarounds



# FEDERAL TAX REFORM WORK-AROUNDS

- New Employment Compensation Expense Program (ECEP), TSB-M-18(1)ECEP
  - Employers who opt in are subject to 5% tax on all payroll over \$40,000. December 1 deadline for subsequent year.
  - Three-year phase-in: 1.5% in 2019; 3% in 2020; 5% in 2021

## Current

\$100 - Employer Pays  
- 5% - NYS Withholding Tax  
\$ 95 - Employee take-home

## New Law

\$95 - Employer Pays  
-5% - Tax on Employer/credit to employee  
\$95 - Employee take-home

Savings – about \$18K/million of compensation  
2019 savings of \$5,400/\$1M

## Problems:

- Employer out of pocket unless salary reduced
- Contracts? Unions?
- 401-K match, social security, and similar
- Nonresidents
- Multi-state employees
- Is it income?

Maybe for high-income executives?

# FEDERAL TAX REFORM WORK-AROUNDS (CON'T)

## Proposed NYS Unincorporated Business Tax (UBT)

- The proposed UBT would apply to entities treated as partnerships for federal purposes, including partnerships and multi-member LLCs, but not single-member LLCs. A 5% tax would be imposed on those partnerships “doing business” in NYS. Partners would receive an offsetting credit (possibly 93%) for the tax paid against their NY tax liability.
  - The Department is seeking comments on what should be treated as unincorporated taxable income. As currently proposed, the tax base would be federal ordinary business income with an addback for NYC UBT and an addback for guaranteed payments to partners.
  - The proposal includes equally weighted three-factor apportionment, comprising property, payroll, and gross income percentages.
  - What about nonresident partners? Do they lose the credit for taxes paid to NY?
  - CT enacted a 6.99% pass-through entity tax allowing members a 93.01% credit (reduced to 87.5%, effective January 1, 2019).

# HOT TOPICS

## ➤ Hot Buttons for 2019-20

- Corp v. sales tax revenue
- Cash-to-credit ratio:
  - Dine-in restaurants supposedly have 18% cash sales
  - Coffee shops have 28% cash sales
- Art Gallery sales and use taxes
- NYC residents with Sch. C income (BOD members, too!)
- “No” Box
- Visiting executives
- Social Media

- ## ➤ Return preparer penalties – \$1K/return – no reasonable belief \$5K/return – reckless disregard

# HOT TOPICS (CON'T.)

## ➤ Whistleblowers

- Sprint Corporation – paid \$330M settlement in December of 2018. Largest to date.
- Failure to file can be a false claim. *Campagna v. Post Integrations* (1<sup>st</sup> Dept 2019)

## ➤ Data Sharing – with IRS, CA, CT, GA, MA, MN, OR, PA, and NYC

## ➤ Voluntary Disclosure

## ➤ Offers in compromise – almost 80% acceptance rate

# SALES AND USE TAX: A HIGH-STAKES GAMBLE

## Sales and Use Tax Characteristics:

1. Ubiquity
2. Onerous Record Keeping
3. Aggressive Audit Methodologies
4. Pyramiding of Tax Liabilities
5. Burdensome Penalties and Interest
6. Personal Liability
7. Advanced Audit Targeting
8. Confusion!

# FOUR EXAMPLES OF SALES TAX MISHEGAS

- Why are your cookies warm?
- Where are you styling hair, and whose hair is it?
- Home inspections
- Pumpkins



# HOT TOPICS - COMPLIANCE

## Technology – NY’s “CISS” Program



- This is a photo from NY’s JFK Airport
- “Smarter analytics helped New York State save over \$1.2 billion in lost taxes”

# SALES TAX: ENFORCEMENT / AUDIT ISSUES

## ➤ How does a business get chosen for audit?

### 1. Audits of other taxpayers

### 2. NY's CISS program

- Corporate tax return sales v. sales tax return sales
- Consistent taxable percentage
- Cash-to-credit card ratio out of sync with similar businesses
  - Dine-in restaurants supposedly have a 35%/33%/18% credit card/debit card/cash ratio. Coffee shops have 28% cash
- Drastic changes in filing pattern
- New “self-audit” letters based on “typical” use tax liabilities.
- Information from more sources (franchisers, insurance companies, liquor distributors, and financial institutions)
- Compare returns of similar businesses operating within the same geographic areas
- lottery traffic vs. low sales





# NEW SALES TAX LEGISLATION

1. Sales tax on energy delivery services
2. Passenger car rental special tax increases
3. Vending machine exemption amendments for candy, fruit drinks and soft drinks
4. Amended exemption for cemetery monuments
5. Advertising and sales tax collections
6. New supplemental tax on vapor products and new registration requirements
7. Extensions:
  - i. Electronic filing and electronic payments mandate
  - ii. Segregated accounts program
  - iii. Exemption for transactions related to the Dodd-Frank Wall Street Reform and Consumer Protection Act
8. Economic Nexus & Marketplace Compliance

# NEXUS DEFINED

- What is nexus?
- Nexus is the quality and quantity of contacts a business must have within a state before that state may exercise its taxing jurisdiction over the business.
- Traditional nexus was a “presence” concept. If you aren’t there, you can’t be taxed there.

# NEXUS: CHANGING STANDARDS

- For many years, Supreme Court jurisprudence recognized a physical presence standard for sales and use tax nexus purposes.
  - People
  - Offices
  - Property
  
- In *South Dakota v. Wayfair*, the Supreme Court permitted the possibility that economic presence could create sales and use tax nexus.
  - South Dakota Law:
  - \$100K in sales of goods or services to SD or;
  - 200 or more separate transactions.

# NEXUS: WHY THE CHANGE?

- In 1992, *when the last nexus case was decided*, less than 2% of Americans had Internet access – today, 89% of Americans have Internet.
- In 1992, mail-order sales in the US totaled \$180 billion.
- In 2017, **e-commerce retail sales alone were about \$453.5 billion!**
- Since the Dept of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8% to 8.9% of total retail sales in the US – percentage is expected to continue increasing.
- In 1992, it was estimated that the states were losing between \$694 million-\$3 billion annually in sales tax revenues as a result of the physical presence rule. It was more recently estimated that the physical presence standard caused the states to lose between \$8-\$33 billion every year.
- ...“the Court could not have envisioned a world where the world’s largest retailer would be a remote seller.”
- The sheer numbers and statistics show how the Internet has changed the dynamics of the national economy – those numbers will continue increasing, while states continue to lose revenue.

# NEW YORK PROVISIONS

Tax Law §§1101(b)(8)(i)(E) and 1101(b)(8)(iv)

Notice N-19-1

A Taxpayer with NO physical presence is presumed to be soliciting business:

## THRESHOLD

- \$500,000 in-state sales of tangible personal property (up from \$300,000 initially)

**AND**

- 100 transactions, for immediately preceding four quarters ending February, May, August and November
- Exception – demonstrates to satisfaction of Commissioner that it cannot reasonably be expected to have \$500,000 OR 100 transactions in the next four quarters ending February, May, August and November.

But the devil is in the details and several questions arise regarding how New York, and the other states, will apply these economic presence laws.

# STATE-BY-STATE WAYFAIR RULES (AS OF OCTOBER 1, 2019)

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Alabama	10/1/2018	\$250,000 in-state sales and seller conducts one of the listed activities
Arizona	10/1/2019	\$200,000 in-state sales for 2019, \$150,000 for 2020, and \$100,000 for 2021 and thereafter
Arkansas	7/1/2019	\$100,000 in-state sales or 200 transactions
California	4/1/2019	\$500,000 in-state sales
Colorado	6/1/2019	\$100,000 in-state sales
Connecticut	12/1/2018 7/1/2019 for \$100K	\$250,000 in-state sales and 200 transactions until 6/30/2019 \$100,000 in-state sales and 200 transactions as of 7/1/2019
District of Columbia	1/1/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	\$100,000 in-state sales or 200 transactions
Georgia	1/1/2019 1/1/2020 for \$100K	\$250,000 in-state sales or 200 transactions until 12/31/2019 \$100,000 in-state sales and 200 transactions as of 1/1/2020
Hawaii	7/1/2018	\$100,000 in-state sales or 200 transactions
Idaho	7/1/2018 for referrals 6/1/2019 for \$100k	\$10,000 in-state sales (result of referrals) \$100,000 in-state sales
Illinois	10/1/2018	\$100,000 in-state sales or 200 transactions
Indiana	10/1/2018	\$100,000 in-state sales or 200 transactions
Iowa	1/1/2019 7/1/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 6/30/2019 \$100,000 in-state sales as of 7/1/2019
Kansas	10/1/2019	No threshold
Kentucky	10/1/2018	\$100,000 in-state sales or 200 transactions
Louisiana	7/1/2019 Enforced: no later than 7/1/2020	\$100,000 in-state sales or 200 transactions

# STATE-BY-STATE WAYFAIR RULES (AS OF OCTOBER 1, 2019)

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Maine	7/1/2018	\$100,000 in-state sales or 200 transactions
Maryland	10/1/2018	\$100,000 in-state sales or 200 transactions
Massachusetts	10/1/2017	\$500,000 in-state sales and 100 transactions until 9/30/2019
	10/1/2019 for \$100K	\$100,000 in-state sales as of 10/1/2019
Michigan	10/1/2018	\$100,000 in-state sales or 200 transactions
Minnesota	10/1/2018	10 or more retail sales totaling more than \$100,000 or 100 transactions until 9/30/2019
	10/1/2019 for \$100K	\$100,000 in-state sales or 200 transactions as of 10/1/2019
Mississippi	9/1/2018	\$250,000 in-state sales
Missouri	Proposed	\$100,000 in-state sales or 200 transactions
Nebraska	1/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	10/1/2018	\$100,000 in-state sales or 200 transactions
New Jersey	11/1/2018	\$100,000 in-state sales or 200 transactions
New Mexico	7/1/2019	\$100,000 in-state sales
New York	6/21/2018	\$500,000 in-state sales and 100 transactions
North Carolina	11/1/2018	\$100,000 in-state sales or 200 transactions
North Dakota	10/1/2018	\$100,000 in-state sales or 200 transactions until 12/31/2018
	1/1/2019 for \$100K	\$100,000 in-state sales as of 1/1/2019
Ohio	1/1/2018	\$500,000 in-state sales and uses in-state software to promote sales, or \$500,000 in-state sales and enters into an agreement to provide content distribution to enhance delivery until 7/31/2019
	8/1/2019 for \$100K	\$100,000 in-state sales or 200 transactions as of 8/1/2019
Oklahoma	7/1/2018	\$10,000 in-state sales (register or report) until 10/31/2019
	11/1/2019 for \$100K	\$100,000 in-state sales (register and collect) can no longer provide notice and report as of 11/1/2019

# STATE-BY-STATE WAYFAIR RULES (AS OF OCTOBER 1, 2019)

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Pennsylvania	4/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) until 6/30/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as of 7/1/2019
Rhode Island	8/17/2017	\$100,000 in-state sales or 200 transactions and can no longer provide notice and report as of 6/27/2019
South Carolina	11/1/2018	\$100,000 in-state sales
South Dakota	11/1/2018	\$100,000 in-state sales or 200 transactions
Tennessee	7/1/2019	\$500,000 in-state sales
Texas	1/1/2019 Enforced: 10/1/2019	\$500,000 in-state sales
Utah	1/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	7/1/2018	\$100,000 in-state sales or 200 transactions
Virginia	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	10/1/2018 3/14/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 3/13/2019 \$100,000 in-state sales as of 3/14/2019
West Virginia	1/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	2/1/2019	\$100,000 in-state sales or 200 transactions



# HOW ARE SALES MEASURED?

<u>State</u>	<u>How Are Sales Measured</u>
Alabama	Retail sales of tangible personal property
Arizona	Gross proceeds of sales (cash discounts not included) or gross income (no deduction for losses) derived from the person's transactions with purchasers in this state – does not include returns that are refunded in cash or credit
Arkansas	Sales of tangible personal property, taxable services, a digital code, or specified digital products
California	Sales of tangible personal property in this state or for delivery in the state
Colorado	Gross revenue from the sale of tangible personal property or Services, including exempt sales
Connecticut	Gross receipts
District of Columbia	Gross receipts from retail sales, including the sale of, or charges for, digital good
Florida	Retail sales of tangible personal property or services
Georgia	Gross revenue from retail sales of tangible personal products delivered into the state electronically or physically
Hawaii	Gross income or gross proceeds from sale of tangible personal property in the state, services used or consumed in the State, or intangible property used in the State
Idaho	Cumulative gross receipts from sales delivered into Idaho
Illinois	Sales of tangible personal property in the state, including exempt sales but not sales for resale
Indiana	Gross revenue from any combination of: the sale of tangible personal property delivered into Indiana; a product transferred electronically into Indiana; or a service delivered in Indiana.
Iowa	Gross revenue
Kansas	Gross receipts from retail sales
Kentucky	Gross receipts derived from the sale of tangible personal property or digital property
Louisiana	Gross revenue of sales of tangible personal property, products transferred electronically, or services delivered into the state

# HOW ARE SALES MEASURED?

<u>State</u>	<u>How Are Sales Measured</u>
Maine	Gross revenue from delivery of tangible personal property, products transferred electronically or services that are taxable by the state
Maryland	Gross revenue from the sale of tangible personal property or taxable services delivered in the state
Massachusetts	Transactions completed over the Internet and made sales resulting in a delivery into Massachusetts
Michigan	Sales, both taxable and nontaxable
Minnesota	Retail sales of tangible personal property or taxable services
Mississippi	Sales into the state, including wholesales and those taxable under sales and use statutes
Missouri	Gross receipts/revenue from sales of tangible personal property into the state
Nebraska	Total retail sales of property in state
Nevada	Gross revenue from retail sale of tangible personal property
New Jersey	Gross revenue from tangible personal property, specified digital products, or taxable services
New Mexico	Taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to the state.
New York	Gross receipts of sales of tangible personal property delivered in the state
North Carolina	Gross sales sourced to NC, includes tangible personal property and digital property
North Dakota	Gross sales of tangible personal property and other taxable items delivered in the state
Ohio	(1) Gross receipts of sales or leases of taxable tangible personal property or services using in state software or (2) sale of tangible personal property for storage, use, or consumption in the state or from providing services the benefit of which is realized in the state.
Oklahoma	Aggregate sales of tangible personal property
Pennsylvania	Aggregate sales at retail of tangible personal property subject to tax excluding sales made through a marketplace facilitator who collects tax on its behalf.
Rhode Island	Gross revenue from the sale of tangible personal property, prewritten computer software or taxable services

# HOW ARE SALES MEASURED?

<u>State</u>	<u>How Are Sales Measured</u>
South Carolina	Gross revenue from all sales of tangible personal property, including exempt retail sales and wholesales, sales of product transferred electronically, and all services whether subject to tax or not
South Dakota	Gross revenue from the sale, rental or lease of tangible personal property, any product transferred electronically, or services delivered into
Tennessee	Gross Sales
Texas	Gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state, including taxable, nontaxable, and exempt sales.
Utah	Gross revenue from the sale of tangible personal property, any product transferred electronically, or services for storage, use, or consumption in the state
Vermont	Sales into the state
Virginia	Gross revenue from retail sales of taxable tangible personal property or taxable services in the state, and sales made by commonly controlled persons shall be aggregated
Washington	Gross receipts of all gross income of attributed to the state
West Virginia	Gross revenue from sale or lease of tangible personal property, custom software or a taxable service
Wisconsin	Gross sales including taxable and nontaxable sales
Wyoming	Gross sales, which includes the total revenue in Wyoming including taxable, exempt and wholesale sales

# WHAT'S THE MEASUREMENT PERIOD?

<u>State</u>	<u>The Measurement Period</u>
Alabama	Previous calendar year
Arizona	Previous or current calendar year
Arkansas	Previous or current calendar year
California	Previous or current calendar year
Colorado	Previous or current calendar year
Connecticut	The twelve-month period ended on the September thirtieth immediately preceding the monthly or quarterly period with respect to which such person's liability for tax
District of Columbia	Previous or current calendar year
Florida	Previous calendar year
Georgia	Previous or current calendar year
Hawaii	Current on immediately preceding calendar year
Idaho	Immediately preceding 12 months
Illinois	Determined on a quarterly basis, ending on the last day of March, June, September, and December, whether either threshold was met in the preceding 12-month
Indiana	Previous or current calendar year
Iowa	Immediately preceding or current calendar year
Kansas	HB 2352: (1) the calendar year 2018; (2) from January 1, 2019, through June 30, 2019; or (3) during the current or immediately preceding calendar year
Kentucky	Previous or current calendar year
Louisiana	Previous or current calendar year
Maine	Previous or current calendar year
Maryland	Previous or current calendar year
Massachusetts	After 2018, preceding calendar year
Michigan	Previous calendar year

# WHAT'S THE MEASUREMENT PERIOD?

<u>State</u>	<u>The Measurement Period</u>
Minnesota	Period of 12 consecutive months
Mississippi	Prior 12 month period
Missouri	SB 189 – Prior Calendar Year SB 50 – previous or current calendar year HB 701: Preceding calendar year
Nebraska	Previous or current calendar year
Nevada	Previous or current calendar year
New Jersey	Current or prior calendar year
New Mexico	Previous calendar year
New York	Immediately preceding four sales tax quarters. The sales tax quarters are: March 1 through May 31, June 1 through August 31, September 1 through November 30, and December 1 through February 28/29
North Carolina	Previous or current calendar year
North Dakota	Previous or current calendar year
Ohio	Previous or current calendar year
Oklahoma	Preceding calendar year
Pennsylvania	Preceding calendar year
Rhode Island	Preceding calendar year
South Carolina	Prior or current calendar year
South Dakota	Prior or current calendar year
Tennessee	Prior 12 month period
Texas	Preceding 12 calendar months - Initial period will be 7/1/2018 - 6/30/2019
Utah	Prior or current calendar year

# WHAT'S THE MEASUREMENT PERIOD?

<u>State</u>	<u>The Measurement Period</u>
Vermont	Any 12-month period preceding the monthly period with respect to which that person's liability for tax under this chapter is determined
Virginia	Prior or current calendar year
Washington	Prior or current calendar year
West Virginia	Prior or current calendar year
Wisconsin	Previous or current calendar year
Wyoming	Prior or current calendar year

# NEW YORK'S MARKETPLACE LEGISLATION

- A marketplace provider is: “a person who, pursuant to an agreement, facilitates sales of tangible personal property by a marketplace seller or sellers.”
  
- A person “facilitates a sale of tangible personal property” when:
  - the person provides the forum in which, or by means of which, the sale takes place or the offer of sale is accepted, including an internet web site, catalog, shop, store, booth or similar forum; and
  
  - the person, or an affiliate, collects the receipts paid by a customer to a marketplace seller for a sale of tangible personal property, or contracts with a third party to collect the receipts.

# NEW YORK'S MARKETPLACE LEGISLATION

- New York's new economic nexus rules apply to marketplace providers. The law states:
- A person with no physical presence in New York State who facilitates sales for marketplace sellers as described above is a marketplace provider and is required to register for sales tax purposes and collect and remit sales tax if, in the previous four sales tax quarters:
  - the cumulative total of the person's gross receipts from sales made or facilitated of tangible personal property delivered into the state exceeded \$500,000, and
  - such person made or facilitated more than 100 sales of tangible personal property delivered in the state.



# STATE-BY-STATE MARKETPLACE FACILITATOR (AS OF OCTOBER 1, 2019)

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Alabama	Yes	1/1/2019	\$250,000 in-state sales (register or report)
Arizona	Yes	10/1/2019	\$100,000 in-state sales
Arkansas	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
California	Yes	10/1/2019	\$500,000 in state sales
Colorado	Yes	10/1/2019	\$100,000 in-state sales
Connecticut	Yes	12/1/2018	\$250,000 in-state sales
District of Columbia	Yes	3/22/2019	\$100,000 in-state sales or 200 transactions
Florida	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Georgia	Proposed	TBD	\$100,000 in-state sales
Hawaii	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Idaho	Yes	6/1/2019	\$100,000 in-state sales
Illinois	Yes	1/1/2020	\$100,000 in-state sales or 200 transactions
Indiana	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Iowa	Yes	1/1/2019 7/1/2019 for \$100K	\$100,000 in-state sales or 200 transaction until 6/30/2019 \$100,000 in-state sales as of 7/1/2019
Kansas	Unclear	8/1/2019	"A person who is a marketplace facilitator should contact the Department concerning entering into a voluntary compliance agreement with the Department."
Kentucky	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Louisiana	No		
Maine	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions

# STATE-BY-STATE MARKETPLACE FACILITATOR (AS OF OCTOBER 1, 2019)

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Maryland	Yes	10/1/2019	No threshold
Massachusetts	Yes	10/1/2017	\$500,000 in-state sales and 100 transactions until 9/30/2019
		10/1/2019 for \$100K	\$100,000 in-state sales as of 10/1/2019
Michigan	Proposed	TBD	\$100,000 in-state sales or 200 transactions
Minnesota	Yes	10/1/2018	No threshold until 9/30/2019
		10/1/2019 for \$100k	\$100,000 in-state sales or 200 transactions as of 10/1/2019
Mississippi	No		
Missouri	Proposed	TBD	100,000 in-state sales or 200 transactions
Nebraska	Yes	4/1/2019	\$100,000 in-state sales or 200 transactions
Nevada	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
New Jersey	Yes	11/1/2018	No threshold
New Mexico	Yes	7/1/2019	\$100,00 in-state sales
New York	Yes	3/31/2019	\$500,000 in-state sales and 100 transactions
		Enforced after 6/1/2019	
North Carolina	Proposed	TBD	\$100,000 in-state sales or 200 transactions
North Dakota	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions

# STATE-BY-STATE MARKETPLACE FACILITATOR (AS OF OCTOBER 1, 2019)

<u>State</u>	<u>Marketplace Nexus</u>	<u>Effective Date</u>	<u>Applicable Threshold</u>
Ohio	Yes	8/1/2019	\$100,000 in-state sales or 200 transactions
Oklahoma	Yes	7/1/2018	\$10,000 in-state sales (register or report)
Pennsylvania	Yes	4/1/2018 for \$10k 7/1/2019 for \$100k	\$10,000 in-state sales (register or report) until 6/30/2019 \$100,000 in-state sales (register and collect) can no longer provide notice and report as 7/1/2019
Rhode Island	Yes	8/17/2017	\$100,000 in-state sales or 200 transactions and can no longer provide notice and report as of 6/27/2019
South Carolina	Yes	11/1/2018	\$100,000 in-state sales
South Dakota	Yes	3/1/2019	\$100,000 in-state sales or 200 transactions
Tennessee	No		
Texas	Yes	10/1/2019	No threshold
Utah	Yes	10/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	Yes	6/4/2019	\$100,000 in-state sales or 200 transactions
Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Washington	Yes	10/1/2018 3/14/2019 for \$100K	\$100,000 in-state sales or 200 transactions until 3/13/2019 \$100,000 in-state sales as of 3/14/2019
West Virginia	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	Yes	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	Yes	7/1/2019	\$100,000 in-state sales or 200 transactions

# NEXUS: THE WAYFAIR CHECKLIST

- The Court provided a checklist of factors present in South Dakota’s law that strongly suggested why it would be constitutional under the new standard:
  - Safe harbor: Exclude “those who transact only limited business” in the state. (South Dakota’s is \$100,000 in sales or 200 transactions.)
  - No retroactive collection.
  - Single state-level administration of all sales taxes in the state.
  - Uniform definitions of products and services (South Dakota is a full member of Streamlined Sales and Use Tax Agreement (SSUTA)).
  - Simplified tax rate structure. (South Dakota requires the same tax base between state and local sales tax, has only three sales tax rates, and limited exemptions from the tax.)
  - Software: access to sales tax administration software provided by the state.
  - Immunity: sellers who use the software are not liable for errors derived from relying on it.
- Would other state laws satisfy these requirements? Some almost certainly would not!

# OUTSIDE COMPLIANCE HELP

## Avalara Stock Price on the Day of the Wayfair Case



# IS PHYSICAL PRESENCE DEAD?

- NO!!!! “The reports of my death are greatly exaggerated...”
- Economic presence only enters the analysis when the vendor has no physical presence in a state.
- For example, if a business has a salesperson who regularly enters state X, that business will have nexus in state X even if its sales are below state X’s thresholds (e.g., sales into the state amount to only \$30K)

# PERSONAL INCOME TAX TAKE-AWAYS

- Move out of NYC before the closing
- Avoid permanent place of abode (PPA) rules with a brokerage agreement
- Effective 2019, statutory residence trumps domicile
- Keep an eye on *Wynne*-based cases – petition for cert. to U.S. Supreme Court denied October 8, 2019 in *Edelman*.
- Opportunity Zone possibilities?

# RESIDENCY

- Why do we care?
  - Income tax
  - 17 states still impose an estate or inheritance tax
- Domicile or by statute?
- “Leave and land”
- When did you “move” or “change” your domicile?
- Explain the “change”
- Who proves what?
- Foreign domicile problems ( and safe-harbor)



# RESIDENCY AUDITS

*HOW THEY FIND YOU!*

Year of residency change — almost automatic

Substantial difference between federal and state income

Answer to “living quarters” question

Number of days in NY on return

Past audit history

Cross-check with real property records

Any STAR or NYC parking exemptions

NY addresses reported on a Form 1099 or K-1

All press is not good press

Unhappy ex-spouse

Audits of related parties, partners, etc.

Whistleblower



# FOR NEW YORK, ITS HUGE TAX DOLLARS...

**Taxing non-New Yorkers is big money for New York**



**\$1 Billion**

collected from non-residency audits over the last five years

Source: Secured by Monaeo, Inc. via a FOIA request from the NYS Department of Taxation and Finance

# ...DOLLARS THEY DON'T LET GO WITHOUT A 'FIGHT'



Source: Secured by Monaeo, Inc. via a FOIA request from the NYS Department of Taxation and Finance

# RESIDENCY – FACTS and FIGURES

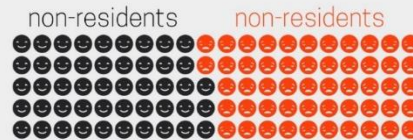
## 1-IN-2 TAXPAYERS AUDITED, LOSES



**15,122**

New York non-residency audits in the last five years

**Most non-New Yorkers can't prove they're non-residents of New York**



**52%**

lose their non-residency audit to New York state

Source: Secured by Monaeo, Inc. via a FOIA request from the NYS Department of Taxation and Finance

# RESIDENCY (CONT.)

## ➤ Statutory Residence

- 183 days and a permanent place of abode (PPA)
- What is a “day”?
- Proof
- Exceptions
  - Travel
  - In-patient



# PERMANENT PLACE of ABODE (PPA)

**Start Here**

Does the dwelling exhibit the physical characteristics ordinarily found in a dwelling suitable for year-round habitation?

**NO**

It's not a PPA

**YES**

Does the taxpayer have a legal right to occupy it as a residence?

**YES**

Does the taxpayer exercise that right by enjoying a residential interest in the place?

A taxpayer "enjoys a residential interest" in the place by actually residing there, per the Tribunal's holding

**YES**

It is a PPA

**NO**

Can be maintained on a temporary basis (*Mays*)

Exclusive Use

Unfettered Access

Sharing common living expenses in rent-free abode (*Evans*)

Examine the taxpayer's relationship with the dwelling

# STATUTORY RESIDENCY – DAY COUNT RECORDS

<b>Credit Card Statements</b>	<b>ATM Usage</b>	<b>Personal Diary</b>	<b>Outlook Calendar</b>
Flight Records (frequent flyer reports)	EZ Pass	Limo Logs	Landline Phone
Cell Phone Logs!!	Special Software (MONAEO)	Travel Itineraries	Swipe-Card Records

# DOMICILE – PRIMARY FACTORS

## ➤ Home

- Bigger, better, more valuable
- Watch out for “STAR” and IRC § 121 issues

## ➤ Business

- Limited to active involvement
- Location of business headquarters, your office, assistant, etc.



# DOMICILE – PRIMARY FACTORS (CONT.)

## ➤ Time

- Not 183-day rule!
- Domicile day count

## ➤ Near and Dear

- Where is your teddy bear,
- Safe deposit box,
- And insured and other “valuables”?
- Moving vans v. storage



# DOMICILE

## ➤ Family Factor

- Most spouses share their domicile
- Minor children can be critical

## ➤ Other Factors

- Checklist items – nice but not determinative
- Parking tax exemption

## ➤ 548- and 30-day safe-harbor rules

# DOMICILE: NEW CASES

- *Patrick* – love conquers all
- *Blatt* – loving your dog works, too
- *Campaniello* – failure to check the box is negligence
- *Ruderman* – Affidavits have little value
- *Biggar* – Burden of proof is on the party asserting the change of domicile

# OTHER INCOME TAX ISSUES

- Wages (including “convenience” rule)
- Deferred comp.
- Business and flow-through income
- Post-retirement remuneration
- Sales of property (*see, e.g. Ittleson*). Is location temporary?
- Accrual rule (a cruel rule)
- Withholding audits (over \$60M collected in 2016). Audits up over 150%, only 21% resulted in no-change.
- Resident credit audits
- Impact of NY’s limited itemized deductions (*Lifton, ALJ June 13, 2019*)



# TOP TEN RESIDENCY ERRORS

1. Nobody moves on January 1
2. Statutory residence trumps domicile
3. The “Living Quarters” box
4. Consistency!
5. Husbands and wives usually share a domicile
6. Don’t start an audit with an offer to settle
7. Don’t let client “chat” with auditors
8. Credits for taxes paid elsewhere
9. Never amend a return under audit
10. Many states have an accrual rule (a cruel rule!)

# CORPORATE TAX REFORM

- Economic Nexus – most states
- Market-based sourcing
- Exempt investment income limited to stocks held over one year
- 8% limitation on investment income exemption
- Special NYC rules

# FACTOR PRESENCE NEXUS

State	Factor Presence
AL (beginning 2015)	MTC Factors
CA	MTC Factors (adjusted for inflation)
CO	MTC Factors
CT	\$500K in receipts
MI	\$350,000 or more of receipts from Michigan sources
NY (beginning 2015)	\$1 million in receipts
OH (CAT)	MTC Factors
TN (beginning 2016)	MTC Factors
WA (B&O)	\$50K property, \$50K payroll, \$250K receipts, or 25% of total.

Note: 26 states have adopted market-based sourcing (July 2019)

# STATES WITH ECONOMIC NEXUS – BUSINESS TAXES

State	Economic Presence
OR	\$750,000 annual gross sales threshold for new gross receipts tax
HI	\$100,000 or more in annual gross receipts, or at least 200 annual transactions
MA	Presumption that the state corporate excise tax applies if in-state sales exceed \$500,000 annually
PA	\$500,000 threshold as a rebuttable presumption
WA (B&O)	\$100,000 in gross receipts
TX	\$500,00 in annual gross receipts

Note: As of November 15, 2019



# PUBLIC LAW (P.L.) 86-272

- Prohibits the imposition of a net income tax by state if the only activities performed in the state relate to solicitation of sales of tangible personal property
- Does not affect an employer's responsibility to withhold income tax, pay unemployment tax and disability insurance, and cover workers' compensation, *See e.g.* VA Public Document 94-192
- Only applies to net income taxes
- No impact on gross receipts taxes (e.g. Ohio commercial activity tax and Washington B&O tax)
- Limited to sales of tangible personal property
- Limited to "mere solicitation" *Wisconsin Dept. of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214 (1992)

# ESTATE TAX CHANGES

- Rates
- Exclusion phase-out – “cliff”
- Gift “tax”
- GST gone
- No portability
- New calculation for nonresidents
- Trust changes

# ABANDONED PROPERTY: GENERAL RULES

## ➤ General Information

1. All 50 states, the District of Columbia and 3 Canadian provinces (Alberta, British Columbia, and Quebec) have enacted unclaimed property laws. Ontario proposed unclaimed property legislation in its 2012 budget.
2. Unclaimed property laws are intended to safeguard the property of a state's citizens, while utilizing the escheated property for the benefit of all citizens.
3. States have increasingly turned to their unclaimed property laws to increase revenue without raising or extending taxes, which is politically unpopular.
4. States' Unclaimed property laws apply to all entity types, including:
  - Corporations;
  - S Corporations;
  - Partnerships; and
  - Limited Liability Companies
  - Not for Profits



# ABANDONED PROPERTY: GENERAL RULES

## ➤ General Information

1. As you might expect, NYS is known as one of the more aggressive states for abandoned property purposes.
2. In fact, the Council on State Taxation (“COST”) recently gave NY its lowest grade when comparing the aggressiveness of the abandoned property laws across the 50 states. Only NY, DE and MS received a grade of “D-”.
3. Here is a sampling of some of the states in the Northeast:
  - CT : B-
  - MA: A
  - MD: B+
  - NH: D
  - NJ: D
  - PA: D
  - VT: C-

# GENERAL RULES: DEFINITIONS

## ***“UNCLAIMED PROPERTY”***

- Unclaimed property generally includes property for which there has been no contact between the owner and holder for a statutorily prescribed period of time (“dormancy period”).
- Common categories include:
  - Wages, payroll, salaries, commissions, pension payments
  - Uncashed payable/vendor checks
  - Gift certificates/gift cards/stored value cards
  - Customer credits, deposits, refunds or rebates
  - Overpayments/unidentified balances
  - Cash and stock dividends
  - Merger redemption proceeds
  - Underlying and unexchanged shares
  - Bond principal and interest
  - Mutual fund and dividend reinvestment plan book shares, physical shares, and associated distributions

# ADMINISTRATIVE UPDATE

## ➤ BCMS

- 7,000 cases
- 75% agreement
- 67% resolved within six months

## ➤ ALJ

- 16-month backlog

## ➤ TAT

## ➤ Article 78

# THANK YOU



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