



Montana Taxpayers Association 103d Annual Meeting

Trends in State Corporate Taxation

December 4, 2024

By:

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Agenda

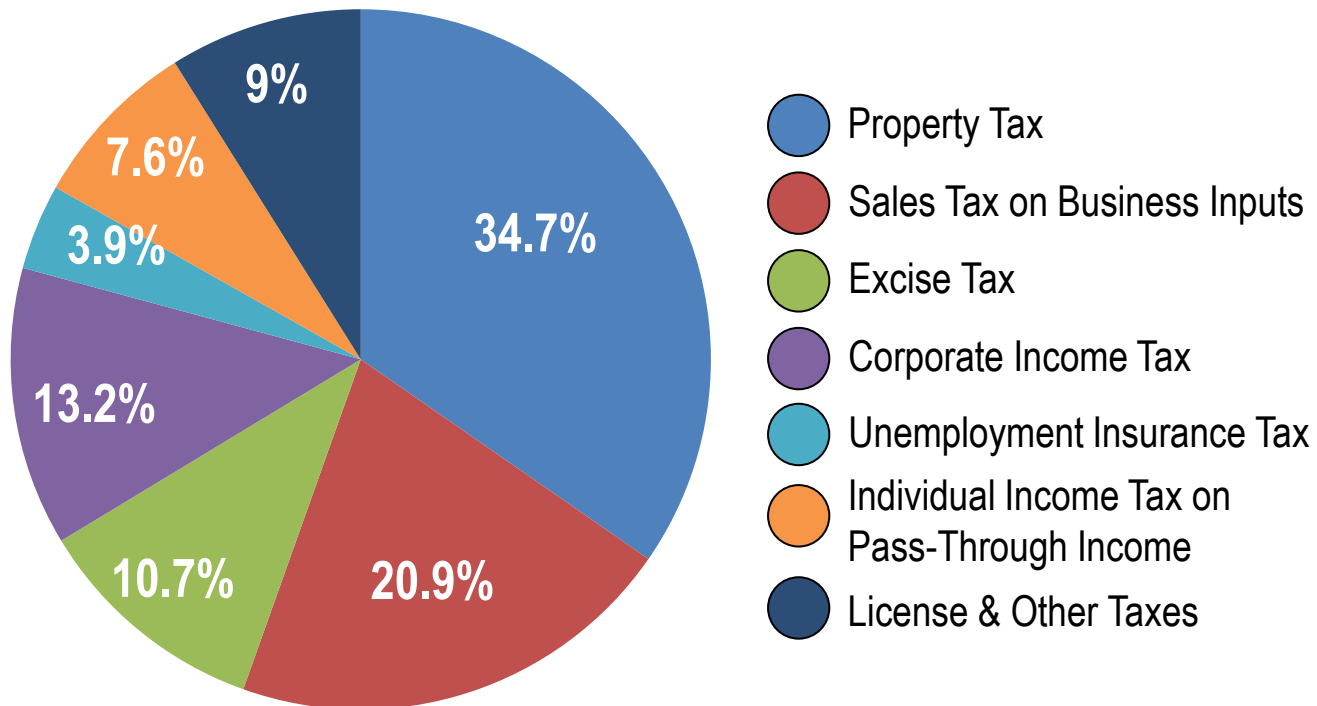
- COST's State Tax Policy Advocacy
- Supreme Court Update
- State Tax Updates & Policy Considerations
 - Apportionment
 - Mandatory Worldwide Combined Reporting
 - Taxation of Foreign Source Income
 - Related Party Attacks: Forced Combination, Transfer Pricing, Addbacks
 - Sourcing
 - Digital Advertising Taxes
 - P.L. 86-272

COST's State Tax Policy Advocacy:

Do businesses pay a “Fair Share” of state and local taxes?

FY 2022 State and Local Business Tax Burden Study

Composition of State and Local Business Taxes by Type, FY22
United States



Source: Total State and Local Business Taxes: State-by-State Estimates for FY22, prepared by Ernst & Young for COST and STRI, December 2023

How Much Do Businesses Pay?

- Businesses paid more than \$1.07 trillion in U.S. state and local taxes in FY22, an increase of 13.7% from FY21
- State business taxes increased by 18% and local business taxes grew by 9%
- Corporate income tax revenue increased by 26.7% in FY22
- In FY22, business tax revenue accounted for 44.6% of all state and local tax revenue
- Remarkably, the business share of SALT nationally has been within approximately 1% of 44% since FY03



What Is a ‘Fair Share’ for Business of State and Local Taxes?

The central thesis of leading advocates of progressive state tax policy (and WWCR) - Dan Bucks/Peter Enrich/Michael Mazerov/Darien Shanske (BEMS) from 23 Tax Notes roundtables:

- 1) Business does not pay its “fair share” of state and local taxes, with a particular emphasis on the corporate income tax as a microcosm of the whole
- 2) The “underpayment” of state and local taxes is the result of flaws in the design of tax statutes that favor businesses
- 3) These structural deficiencies reflect inordinate business political influence over state legislative and administrative processes

The Rebuttal:

- 1) Does the structural design (and political influence) explanation for the business “underpayment” of corporate income tax apply equally to the other largest state and local taxes imposed on business (sales/excise taxes on business inputs and property taxes)?
- 2) If not, is there a quantifiable business “overpayment” of other state and local taxes compared with what business would pay with a more optimal or neutral tax design?



Business Pays More Than Its ‘Fair Share’ of State and Local Taxes as Measured by Deviations from Optimal or Neutral Tax Design

- There is widespread agreement among sales tax experts that a well-designed sales tax does not include business inputs in the tax base in order to avoid sales tax pyramiding.
 - The current design of the SUT disfavors business as business inputs on average make up 42% of the sales tax base.
- The property tax in most jurisdictions significantly favors homeowners and disfavors business.
 - The current design of the property tax disfavors business as commercial and industrial properties have on average effective tax rates over 80% higher than homeowner properties.
- Based on deviations from optimal or neutral tax designs, estimated **business “overpayments” of sales and excise taxes on business inputs and property taxes on business property are 15 to 21 times greater** than even the highest (unadjusted) BEMS/ITEP estimated business “underpayments” of state corporate income tax.
- **See: Karl A. Frieden, “Wearing Blinders in the Debate Over Business’s ‘Fair Share’ of State Taxes”, *Tax Notes State*, April 8, 2024**



COST Perspective on Fair and Effective Administrative Practices

- **COST presently has 4 Scorecards addressing the states' administrative practices**
 - Administrative Scorecard
 - Sales Tax Systems Scorecard
 - International Property Tax Scorecard (issued with IPTI)
 - Unclaimed Property Scorecard
- Focus is primarily on using objective criteria of important administration with bias towards issues of concern with business taxpayers
 - Scorecards do not grade subjective personalities of state tax administrators
- **Letter grading is for comparison purposes with goal to encourage tax policy makers (e.g., legislators) to improve administrative practices**
 - It is acknowledged and understood that tax administration varies significantly state-by-state



COST Administrative Scorecard

- **Objective evaluation of state statutes and rules that govern the degree of a taxpayer's access to an independent appeals system.**
 - ***Elements of an effective and independent tax appeals system - Evaluated***
 - The forum must be truly independent;
 - Taxpayers must not be forced to pay the tax or post a bond prior to an independent hearing and resolution of the matter;
 - The record for further appeals must be established at the independent tribunal; and
 - The arbiter at the hearing must be well versed in state tax laws and concepts.
 - ***Procedural developments - Evaluated***
 - Even-handed statute of limitations;
 - Equal interest rates for refunds and deficiencies;
 - Due dates for corporate income tax returns are at least one month beyond the federal due date with an automatic extension based on the federal extension;
 - Adequate time to file a protest before the independent forum;
 - Reasonable and clearly defined procedure for filing amended state income/franchise tax returns following a federal audit;
 - Transparency in the form of published letter rulings (redacted) and administrative tribunal decisions.
- **Tool for policymakers seeking to improve tax administration and the business climate**



The Best and Worst of State Tax Administration

COST Scorecard on State Tax Appeals & Procedural Requirements

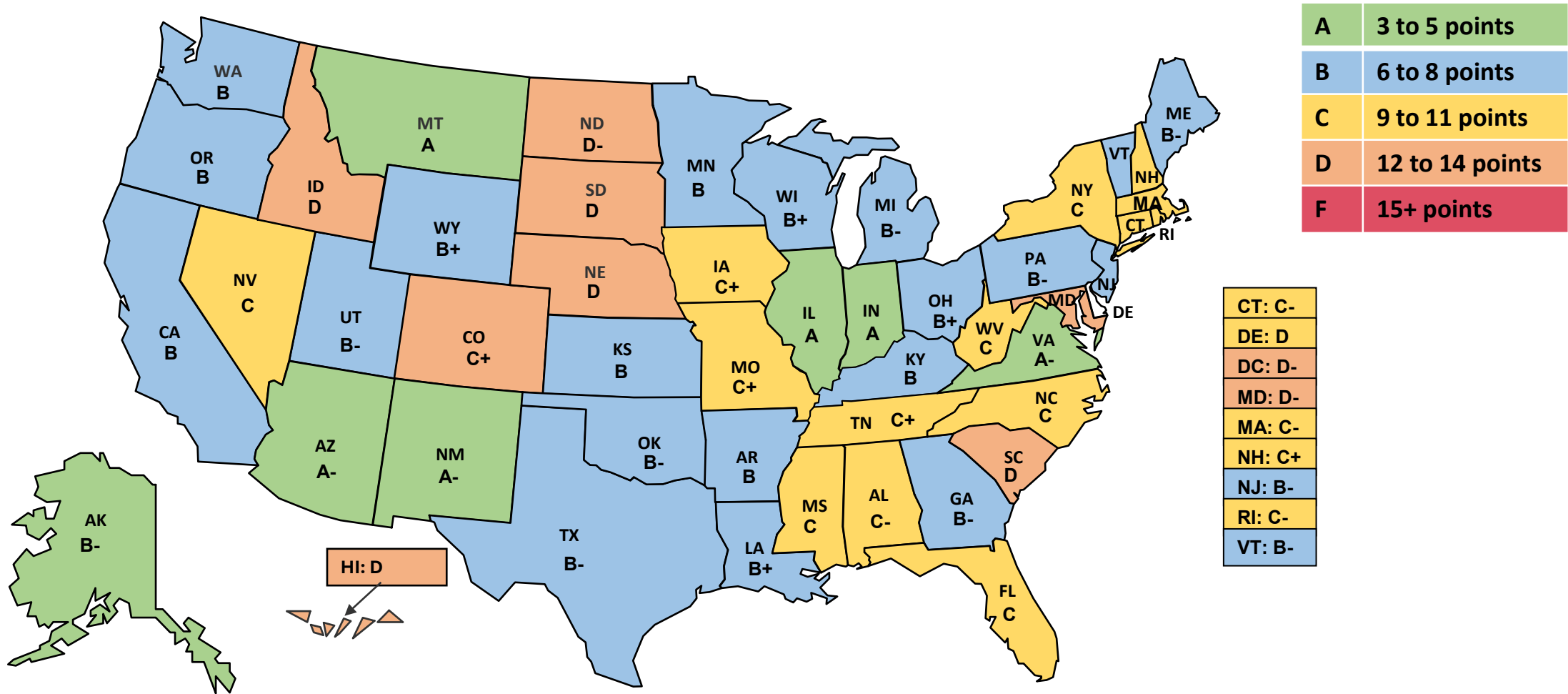
Douglas L. Lindholm
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December 2023

Executive Summary

The Council On State Taxation (COST) has long monitored and commented on state tax appeals processes and administrative practices. Part of that effort has resulted in the regular publication of a scorecard ranking the states. Our focus is on the states' adoption of procedural practices that impact the fairness of states' laws and regulations for the administration and appeal of state tax matters. Why are these issues so important? Although compliance with state tax statutes and regulations is subject to audit scrutiny, the percentage of taxpayers actually audited is small. As

State Tax Administration Scorecard: State Grades



Source: COST's Scorecard on State Tax Administration, December 2023



Recent COST Articles/STRI Studies

- **A State DAT Relabeled a ‘Digital Barter’ Tax is Still Bad Tax Policy** (August 2024)
- **Is E-Invoicing Relevant in the US State Sales Tax Context?** (May 2024)
- **Wearing Blinders in the Debate Over Business’s “Fair Share” of State Taxes** (April 2024)
- **Mandatory Worldwide Combined Reporting: Elegant in Theory but Harmful in Implementation** (March 2024)
- **Digital Business Input Exemptions: Lessons From Sales Tax History** (January 2024)
- **FY22 State and Local Business Tax Burden Study** (December 2023)
- **COST Scorecard on State Tax Administration** (December 2023)
- **Minnesota’s New Approach to Taxing Foreign Income Is Unfair and Unwise** (August 2023)
- **State Digital Services Taxes: A Bad Idea Under Any Theory** (April 2023)
- **Five State Tax Policy Changes That Would Modernize Laws and Ease Administration and Compliance** (April 2023)
- **COST Scorecard on Sales Tax Administration** (December 2022)
- **Down the Rabbit Hole: Sales Taxation of Digital Business Inputs** (July 2022)
- **Resisting the Siren Song of Gross Receipts Taxes: From the Middle Ages to Maryland’s Tax on Digital Advertising** (July 2022)

<https://cost.org/state-tax-resources/cost-studies-articles-and-reports/>



U.S. Supreme Court Update



Decision: *Loper Bright Enterprises v. Raimondo*, U.S. Supreme Court No. 22-451 (June 28, 2024)

- Challenge to federal court deference to agency regulations under *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).
- The Court held that the Administrative Procedures Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.
- *Chevron* is overruled, prospectively.
- **Implications for judicial philosophy and deference at the state level?**



Denied Cert: *Ellingson Drainage, Inc. v. Dep't of Revenue*, No. 30280 (S.D. February 7, 2024)

Facts:

- Ellingson brought equipment into the state for 30 drainage projects.
- South Dakota DOR assessed a 4.5% use tax on the value of the equipment that Ellingson used in the state from March 2017 to January 2020.
- State valued the property at \$1.23 million, after accounting for depreciation, resulting in an assessment of ~\$60,000 in use tax and ~\$15,000 in interest.

Holding:

- Upheld the DOR's assessment, reasoning: "Having paid the use tax on its equipment that had otherwise not been subject to sales or use tax in another state, Ellingson was and is free to bring the equipment back to work on jobs in South Dakota where Ellingson will continue to enjoy the privilege of conducting its business without being subject to additional use tax."

Cert petition filed with SCOTUS on May 7, 2024; Cert. denied October 7, 2024.



Pending: *Zilka v. City of Philadelphia*, Tax Review Board, No. 23-914

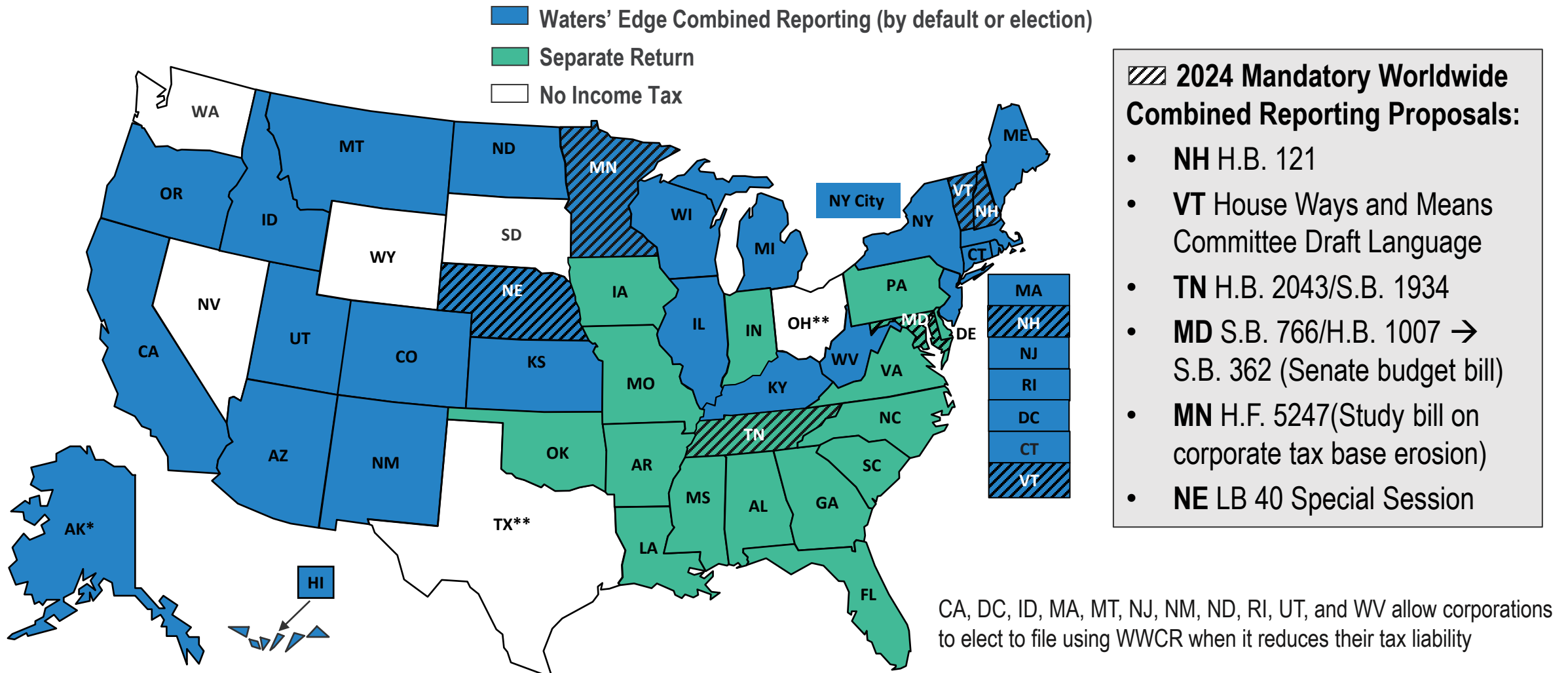
- Resident Diane Zilka challenged City of Philadelphia's income tax policy regarding scope of credits for out-of-state taxes paid, arguing it violated the Commerce Clause by not crediting her out-of-state tax liabilities against her local tax liabilities paid in Delaware (where she earned income exclusively).
- The Philadelphia Tax Review Board denied Zilka's refund request, a decision upheld by the Court of Common Pleas, the Commonwealth Court, and the Pennsylvania Supreme Court.
- **Cert petition filed with U.S. Supreme Court March 2024.**
 - Arguments raised include internal consistency test (Dormant CC)
 - June 2024: The U.S. Solicitor General was invited to file a brief in this case expressing the views of the United States.

State Tax Updates & Policy Considerations

Apportionment

**Mandatory Worldwide
Unitary Combined Reporting
&
Taxation of Foreign Source
Income**

No State Currently Requires Mandatory Worldwide Combined Reporting



*Alaska has worldwide combined reporting for oil and gas producers
 **Combined reporting for a tax based on gross receipts

Disclaimer: This information should be used for general guidance and not relied upon for compliance.
Source: Council On State Taxation (COST)



Mandatory Worldwide Combined Reporting

- ***Mandatory Worldwide Combined Reporting: Elegant in Theory but Harmful in Implementation*** -- by Douglas L. Lindholm and Marilyn A. Wethekam – March 2024
- A renewed focus on MWWCR by certain academicians and policymakers has brought the method back to the forefront of state tax policy controversy.
 - The primary justification for the resurgence: Recoup revenues ostensibly “lost” through global profit shifting.
 - The widely quoted state revenue estimates associated with the justification for the adoption of MWWCR are based on faulty economic assumptions.
- The resurgence of the effort to adopt MWWCR fails to take into consideration:
 - The alternative efforts started a decade ago by the international tax community, led by the Organization for Economic Cooperation and Development (OECD), to collaboratively address and combat the growth in global profit shifting
 - Discounts the compliance burden imposed by MWWCR on both multinational taxpayers and state departments of revenue.

Legislation

Mandatory Worldwide Combined Reporting, GILTI & Foreign Dividends

MARYLAND:

- The Maryland House of Representatives on March 21 passed SB 362, the Senate Budget bill, with amendments to impose worldwide mandatory unitary combined reporting in the State
- The measure as amended was rejected by the Senate on March 25 and will be brought to a conference committee
- The final version of SB 362 was adopted on April 5 and excludes the MWWCR provisions

MINNESOTA:

- HF 1938 (2023); SF 1811 (2023). Proposed to repeal water's-edge election and thereby impose mandatory worldwide combined reporting.
- HF 5247 (Gomez), State tax omnibus bill had provisions dealing with the disclosure of corporate franchise tax information (Sec. 4), and corporate tax base erosion study (Sec. 16). The House Ways and Means Committee recommended adoption with amendments
- COST submitted testimony in opposition to both these provisions; COST opposed the corporate tax base erosion study because it is completely one-sided, only looking at structural tax design issues relating to the corporate income tax. The State recently expanded its tax base to include 50 percent of GILTI and foreign dividends
- While the legislation was enacted, these provisions did not make it through the Senate and were struck out in conference committee

NEBRASKA:

- Governor Pillen (R) during regular session failed to get the Legislature to pass alternate revenue sources to offset projected losses from his property tax reform proposal and called for a special session that convened July 25
- Legislation under consideration during the ongoing special session includes MWWCR (LB 40); COST testified in person at the hearing on 8/1
- *COST also testified in opposition to additional legislation of concern: a digital ad tax (LB 1), and new taxes on business inputs (LB 1, LB 8, LB 19, LB 26)*

Legislation

Mandatory Worldwide Combined Reporting, GILTI & Foreign Dividends

NEW HAMPSHIRE:

- H.B. 121 (Schamberg (D)), introduced in January 2023, was voted inexpedient to legislate by the House in January 2024
- Proposed to repeal water's-edge and replace with mandatory worldwide combined reporting
- New Hampshire's Commission on Worldwide Reporting for Unitary Businesses Under the Business Profits Tax final report issued in November 2023

NEW MEXICO:

- HB 252, the State tax omnibus bill, was signed by the Governor on March 6. Among its provisions, it:
 - Establishes a flat corporate income tax at a 5.9% (removing the progressive rate at \$500,000)
 - Removes the state's IRC Section 952 subpart F exclusion and
 - Excludes U.S.-incorporated entities from the 80-20 rule for the water's-edge election

VERMONT:

- House Ways and Means Committee considered MWWCR draft legislation in January. COST submitted testimony in opposition to the draft bill. Due to the greatly reduced fiscal estimate prepared by the Joint Fiscal Office for the committee's February 29 hearing, the committee gave up WWCR instead discussed taxing a greater percentage of GILTI
- The Vermont House on March 27 passed an amended version of HB 721, a measure that as amended would: Increase the corporate income tax rate from 8.5% to 10% and Decouple from the federal GILTI and FDII deductions by requiring an addback to federal income of "the amount of any deduction allowed under 26 U.S.C. § 250(a)." These changes would apply to taxable years beginning on or after January 1, 2025. The changes are estimated to raise \$2 million in FY2025 and \$33 million in FY2026
- HB 721 was referred to Senate Committee on Finance on April 18 where it failed to move



California – Foreign Dividends

In re Microsoft Corp. and Subsidiaries, No. 21037336, July 27, 2023 (Rehearing denied February 14, 2024)

- The OTA held Microsoft may include 100 percent of its repatriated dividends in the sales factor denominator.
- Microsoft filed a water’s-edge combined report for the 2018 fiscal year and included 25 percent of repatriated dividends as apportionable income after applying California’s 75 percent dividends received deduction under R&TC §24411. Although only 25 percent of the dividends were treated as apportionable income, Microsoft on an amended returns included 100 percent of the dividends in the sales factor denominator.
- The FTB, denied the refund arguing the “matching principle” should apply and only 25 percent of the dividends should be included in the sales factor denominator.
- The OTA three-judge panel unanimously rejected the FTB’s arguments, holding that California statutes and regulations did not preclude including the dividends that qualified for the R&TC § 24411 deduction as “gross receipts” in the sales factor. The panel also found that the FTB did not demonstrate a qualitative difference or quantitative distortion that warrants use of an alternative apportionment methodology.



California Legislation Overturns *Microsoft*

- After the *Microsoft* case, California enacted legislation that excludes from the state's apportionment formula any income or loss from a transaction or activity that is not included in net income.
- The legislation is retroactive.
- The National Taxpayers Union and California Taxpayers Union are currently challenging this provision, arguing it is a revision of the State's apportionment laws and the unlimited retroactive change violates due process.
- The Franchise Tax Board has denied all claims, asserting the suits failed to state a claim and the court lacks jurisdiction to hear the cases.



Nebraska – I.R.C § 965 Income is Not a “Deemed Dividend”

Precision Castparts Corp. v. Nebraska Dept. of Rev., 317 Neb. 481 (Aug 30, 2024)

- Taxpayer sought to deduct § 965 repatriation income from Nebraska taxable income as “dividends...deemed to be received” under Neb. Rev. Stat. § 77-2716(5).
- Applied the general rules of statutory interpretation and the standards specific to tax statutes (tax imposition strictly construed against government/exemptions strictly construed in favor of government).
- Cited extensively from *Moore v. U.S.* and held:
“that the language of Section 965 does not deem the income included to be dividends, and we determine that Section 965 employs pass-through treatment to attribute earnings to shareholders without deeming a distribution to have been made to shareholders. We therefore conclude that income included in federal taxable income pursuant to Section 965 does not qualify for deduction as ‘dividends...deemed received’ under § 77-2716(5).”



Oregon – Factor representation of repatriated income

Microsoft Corp. v. Department of Rev., Oregon Tax Court, Regular Division, TC 5413, 8/29/2024 (unpublished).

- At issue in the case was whether and how to adjust the apportionment factor to account for the “20 Percent Repatriation Amount” included in Oregon taxable income after subtracting 80 percent of the federal repatriation amount under IRC Sec. 965.
- The court agreed with the taxpayer and applied the Oracle II analysis in 2021 to include the 20 Percent Repatriation Amount in the sales factor denominator.
- The court rejected three alternative apportionment methods put forward by taxpayer: 1) adding to the denominator 20 percent of the CFCs’ gross receipts; 2) including 100 percent of the Federal Repatriation Amount in the denominator; and 3) exclude the 20 Percent Repatriation Amount from the tax base altogether.

Related Party Attacks



Forced Combination in Separate Filing States

- *Tractor Supply Co. v. S.C. Dep't of Revenue*, No. 19-ALJ-17-0416-CC (S.C. Admin. L. Ct. Dec. 4, 2023). Appeal pending.
 - Forced combined unitary reporting as an alternative apportionment method because the transfer pricing expert recognized the transfer pricing study was flawed.
- *CarMax Auto Superstores v. S.C. Dep't of Revenue*, No. 21-ALJ-17-0182-CC (S.C. Admin. L. Ct. Aug. 5, 2024).
 - Forced combined unitary reporting as an alternative apportionment method because it found the east coast entity shifted most of its income to the west coast entity; thus, the standard separate reporting method did not fairly reflect CarMax's business activity in South Carolina.



South Carolina Legislation on Forced Combination

March 2024 – South Carolina legislature enacted legislation proposed by a COST Coalition that says DOR can only require a company to file a combined return if it determines that the company's intercompany transactions lack economic substance or are not at fair market value.

- Written notice of the adjustment and determinations is required.
- The statute requires a joint agreement with the taxpayer as to what the alternative filing method should be.

Transfer Pricing



Transfer Pricing

- *Tractor Supply* and *CarMax* South Carolina cases
- *Richard v. ConocoPhillips Co.*, No. C-740344 (La. 19th J.D.C. 2023).
 - The Louisiana Department of Revenue filed suit against ConocoPhillips alleging its transfer pricing was not at arms-length and thus understated taxable income in 2008-2011. Press reports citing DOR representatives indicated an assessment of over \$700 million.
 - The case settled and was dismissed earlier this year.
- New Jersey re-engaged Ednaldo Silva – former owner of RoyaltyStat, now owner of EdgarStat. Silva also consulted in Louisiana and several other states.

Sourcing



Trend Towards Single Sales Factor and Market-Based Sourcing Continues

Alaska S.B. 122 (Pending - Carryover) – would adopt certain MTC Model provisions including market-based sourcing, single sales factor for certain businesses, and would impose a throwout rule

Arizona S.B. 1682 (Failed) – would have moved the State to a double-weighted sales factor for taxable years beginning on and after December 31, 2023 and market-based sourcing for sales other than sales of tangible property

Arkansas S.B. 482 (Enacted) – will allow railroads to elect to apportion using either three-factor apportionment (with a double-weighted sales factor) or single sales factor apportionment

Kansas H.B. 2110 (Pending - Carryover) – would allow certain qualifying taxpayers (manufacturing or the production/storage of electricity in Kansas) to use single sales factor apportionment

Massachusetts H.B. 4104 (Enacted) – tax reform package moves to single-sales factor apportionment and has personal income tax cuts

Montana S.B. 124 (Enacted) – implement single sales factor apportionment effective January 1, 2025

New Mexico H.B. 547 (Line-Item Veto) – would have switched the State to single-sales factor apportionment

Oklahoma H.B. 1375 (Pending - Carryover) – allow qualifying corporations to elect to use single-sales factor or three factor apportionment

Tennessee H.B. 323 (Enacted) – provides a three-year transition period to single-sales factor apportionment for franchise/excise taxes

Virginia H.B. 1978 (Enacted) – will allow affiliated corporations filing on a consolidated basis to elect to apportion using a single-sales factor

States' Shift to Single-Sales Factor Apportionment

Arizona: Taxpayer can elect to use a three-factor formula with double-weighted sales or single sales factor.

California: Businesses with 50% of gross receipts from agricultural, extractive, savings and loan, and banking and financial business activities use an equally-weighted three-factor apportionment formula. Special rules apply to qualified taxpayers in the cable industry. [[Cal. Rev. & Tax. Cd. §25136.1.](#)]

Georgia: Different formula for corporations that have income derived principally from transporting passengers or cargo in revenue flight. Three factor formula: (1) revenue air miles; (2) tons handled factor; (3) originating revenue factor. Special rules for joint ventures, petroleum pipeline companies, and motor carriers. Ga. Comp. R. & Regs. 560-7-7-.03 section 5(e).

Louisiana and Utah: Varies, depending on the type of business.

Mississippi: Industry specific formulas, with single sales factor if no specific formula is specified.

Montana: Legislation enacted in 2023 shifts to single sales factor effective January 1, 2025.

New Mexico: If 80 percent or more of the New Mexico numerators of the property and payroll factors for a filing group, or for a taxpayer that is not a member of a filing group, are employed in manufacturing or operating a computer processing facility, the filing group or the taxpayer may elect to have business income apportioned to this state by multiplying the income by the sales factor for the taxable year. 7-4-10(B).

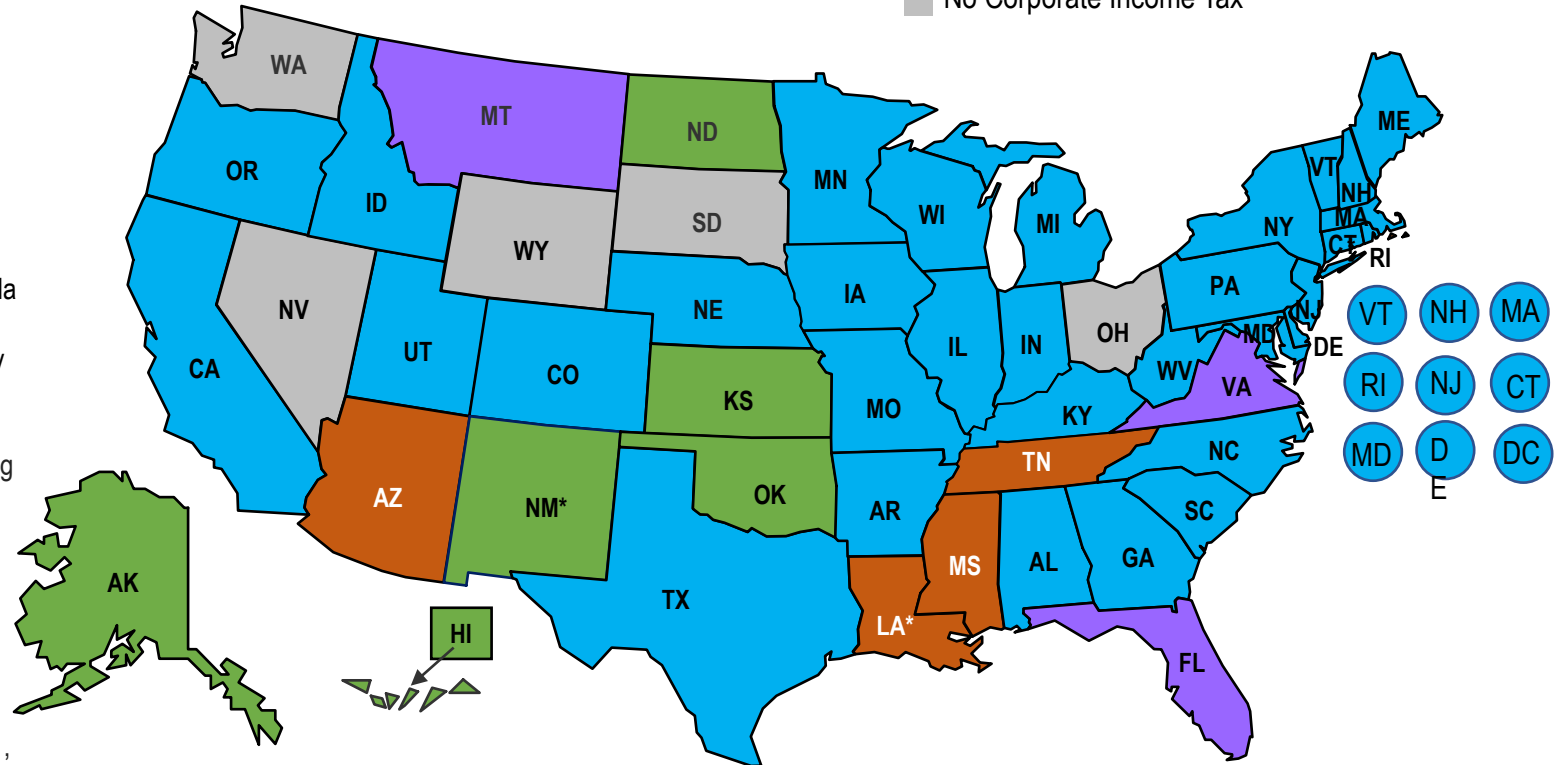
North Dakota: Option to choose three-factor formula or single sales factor.

Oklahoma: The sales factor is double-weighted, meaning that the denominator is four rather than three, for corporations whose taxable property has an initial investment cost of \$200 million or more, if the investment is made on or after July 1, 1997. In addition, the sales factor is double-weighted for corporations that expand their property or facilities in Oklahoma where such expansion has an investment cost of \$200 million or more over a period of three years or less, if the expansion is made on or after January 1, 2000. [[Okla. Stat. 68 §2358\(A\)\(5\)](#); [Okla. Admin. Code 710:50-17-71.](#)]

Tennessee: Three factor formula with triple-weighted sales. Enacted legislation in 2023 to phase-in single sales factor by 2025.

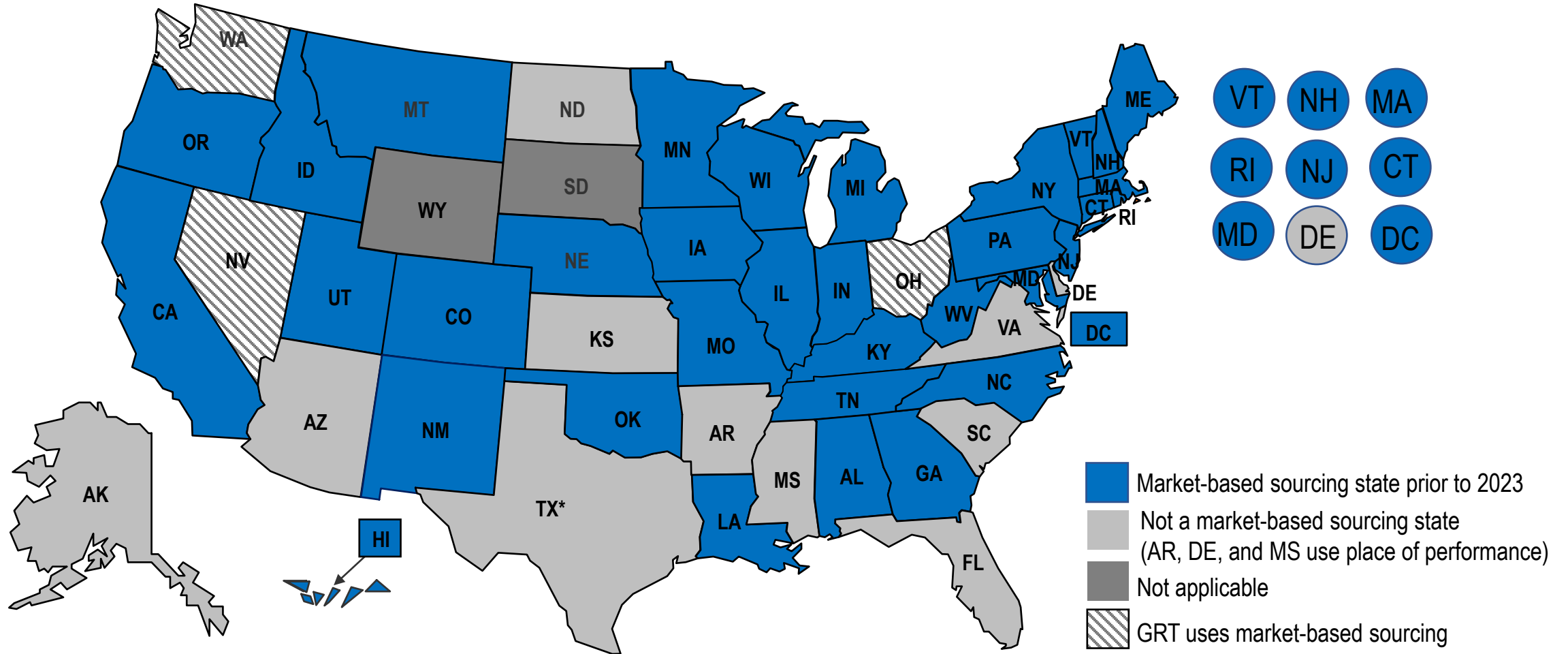
* While it's not mandatory for everyone, qualified manufacturers can use single sales factor in **Louisiana and New Mexico.**

- Single Sales Factor
- Double-Weighted Sales Factor
- Equally Weighted Three Factors
- Other
- No Corporate Income Tax



Disclaimer: This information should be used for general guidance and not relied upon for compliance.
Source: Council On State Taxation, Bloomberg Law

Market-Based Sourcing vs. Cost of Performance Sourcing



Receipts from the sale of services are sourced to **Texas if the service is performed in Texas. If the service is performed both inside and outside of Texas, the receipts are sourced to Texas based on the fair value of services rendered in the state.

Source: Bloomberg Law

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Digital Advertising Taxes



Maryland Digital Advertising Tax

- In 2021, Maryland became the first state to adopt a digital advertising services tax on annual gross receipts derived from digital ad services in the state
 - Imposed on entities with global gross revenue of at least \$100 million
 - Entities with \$1 million of digital ad revenue from MD sources required to file
 - Tax rates range from 2.5% to 10% based on amount of annual global gross revenue
- Status of current litigation challenging the tax:
 - Federal lawsuit (*U.S. Chamber of Commerce*): largely dismissed for lack of jurisdiction under federal Tax Injunction Act, on appeal to Fourth Circuit Court of Appeals
 - State lawsuit (*Comcast/Verizon*): MD state trial court struck down the tax in Oct. 2022 on Internet Tax Freedom Act, Commerce Clause, First Amendment grounds; MD Supreme Court dismissed lawsuit on procedural grounds in May 2023 – tax stands for now
 - Late 2023: Apple and 13 other companies filed appeals in MD Tax Court, asking for refund of estimated taxes paid during 2022 – revives substantive arguments not addressed by MD Supreme Court; MD Tax Court most recently ruled that *Apple* litigation may proceed



Digital Ad Tax Efforts in Other States

- **California** (SB 1327) – Passed by Senate with 2/3 vote; awaiting consideration in State Assembly.
 - Labeled a “Data Extraction Mitigation Fee”, but is actually a gross receipts tax on digital advertising services
 - Applies only to companies with applicable in-state digital advertising revenues of over \$2.5 billion
 - Flat rate of 7.5%
- **New York** (S.B. 5551 / A.B. 5842)
 - Digital ad tax on persons with \$100 million or more in NY annual gross revenues beginning in 2024
 - Purpose: “indirectly tax the rampant exchange of personal data, generating new, necessary revenue for the state”
- **Tennessee** (H.B. 2234/S.B. 2065) – data transaction privilege tax proposed:
 - Consists of a 9.5% tax on annual gross revenues derived from digital ad services in Tennessee
 - Would be applicable to entities that have a Tennessee ad revenue base of at least \$50 million
 - Both bills withdrawn for further study.
- **New Mexico:**
 - Digital advertising is already subject to gross receipts tax (similar to sales/use tax)
 - Dec. 19, 2023: Taxation & Revenue finalized regulations (3.2.1.12 NMAC) “to reflect changes in technology” that provide several new definitions and examples of sales of advertising services provided on a digital platform to advertisers within and outside NM that are subject to the gross receipts tax
- **Nebraska:**
 - Digital Ad Tax proposed during Governor’s Special Session to reduce property taxes (LB 388). COST comment letter filed in opposition.

Public Law 86-272



PL 86-272

- Enacted in 1959 to address corporate concerns with state tax burdens. Legislation also created the Willis Commission to review current state corporate income taxes
 - Was meant to be a “temporary” law to provide Congress with additional time to more thoroughly address uniformity, compliance, and administration of state taxes
 - MTC (1967) and COST (1969) formation indirectly a result of this activity
- Protects sellers of tangible personal property from imposition of state income taxes outside the home state.
- Three criteria must be met:
 - The only activity “within” a state consists of the soliciting of sales of tangible personal property,
 - Such sales are approved by the home office outside of the customer’s state, and
 - The tangible personal property is shipped to the customer from outside of the state.
- States have long criticized P.L. 86-272 as a perceived intrusion on their state sovereignty.



MTC PL 86-272 Statement

- The Multistate Tax Commission approved proposed revisions to its Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272 (Aug. 4, 2021).
- *These revisions effectively revoke the protections provided by P.L. 86-272, as any taxpayer with an interactive website (one with more than static information) would not receive P.L. 86-272 protection.*
 - COST opposed these protections noting that the revisions would render P.L. 86-272 a nullity



Proposed PL 86-272 Amendment

- Federal Legislation: House Bill 8021 and Senate Bill 5158 introduced to amend PL 86-272
- Both bills propose to add the following language to define “solicitation of orders”:
 - “any business activity that facilitates the solicitation of orders even if that activity may also serve some independently valuable business function apart from solicitation”



American Catalog Mailers Ass’n v. Franchise Tax Bd., No. CGC-22-601363 (Cal. Sup. Ct. Dec. 13, 2023)

- The California FTB issued revised guidance regarding Internet activities in Technical Advice Memorandum No. 2022-01 and FTB 1050. The guidance aligns with the MTC’s 2021 adopted revisions to the *Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272*.
- On summary judgment, the court determined that guidance adopted by the Franchise Tax Board (“FTB”) in TAM 2022-01 and FTB Publication 1050 were not implemented in compliance with California’s Administrative Procedure Act.
- Therefore, the State’s adoption of the Multistate Tax Commission’s updated P.L. 86-272 guidance for activities occurring through the internet through state guidance was an “underground regulation.”
- The FTB did not appeal this decision by the deadline.

Questions?

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