

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SUBJECT

MISSOURI ALLOWS SINGLE SALES FACTOR APPORTIONMENT AND MARKET SOURCING FOR SERVICE AND INTANGIBLE PROVIDERS AND REQUIRES THE DEPARTMENT TO NOTIFY TAXPAYERS OF A CHANGE IN SALES/USE TAX LAW

SUMMARY

Missouri Governor Jay Nixon (D) recently signed into law Senate Bill 18 (“S.B. 18”) and Senate Bill 19 (“S.B. 19”). S.B. 19 provides market sourcing rules for all sales that are not sales of tangible personal property (e.g., services and intangibles) under the single sales factor apportionment election and, thus, now definitively allows corporations that have such sales the option of electing this apportionment method for purposes of the corporate income tax. S.B. 18, which relates to sales and use tax, requires the Department of Revenue (the “Department”) to notify affected sellers if there has been a change in an interpretation of the law that modifies the taxability of an item of tangible personal property or a service.

DETAILS

CORPORATION INCOME TAX - SINGLE SALES FACTOR APPORTIONMENT

A corporation may make an annual, irrevocable election to apportion business income using a fraction comprised of in-state sales in the numerator and everywhere sales in the denominator. The Department had previously denied taxpayers that sell services or license intangibles the use of this method on the basis that the statute did not provide for a method of sourcing such sales. S.B. 19 provides rules for sourcing sales of services and intangibles and, thus, at least with respect to an original return filed after August 27, 2015, definitively allows taxpayers that sell services and/or license intangibles the option of electing to use this apportionment method.

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S.B. 19 assigns sales of services, intangibles and other certain items to Missouri using a “market” approach. See the following chart. If the state of assignment of a sale cannot be determined or reasonably approximated under these rules, it is excluded from the numerator and denominator of the apportionment factor.

Receipt From ...	Source to Missouri If ...
... Sale, rental, lease or license of real property	... Missouri property
... Rental, lease or license of real or tangible personal property	... Missouri property
... Service	...The ultimate beneficiary is in the state
... Rented, leased or licensed non-marketing intangible	...The intangible property is used in the state by the rentee, lessee or licensee
... Rented, leased or licensed marketing intangible	...The good or service is purchased by a consumer in the state
... Franchise fees or related royalties or right to conduct business	...The franchise location is in the state
... Sale of intangible property - contract right, government license or similar intangible that authorizes the holder to conduct a business activity in a specific geographic area	...The geographic area includes all or part of the state
... Sale of intangible property - sales contingent on productivity, use or disposition of the intangible property	...Treated as a receipt from the rental, lease or license of the intangible property

SALES AND USE TAX - DEPARTMENT NOTIFICATION

Effective August 28, 2015, S.B. 18 requires the Department to notify affected sellers if an item of tangible personal property or a service determined to be taxable is modified by a decision of the Department, the administrative hearing commission, or a court decision, and a reasonable person would not have expected the decision or order based on prior law or regulation. Failure by the Department to provide notification relieves a seller that has not previously remitted tax on the tangible personal property or service of liability for taxes that would otherwise be due.

Formal notification in this case may be delivered via U.S. mail or email. The Department is also required to update its website with information regarding modifications to sales tax law.

BDO INSIGHTS

- ▶ As compared to the three factor apportionment formula option under which sales of other than tangible personal property are sourced using the original multistate compact income-producing activity/costs of performance rules, the single sales factor option using market sourcing rules may be more beneficial to a Missouri-based corporation (i.e., including an S corporation and an LLC that elects to be taxed as a corporation for federal income tax purposes) that provides services or intangibles to non-Missouri customers. This may be particularly beneficial since the elective single sales factor apportionment method does not contain a “throwback” or “throw out” rule for sales to states in which the corporation is not subject to tax.
- ▶ The changes to the single sales factor apportionment appear to be limited to original returns filed after August 27, 2015. This means that a taxpayer that sells services or licenses intangibles that files a validly extended or past due original return after this date may make the election to use the single sales factor apportionment method and source sales accordingly.

- ▶ While the Missouri General Assembly characterized this change in the law as a “clarification” of the intent of the existing statute in committee reports related to bills that had similar language, this was not directly reflected in the legislative history to S.B. 19. In addition, the Department has informally announced that it will not apply S.B. 19 as a clarification to existing law.
- ▶ It should be noted that the market sourcing provisions under the single sales factor option do not address how to assign a sale of goodwill. Thus, it appears that a sale of goodwill should be excluded from the numerator and denominator of the fraction if the single sales factor option has been elected.
- ▶ S.B. 18 seeks to resolve an ongoing problem caused by the Department assessing sales and use tax, plus interest and penalties, on transactions after informing a taxpayer that the transactions were not subject to tax.

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