

AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SUBJECT

WISCONSIN ENACTS A SALES/USE TAX EXCLUSION FOR DISTRIBUTION FACILITY OPERATORS, CODIFIES ADDITIONAL SALES/USE TAX NEXUS CREATING ACTIVITIES, AND CREATES A BUSINESS DEVELOPMENT CREDIT FOR INCOME TAX PURPOSES

SUMMARY

On July 12, 2015, Wisconsin Governor Scott Walker (R) signed into law Senate Bill 21 (2015 Act 55), the Governor's 2015-2017 Budget Bill. This law enacts several changes to the state's sales and use tax law, including the adoption of an exclusion from the tax for certain distribution facility operators, codifies additional nexus creating activities, delays the private label credit card bad debt deduction, and clarification of the refund offset. In addition, the law creates a Business Development Credit for corporate and individual income tax purposes and revises the Research Credit and the Manufacturing and Agriculture Credit. The effective dates for these law changes are noted in the discussion that follows.

DETAILS

Sales and Use Taxes

Certain Distribution Facility Operators Excluded from Tax

Effective July 14, 2015, the law excludes from the definition of "retailer" a person or business entity (or its affiliate) making sales of tangible personal property if all of the following apply:

- ▶ The person or business entity (or its affiliate) operates a distribution facility;
- ▶ The person or business entity (or its affiliate) sells tangible personal property on behalf of a third-party seller;

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- ▶ A third-party seller owns the tangible personal property and is disclosed to the customer as the seller; and
- ▶ The person or business entity (or its affiliate) does not make sales for which the customer takes possession of the tangible personal property at a location operated by the person or business entity (or its affiliate).

Prior to the enactment of this provision, a person or business entity may have been liable for the payment of sales tax if the person or business entity was acting for a known or disclosed principal, had possession of tangible personal property owned by the principal, and made sales of such property.

The foregoing distribution facility operator exclusion does not apply to auction sales, sales of tangible personal property owned or previously owned by the person or business entity (or its affiliate), and sales of motor vehicles, aircraft, trailers, semitrailers, boats, snowmobiles, all-terrain vehicles or recreational vehicles.

Addition of Nexus Creating Activities

Effective July 14, 2015, the law specifies that the following activities are included in the definition of “retailer engaged in business in this state” and, thus, includes them among the activities that may subject a business to Wisconsin sales and use tax:

- ▶ Any person or business entity servicing, repairing, or installing equipment or other tangible personal property in Wisconsin;
- ▶ Any person or business entity delivering tangible personal property into Wisconsin in a vehicle operated by the person or business entity that sells the property or items that are delivered;
- ▶ Any person or business entity performing construction activities in this state; and
- ▶ Any retailer having a representative in the state for the purpose of performing any of the foregoing activities (among certain others).

Private Label Credit Card Bad Debt Deduction Delayed

The law extends the effective date for the bad debt return adjustments for private label credit card bad debt to apply to bad debts arising from sales completed after June 30, 2017 (previously June 30, 2015).

Refund Offset Clarification

Effective for taxable years beginning on or after January 1, 2015, the law clarifies that a taxpayer has no right to a refund until the offset procedure for delinquent debts owed to the Department of Revenue (the “Department”), other Wisconsin state agencies, and local governmental units has been completed.

Income Tax Credits

Business Development Credit Created

Effective for taxable years beginning after December 31, 2015, the law creates a refundable income tax credit to promote job creation and retention in Wisconsin. The credit is available to a taxpayer certified to receive tax benefits by the Economic Development Corporation (“EDC”) and which increases its net employment in Wisconsin above its net employment during the year before the taxpayer was certified to receive the credit.

The credit may be taken against the corporation income tax and the personal income tax, including by an owner of a limited liability company, a partnership or a tax option corporation.

Generally, the amount of credit, as determined by the EDC, is equal to the following:

- ▶ Up to 10% of the amount of wages paid to a full-time employee;
- ▶ Up to an additional 5% of wages paid to a full-time employee if the employee is employed in an economically distressed area, as determined by the EDC;
- ▶ Up to 50% of the amount of training costs incurred to enhance a full-time employee's knowledge, employability, and skills;
- ▶ Up to 3% of a taxpayer's personal property investment and 5% of its real property investment in certain capital investment projects; and
- ▶ A percentage of wages paid to a full-time employee if the employee's position was created or retained in connection with the location or retention of the taxpayer's corporate headquarters in Wisconsin and the employee's position involves the performance of headquarters functions.

Research Credit Revisions

For taxable years beginning after December 31, 2014, the Research Credit under section 71.28(4)(ad) of the Wisconsin Statutes is equal to 5.75% of the excess of qualified research expenses in Wisconsin for the current taxable year over 50% of the average qualified research expenses for the prior three taxable years. If the taxpayer doesn't have any qualified research expenses in any of the prior three taxable years, the credit is equal to 2.875% of the qualified research expenses for the current year. The percentage is 11.5% (5.75% if no qualified research expenses in three prior taxable years) for activities related to designing internal combustion engines for vehicles, and design and manufacturing of energy efficient lighting systems, building automation and control systems, and automotive batteries for use in hybrid-electric vehicles.

For taxable years beginning after December 31, 2014, the following Research Credits under 71.28(4)(ad) of the Wisconsin Statutes are no longer allowed: (i) the 5% credit for increasing research expenses; (ii) the 10% credit for research related to designing internal combustion engines for vehicles; and (iii) the 10% credit for research related to design and manufacturing of energy efficient lighting systems, building automation and control systems, or automotive batteries for use in hybrid-electric vehicles. However, for the tax years while in effect, the calculation of each of these research credits is expanded to include compensation used for purposes of calculating the Development Zones Jobs Credit under section 71(1dj) of the Wisconsin Statutes.

Manufacturing and Agriculture Credit Revisions

For taxable years that begin in 2015 only, the rate used to compute the Manufacturing and Agricultural Credit Tax under section 71(5n) of the Wisconsin Statutes is reduced from 5.526% to 5.025%. The tax credit rate remains at 7.5% for taxable years beginning after December 31, 2015. The amount of any underpayment of estimated tax that arises from the reduction in the credit percentage for 2015 will not be subject to underpayment interest and penalties.

Also, retroactive to taxable years beginning after December 31, 2012, a taxpayer that has been approved to be classified as a manufacturer by the Department may claim the credit in the year of approval even if not eligible to be listed on the Department's manufacturing roll until January 1 of the subsequent year.

BDO INSIGHTS

- ▶ A distribution facility operator should consider whether it qualifies for the new exclusion from sales tax.
- ▶ All Wisconsin income taxpayers should consider whether they qualify for the new Business Development Credit.
- ▶ The provision in the law that adds additional activities that create sales and use tax nexus appears to be a codification of the agency nexus positions that the Department has recently been asserting.

- ▶ A taxpayer that had updated its sales and use tax systems to take the private label credit card bad debt deduction effective July 1, 2015, will now have to update its systems again for the delayed July 1, 2017 effective date.
- ▶ A taxpayer that takes the Research Credit or the Manufacturing and Agriculture Credit should be mindful of the changes to these credits, which may impact the amount of credit that the taxpayer may take on returns to be filed.
- ▶ A taxpayer that has taken the Research Credit but excluded compensation used for purposes of calculating the Development Zones Jobs Credit under section 71(1dj) of the Wisconsin Statute should consider whether additional credit may be claimed on previously filed returns. In addition, a taxpayer that did not take the Manufacturing and Agriculture Credit on a return for a taxable year beginning after December 31, 2012 because it was not listed on the Department's manufacturing roll, should consider whether it may now be eligible to claim the credit under the provision that allows a taxpayer to claim it if it was approved to be classified as a manufacturer by the Department.

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