



SALT Alert!



SALT Alert! 2019–09: Indiana: Significant Tax Legislation Enacted

Recently, two bills were signed into law in Indiana that (1) make significant changes to Indiana’s corporate income tax laws and (2) require marketplaces to collect sales and use tax. Details are addressed below.

Corporate Income Tax Changes

[Senate Bill 563](#), signed May 1, 2019, makes clear that for Indiana corporate income tax purposes, physical presence is not required to establish nexus effective January 1, 2019. Specifically, the corporate income tax law has been revised to provide that “income derived from Indiana shall be taxable to the fullest extent permitted by the Constitution of the United States and federal law, regardless of whether the taxpayer has a physical presence in Indiana.”

Under prior Indiana law, sales, other than sales of tangible personal property, were sourced to Indiana if the income-producing activity was performed in Indiana. Receipts were also sourced to Indiana if the income-producing activity was performed both within and without Indiana and a greater proportion of the income-producing activity was performed in Indiana than in any other state, based on costs of performance. The state’s regulations further provide that the “income-producing activity” means the act or acts directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profit. On audit, the Department of Revenue has interpreted the income-producing activity test to essentially reach a market-based approach by treating the interaction between the taxpayer and the customer as the “income-producing activity.”

Effective retroactively to taxable years beginning after December 31, 2018, Senate Bill 563 adopts market-based sourcing rules and also makes certain other changes to Indiana’s apportionment provisions. First, the definition of “sales,” which generally means all gross receipts of a taxpayer not otherwise allocated, is revised to include only net gains from (1) the maturity, redemption, sale, exchange, loan, or other disposition of stocks, bonds, notes, options, forward contracts, future contracts, and similar instruments or securities, and (2) the maturity, sale, or exchange of two or more contracts, instruments, or securities as part of a hedging or substantially similar transaction. If a taxpayer does not receive money or other property upon the maturity or redemption of a security, any includible amounts shall not be included unless and until the taxpayer actually receives money or other property.

Under Senate Bill 563, receipts, other than receipts from sales of tangible personal property, telecommunications services and broadcasting services, are attributed to Indiana if the taxpayer’s market for the sale is in Indiana. A taxpayer’s market for the sale will be considered in Indiana:

- In the case of a sale, rental, lease, or license of real property, if and to the extent the real property is located in Indiana.
- In the case of a rental, lease, or license of tangible personal property, if and to the extent the property is located in Indiana.
- In the case of the sale of a service, if and to the extent the benefit of the service is received in Indiana.
- In the case of a rental, lease or license of intangible property, if and to the extent the intangible property is used in Indiana (intangible property utilized in marketing a good or service to a customer is used in Indiana if that good or service is purchased by an Indiana consumer).
- In the case of a sale of intangible property, if and to the extent that the intangible property is used in Indiana:
 - If the property sold is a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the intangible property is used in Indiana if the geographic area includes all or a part of Indiana; and
 - Receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property are treated as receipts from the rental, lease, or licensing of the intangible property.
 - All other types of intangible property receipts are excluded entirely from the numerator and denominator of the sales factor.

Interestingly, if the state or states of attribution cannot be determined under the rules discussed above, the service receipts shall be sourced based on where the delivery of the service occurs. Any receipts that cannot be sourced under the above rules (including the rule for service receipts) will be excluded from the denominator of the receipts factor.

Senate Bill 563 adopts a new provision to address receipts from the maturity, redemption, sale, exchange, loan, or other disposition of stocks, bonds, notes, options, forward contracts, futures contracts, and similar instruments. These receipts will be attributable to Indiana if a taxpayer's commercial domicile is in the state. Only the portion of the receipts required to be included in the taxpayer's sales denominator will be attributable to Indiana.

Receipts from the provision of telecommunications services and broadcast services (as defined) are not sourced under the new market-based sourcing rules for service receipts. Taxpayers that derive receipts from performing these services will continue to use the traditional all-or-nothing costs of performance approach.

Senate Bill 563 specifically authorizes the Department of Revenue to adopt rules, including emergency rules, that will be applied retroactively to January 1, 2019, to address the sourcing changes. Any rules adopted must be consistent with the Multistate Tax Commission's model apportionment regulations as in effect on January 1, 2019, including any specialized industry provisions, unless otherwise inconsistent with Indiana law.

Marketplace Facilitator Provisions

Since October 1, 2018, Indiana has required remote sellers to collect and remit sales and use tax if (1) the seller's gross revenue from sales of tangible personal property or services delivered into Indiana, or products transferred electronically into Indiana, exceeds \$100,000, or (2) the seller has 200 or more separate transactions of services, tangible personal property, or electronically transferred products for delivery into Indiana.

Effective July 1, 2019, [Indiana House Bill 1001](#) adds a new section to the state's code that requires certain marketplace facilitators to collect and remit sales and use tax on sales to Indiana

customers if the marketplace facilitator meets the economic nexus thresholds. For purposes of measuring whether the thresholds are met, the marketplace facilitator will include its own sales and sales facilitated for sellers. If a marketplace facilitator meets the thresholds, sellers measuring their own sales will not need to include the sales made through the marketplace in determining whether they have a collection obligation.

A “marketplace facilitator” is broadly defined to include any person (including an affiliate of such person as determined under IRC section 267) that owns, operates, or otherwise controls a marketplace and facilitates retail transactions. The term does not include a payment processor business that is appointed by a merchant to handle payment transactions from various channels, including credit and debit cards, and whose sole activity with respect to marketplace sales is to handle payment transactions between two parties. A “marketplace” means a forum, whether physical or electronic, that a marketplace facilitator uses to connect sellers to purchasers for the purpose of making retail transactions involving a seller's products (including tangible personal property, specified digital products, rooms, lodgings, or accommodations, or enumerated services), by means of any of the following:

- (1) Listing, making available, or advertising products;
- (2) Transmitting or otherwise communicating an offer or acceptance of a retail transaction of products between a seller and a purchaser;
- (3) Providing or offering fulfillment or storage services for a seller;
- (4) Setting prices for a seller's sale of the seller's products;
- (5) Providing or offering customer service to a seller or a seller's customers, or accepting or assisting with taking orders, returns, or exchanges of products sold by a seller; and
- (6) Branding sales as those of the marketplace facilitator.

A marketplace facilitator will be considered the retail merchant for each transaction it facilitates if it does any of the following on behalf of the seller:

- (1) Collects the sales price or purchase price of the seller's products;
- (2) Provides access to payment processing services, either directly or indirectly; or
- (3) Charges, collects, or otherwise receives fees or other consideration for transactions made on its electronic marketplace.

Regardless of whether a transaction is made by the marketplace facilitator on its own behalf or facilitated on behalf of a seller, a marketplace facilitator must collect and remit the gross retail tax, and comply with all applicable procedures and requirements as befits its position as the retail merchant in the facilitated transactions.

The gross retail income from a facilitated transaction is equal to the total amount of consideration paid by the purchaser, including the payment of any fee, commission, or other charge by the marketplace facilitator, except that the gross retail income does not include any taxes on the transaction that are imposed directly on the consumer, other than certain taxes applicable to retail sales of cigarettes.

A purchaser of tangible personal property or services that has overpaid gross tax to a marketplace facilitator may file a claim for refund with the Department and shall not have a cause of action against the marketplace facilitator to recover the overpayment. House Bill 1001 includes fairly extensive provisions addressing circumstances in which the marketplace facilitator will be relieved of liability for failure to collect and remit the correct amount of tax.

Contacts

Please contact [Marc Caito](#) at 317-951-2434 with questions on the corporate income tax changes and [David Knuff](#) at 216-875-8118 with questions on the marketplace provisions.

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