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Kansas: Legislature overrides veto of bill decoupling from TCJA provisions and adopting marketplace facilitator provisions

The Kansas legislature on May 3, 2021, voted to override the governor's veto of Senate Bill 50.

Senate Bill 50 includes measures to: (1) decouple from various provisions of the federal tax law enacted in 2017 (the law that is often referred to as the "Tax Cuts and Jobs Act" (TCJA) (Pub. L. No. 115-97)); and (2) require marketplace facilitators (as defined) to collect and remit taxes if they meet or exceed the new economic nexus provisions.

KPMG observation

The governor's veto appeared to be motivated by concerns around the revenue implications of the individual and corporate tax changes included in the bill.

Corporate income tax provisions

State corporate due date extension: For any tax year beginning after December 31, 2019, the due date of the Kansas corporate income tax return is not later than one month after the due date of the federal corporate income tax return, including any applicable extensions. A taxpayer is not required to request an extension of time to file from the Kansas Director of Revenue if an extension request has been filed with the IRS.

Tax Cuts and Jobs Act changes: The provisions of Kansas law addressing the computation of an individual's Kansas adjusted gross income, which likewise extend to and are applicable to corporate taxpayers, are modified to require a subtraction for the following:

- 100% of GILTI included in income under Internal Revenue Code (IRC) section 951A before the section 250 deduction for "global intangible low-taxed income" (GILTI)
- The amount disallowed as a deduction under IRC section 163(j) as in effect on January 1, 2018

- The amount disallowed as a deduction pursuant to IRC section 274 for meal expenditures to the extent such expense was allowed and in effect on December 31, 2017

An addback is required for the amount deducted for federal purposes as a carryforward of disallowed interest expense under IRC section 163(j).

In addition to these changes, a corporation's federal taxable income is further modified so that IRC section 118 is applied as in effect on December 21, 2017. An addback is required for any amount deducted under IRC section 250(a)(1)(B), which is designed to reduce the rate on GILTI.

Senate Bill 50 also makes clear that the state's 80% dividends received deduction extends to amounts included in income under IRC section 965 net of the deduction allowed under IRC section 965(c). However, the dividends received deduction does not apply to GILTI that is specifically excluded from income. A new subtraction applies to the amount disallowed as a deduction for FDIC premiums pursuant to IRC section 162(r) as in effect on January 1, 2018. These changes all apply for tax years beginning after December 31, 2020.

Senate Bill 50 also modifies Kansas law governing net operating losses (NOLs). For NOLs incurred in tax years beginning after December 31, 2017, a deduction is allowed in the same manner that it is allowed under the IRC, except that NOLs cannot be carried back. Currently, NOLs can be carried forward for 10 years, so this change incorporates the indefinite NOL carryforward allowed under federal law.

Marketplace facilitator law

Senate Bill 50 adopts a narrow definition of a marketplace facilitator. Specifically, a "marketplace facilitator" means a person, including an affiliate of such person, that (1) contracts with sellers to facilitate the sale of products or accommodations, rooms or lodgings through a physical or electronic marketplace operated, owned, or otherwise controlled by the person; and (2) either directly or indirectly, through contracts, agreements or other arrangements with third parties, collects the payment from the purchaser and transmits all or part of the payment to the marketplace seller. The definition specifically excludes platforms that exclusively provide advertising services, principally provide payment processing, and certain derivatives clearing organizations.

- Effective July 1, 2021, marketplace facilitators and out-of-state retailers with annual gross receipts of more than \$100,000 from Kansas sales are required to collect and remit sales and use taxes.
- Effective April 1, 2022, a marketplace facilitator is further required to collect and remit "911 fees" from sales made through their platforms.

Importantly, the Department of Revenue may grant a waiver from the requirement to collect and remit if a marketplace facilitator demonstrates, to the satisfaction of the Department, that substantially all its marketplace sellers already are collecting and remitting taxes.

A marketplace facilitator and marketplace seller may also contractually agree to have the marketplace seller collect and remit all applicable taxes and fees if the marketplace seller: (1) has annual gross sales in the United States over \$1 billion (\$1,000,000,000) including the gross sales of any related entities, and in the case of franchised entities, including the combined sales of all franchisees of a single franchisor; (2) provides evidence to the marketplace facilitator that the marketplace seller is registered with the state; and (3) notifies the Department that the marketplace seller will collect and remit all applicable taxes and fees on sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on such sales.

KPMG observation

With Kansas's enactment of Senate Bill 50, Missouri is now the only sales and use tax imposing state without a law requiring tax collection by a marketplace facilitator.

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