

Income/Franchise:

New York: Retroactive Application of Article 9-A Rule on P.L. 86-272 and Internet Activity Violates Due Process

Case No. 903320-24, N.Y. Sup. Ct., Albany County (4/28/25). An industry trade association representing remote sellers brought a complaint containing two causes of action in a New York State Supreme Court (Court). The first sought declaratory judgment that the New York State Department of Taxation and Finance's (Department) Article 9-A Business Corporation Franchise Tax Regulation adopted in December 2023 involving P.L. 86-272 and internet activity (specifically, 20 NYCRR section 1-2.10 ("Rule")) [see *Repeal of preexisting 20 NYCRR Subchapter A, Parts 1 through 9, the Business Corporation Franchise Tax, and Adoption of New 20 NYCRR Subchapter A, Parts 1 through 9; Repeal of preexisting 20 NYCRR Subchapter B, the Franchise Tax on Banking Corporations Regulations; and Adopted Amendments to 20 NYCRR Subchapter C, the Franchise Taxes on Insurance Corporations*, N.Y. Dept. of Tax. & Fin. (12/11/23); Notice of Adoption, N.Y. Dept. of Tax. & Fin. (12/27/23); and previously issued Multistate Tax Alert for more details on the 2023-adopted Article 9-A Business Corporation Franchise Tax Regulations] is invalid. The second cause of action sought a declaration that retroactive application of the challenged Rule results in a violation of the due process clauses of the US and New York Constitutions. The Court ruled that the Department was entitled to summary judgment dismissing the first cause of action, concluding that the Rule:

URL:
https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=7ybGpJ_PLUS_dVGucWfFtVimf5w==&display=all&courtType=Albany%20County%20Supreme%20Court&resultsPageNum=1
URL: <https://www.tax.ny.gov/rulemaker/adoptions/corp/2023.htm#om121123>
URL: <https://dos.ny.gov/system/files/documents/2023/12/122723.pdf>
URL: <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-multistate-tax-alert-new-york-adopts-final-corporate-income-tax-regulations.pdf>

1. Does not subject out-of-state sellers who engage in more than in-state solicitation to duplicative or unfair taxation; and
2. Is not preempted by P.L. 86-272, the controlling federal statute, or violative of the US or New York Constitutions.

The Court reasoned that the Rule does not broadly tax any and all internet sales, but merely "identifies, for taxation purposes, those internet activities that establish substantial nexus between an out-of-state seller and New York." According to the Court, the Rule treats the internet activities of out-of-state sellers similarly – noting that "when those sellers do more than solicit orders, they will be subject to tax collection."

Nevertheless, the Court ruled in the trade association's favor on its second cause of action seeking summary judgment for a declaration that the Rule's retroactive application resulted in a violation of the due process clauses of both the US Constitution and the New York Constitution – explaining that the trade association and its members were not forewarned of the retroactive application and had no opportunity to alter their behavior. The Court also explained that the length of the retroactive period in this case (*i.e.*, nearly nine years)

was “excessive,” declaring that the Rule’s retroactive application “as applied to any time period before its December 2023 publication date” violates due process. Please contact us with any questions.

— Jack Trachtenberg (New York)
Principal
Deloitte Tax LLP
jtrachtenberg@deloitte.com

Don Roveto (New York)
Partner
Deloitte Tax LLP
droveto@deloitte.com

Mary Jo Brady (Jericho)
Senior Manager
Deloitte Tax LLP
mabrady@deloitte.com

Ken Jewell (New York)
Managing Director
Deloitte Tax LLP
kjewell@deloitte.com

Jeremy Sharp (Washington, DC)
Senior Manager
Deloitte Tax LLP
jesharp@deloitte.com

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.

About Deloitte

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte provides industry-leading audit and assurance, tax and legal, consulting, financial advisory, and risk advisory services to nearly 90% of the Fortune Global 500® and thousands of private companies. Our professionals deliver measurable and lasting results that help reinforce public trust in capital markets, enable clients to transform and thrive, and lead the way toward a stronger economy, a more equitable society and a sustainable world. Building on its 175-plus year history, Deloitte spans more than 150 countries and territories. Learn how Deloitte’s approximately 415,000 people worldwide make an impact that matters at www.deloitte.com.