



This Week in State Tax (TWIST)

September 23, 2024



New York: NYC Releases Revised Plan for Business Corporate Tax Regulations

The New York City Department of Finance (“City” or “Finance”) recently released an update on its development of regulations implementing the New York City Business Corporation Tax (“BCT”). Recall, in December 2023, the New York State Department of Taxation and Finance (“State”) adopted its own regulations to implement sweeping New York State corporate franchise tax reform which took effect for tax years beginning on or after January 1, 2015. Although the BCT closely tracks the state corporate franchise tax, it was previously unclear in which areas the City would parallel the State regulations and in which they might diverge. During discussion sessions held in May 2024, Finance announced several areas in which it was considering departures from policies contemplated in the State regulations. The recent announcement by Finance provides an update on the major areas in which the City previously announced that it was considering deviations from the State regulations.

First, Finance announced that it no longer intends to deviate from the allocation approach used by the State for flow-through partnership income. The notice indicates that Finance considered the comments received and has opted to forego its originally proposed allocation in favor of uniformity across the State and City corporate tax regimes. Briefly, a corporation with partnership flow-through income will apportion such income using the procedures applicable to other corporate income, instead of the rules of the City’s Unincorporate Business Income Tax as originally proposed. Finance indicates this “will streamline the process of tax administration and reduce the cost of doing business in the City of New York.”

Second, the City also plans to forego an initially proposed deviation from the number of business customers needed before a taxpayer can use the billing address of the customer as a safe harbor in determining the primary use location or where the benefit of certain products or services are received.

Finance initially proposed increasing this threshold from 250 customers to 1,000, but ultimately opted against this as it would have been a departure from the income allocation model used by the State as well as the one developed by the Multistate Tax Commission, which other states have also adopted. Third, the City reiterated that while it plans to conform to the State’s primary allocation rule for income from passive investment customers (i.e., to the location of the individual investors), it is considering a deviation from the State’s fallback method of apportionment when the taxpayer does not have the information to allocate to the customer.

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According to the update, rather than looking to the location where the contract is managed by the passive investment customer (as proposed by the State), Finance is proposing an 8 percent flat allocation of such receipts to New York City. Finance says that this 8 percent allocation reflects a fair estimation of the economic activity within the City relative to the nation and is a percentage often used to allocate financial assets in the BCT.

The City also restated its intent to deviate from the State rule requiring “clear and convincing evidence” to overcome certain presumptions related to allocation or the existence of a unitary business. In City’s view, the clear and convincing evidence standard is “excessively burdensome” on the City and its taxpayers, and applying a specific standard would “inappropriately charge Finance with a judicial or quasi-judicial function.” Rather than set a specific standard, Finance will continue to base its determinations on the facts and circumstances of each matter. Finally, the City reiterated that it continues to consider diverging from the State treatment of IRC Section 860E “excess inclusion” in a real estate mortgage conduit’s entire net income. While the State excludes this amount from entire net income, the City would instead conform to the Federal rule requiring that taxable income of an interest holder be no less than its excess inclusion. Finance did note that it is continuing to examine this rule because of concern about its interplay with the calculation of net operating losses. For questions about the New York City’s [update](#), please contact [Russ Levitt](#), [Aaron Balken](#), or [Alec Schwartz](#).

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