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Tags
Accounting
F.A.S.B.
Taxable Presence
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F.A.S.B. TO MONITOR QUARTERLY AND ANNUAL REPORTING TO REFLECT T.C.J.A. CHANGES

The Financial Accounting Standards Board ("F.A.S.B.") has yet to release proposed guidance on how the recent Tax Cuts and Jobs Act ("T.C.J.A.") reform should be reflected on companies' financial reports. However, the F.A.S.B. has decided to monitor quarterly and annual corporate filings to observe how companies are reporting in light of the amendments.

Notable changes to the tax law include the reduction of the corporate tax rate from 35% to 21% and the introduction of the Global Intangible Low Tax Income ("G.I.L.T.I.") regime and the Base Erosion Anti-Abuse Tax ("B.E.A.T.") as it relates to deferred taxes.

The F.A.S.B. has issued an accounting standard update that allows a reclassification from accumulated other comprehensive income to retained earnings for so-called stranded tax effects resulting from the T.C.J.A.[1] The stranded tax effects are eliminated and will improve the usefulness of information reported to financial statement users. The guidance, however, does not address the inclusion in income from continuing operations resulting from the change in the corporate tax law and rates. Also, certain transition disclosures about stranded tax effects must be made which include the nature and reason for the change in accounting principle, a description of the prior period's information that has been retroactively adjusted, and the effect of the change on affected financial statement line items.

The most widely used accounting methods under the G.I.L.T.I. and B.E.A.T. provisions will be identified. In the third quarter, the F.A.S.B. plans to release the results of its preliminary research.

T.C.J.A. EFFECTS: SOME WIN BIG, OTHERS LOSE

The T.C.J.A. has brought in profits for some businesses, while for others the reforms have increased expenses.

The big winners include FedEx and Couche-Tard. The new lower corporate tax rate has caused FedEx to raise its annual profit forecast for the second straight quarter. Couche-Tard declared a $196.3 million net benefit as a result of remeasuring its deferred income tax balance in accordance with the lower corporate tax income rate. The deduction allowable under the transition tax was a major contributor.[2]

1 ASU 2018-02, *Reclassification of Certain Tax Effecrts from Accumulated Other Comprehensive Income (Topic 220)*.

2 Code §965.

In contrast, Jefferies, the global investment banking firm, reported a provisional T.C.J.A.-related charge of $164 million – $108 million of which was non-cash – and a net loss of $61 million after the provisional tax charge. Children's Place Inc., also falls into the losing caregory. It declared a $51.8 million tax expense for its fourth quarter of 2017. The charge consisted of $37.6 million in repatriation tax, $8.5 million in foreign and state withholding taxes for undistributed foreign earnings, and a $5.7 million charge resulting from a remeasurement of the company's deferred tax balances.[3]

SOUTH DAKOTA SUES TO COLLECT TAXES FROM ONLINE RETAILERS

Under a decision of the U.S. Supreme Court, state authorities are prohibited from collecting sales tax on retail purchases made through the internet or other e-commerce routes if the seller has no physical presence in the state.[4] This ruling is based on the Commerce Clause of the U.S. Constitution.[5] State tax authorities have argued that the advent of digital transactions makes this clause obsolete. In *South Dakota v. Wayfair, Inc.*, which is pending before the Court, the state of South Dakota is seeking to have the Supreme Court uphold its law calling for the collection of sales tax on digital sales to South Dakota residents.

As one of seven states without an income tax, South Dakota is heavily dependent on its 4.5% sales tax. In March 2017, South Dakota enacted Senate Bill 106 calling for the collection of sales taxes by out-of-state vendors for purchases made by instate residents. The law applies to vendors who make sales of over $100,000 during the year or who had more than 200 different transactions during the year with residents in the state. South Dakota sent notices to defendants Wayfair, Overstock.com, and Newegg reminding them of the obligation to collect and pay over the sales tax. The companies refused to comply with Sout Dakota state law, contending there was insufficient presence under the standard established in *Quill Corp v. North Dakota*.

A lower court struck down the South Dakota law as it violated the standard in the *Quill* decision. The Supreme Court agreed to hear the case. Fifteen briefs were submitted in support of South Dakota, and twenty-three briefs were submitted in support of Wayfair. Oral arguments have been heard by the Supreme Court.

The stakes in the case are high. Today, consumers conduct nearly 10% of all shopping online, and states collect relatively litte tax revenue from these sales. Smaller online retailers may be unable to navigate the state tax systems. Moreover, it is not clear which side will win no matter what decision is reached. If South Dakota wins, retailers may push for a national sales tax that will be shared on an apportioned basis with the various sates. If Wayfair wins, states may double their efforts to have the Quill decision legislatively reversed. Whether that can occur other than through a national sales tax is an open question.

A ruling is expected by end of the Supreme Court's current term in June.

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[3] Lydia O'Neal et al., "Daily Tax Report," *Bloomberg BNA*, March 21, 2018.

[4] *Quill Corp v. North Dakota*, 504 U.S. 298 (1992).

[5] U.S. Const. art. I, §8, cl. 3.

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