



TaxNewsFlash

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KPMG reports: California (marketplace facilitator law); California (mutual fund service provider sourcing rule); New Jersey (corporation business tax nexus); New York (broker-dealer sourcing rule)

KPMG This Week in State Tax—produced weekly by the KPMG State and Local Tax practice—focuses on recent state and local tax developments.

- **California:** The Office of Tax Appeals (OTA) recently concluded that it did not have jurisdiction to determine if a regulation was properly promulgated. The regulation at issue, California Code Regulations section 25137-14, was adopted in 2007 and provides a “look-through approach” for sourcing service receipts of a mutual fund service provider. In California, the promulgation of regulations is governed by the Office of Administrative Law, which is the sole California agency vested with the authority to determine whether a regulation of another agency was adopted in compliance with the state’s Administrative Procedures Act. As such, the OTA concluded that it lacked jurisdiction to consider the merits of appellant’s arguments that the Franchise Tax Board (FTB) failed to follow the required procedures when promulgating the mutual fund service provider regulation. The OTA next addressed—and rejected—the taxpayer’s position that the look-through approach in the mutual fund service provider regulation was improper because it conflicted with the statutory market-based sourcing rules.
- **California:** The Office of Administrative Law finalized amendments to a regulation addressing marketplace sales. The finalized regulation is generally unchanged from the previous draft version. As revised, there are numerous changes to the regulation, including addressing the statutory carve out for websites that merely advertise tangible personal property for sale and refer a purchaser to the seller to complete the sale.
- **New Jersey:** The Division of Taxation released a technical bulletin (TB-108) addressing corporation business tax nexus for privilege periods ending on and after July 31, 2023. In addition to discussing the state’s new economic nexus standard, the bulletin addresses Pub. L. No. 86-272 and sets forth a list of activities that, in the Division’s view, would cause a taxpayer to lose or retain Pub. L. No. 86-272 protection. Importantly, this list incorporates aspects of the Multistate Tax Commission (MTC) revised statement on Pub. L. No. 86-272 that affect sellers of tangible personal property that have websites or apps.

- **New York:** In a non-precedential decision, an Administrative Law Judge (ALJ) for the New York Division of Tax Appeals ruled in a broker-dealer taxpayer's favor in a dispute involving the application of the customer-based sourcing rules for such entities. Although the taxpayer lost on the issue of who was the relevant customer for purposes of applying the customer-based sourcing rules, the ALJ determined the Division's method to allocate the receipts factor overstated the factor. Therefore, using an alternative method based on New York's share of the U.S. Census was appropriate in this case. The ALJ also concluded that the Division's calculation of the receipts factor resulted in unconstitutional distortion of the taxpayer's income.

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