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State and Local Tax Planning and Strategies for Mergers & Acquisitions

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State Tax Issues on Mergers and Acquisitions

- Due Diligence
- Tax Issues on the Transaction
- Prospective Planning Issues

Due Diligence – Revenue Issues

- Identification of the goods and services provided by the company
- Bundling of goods and services
- Categorization of customers:
Retail:
 - Wholesale/resale;
 - Exempt user;
 - Exempt organization;
 - Government.

Due Diligence - Nexus Issues

- States in which the company has a permanent physical presence (e.g., employees, agents, real property, tangible personal, or tangible personal property)
- States in which the company has sent employees, agents, or other representatives to solicit sales on its behalf more than five times
- States in which the company has sent employees, agents, or other representatives to meet with existing clients more than five times
- States in which the company has clients located (either billing address or user address)

Due Diligence - Income/Franchise Tax Issues

- Filing Issues
 - States in which the company files a state income, franchise, or other "business activity" tax return
 - States in which the company joins in a combined (unitary) state income, franchise, or other "business activity" tax return with affiliates
 - States in which the company joins in a consolidated (based on the federal affiliated group) state income, franchise, or other "business activity" tax return with affiliates

Due Diligence – Income/Franchise Tax Issues

- Apportionment Issues

- Basis on which revenues are assigned a source for sales factor apportionment purposes for each state in which the company files a state income, franchise, or other "business activity" tax return or joins in the return of an affiliate (i.e., the greatest cost of performance, apportioned cost of performance, customer address)
- States in which the company has clients with a physical billing address for the services provided by the company and the percentage of revenue attributed to the customers in such states
- States in which the company has clients with users of the services provided by the company and the percentage of revenue attributed to the users in such states
- States in which the company has payroll expense localized (employee, agent, independent contractor)
- States in which the company has real or personal property located

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Due Diligence - Sales, Use, and Gross Receipts Tax Issues

- States in which the company is registered for sales, use, gross receipts, or other transaction-tax purposes
- States for which the company collects sales, use, gross receipts, or other transaction-taxes from customers

Due Diligence – Incentives Issues

- State or local tax or economic incentives applied for or received
- State or local tax or economic incentives claimed as-of-right

Due Diligence - Audit Issues

- Unclaimed property or state tax audits the company is currently undergoing
- Unclaimed property or state tax audits the company has undergone during the past five years

Due Diligence – Reserve Issues

- Identify and describe any reserves made for state unclaimed property liability
- Identify and describe any reserves made for sales, use, gross receipts, or other transaction-based tax liability
- Identify and describe any reserves made for state income, franchise, or other "business activity" tax liability

Tax Issues on the Transaction

- Income and Business Activity Tax Issues
- Transaction Taxes
- Bulk Filing Issues
- Straddle Periods
- Filing Responsibility

Transaction - Income and Business Activity Tax Issues

- Federal Conformity
- Business/Nonbusiness Characterization of Gain

Transaction - Transaction Taxes

- Sales and Use Taxes
- Real Estate Transfer Tax
- Stock Transfer Tax
- Documentary Transfer/Issuance Tax

Transaction - Bulk Transfer Filing Issues

- Successor Liability
- Tax Clearance
- Tax on the Transaction

Transaction - Straddle Periods

- Apportionment of Taxes
 - Income and Business Activity Taxes
 - Ad Valorem Taxes
 - Other Taxes
 - Unclaimed Property

Transaction - Responsibility for Filing and Right of Review

- Seller Rights and Obligations for Pre-Closing Periods
 - Indemnification
 - Right to Claim Refunds
- Buyer Rights for Post-Closing Periods
 - Consistency and Indemnification
 - Addition of Jurisdictions

Prospective Planning

- Structural Planning Issues
- Operational Planning Issues

Structural Planning Issues

- Location/Deductibility of Acquisition Indebtedness
- Selection/Management of the Unitary Group
- Nexus Management

Operational Planning Issues

- Public Law 86-272 Planning
- Factor Planning
- Nexus Management