New Beginnings in 2021?

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"Should old 2020 be forgot, and never brought to mind? Should old 2020 be forgot, and auld lang syne?"[51] The Robert Burns lyrics pose the rhetorical question, is it right that old times be forgotten? With respect to 2020, the response should be a resounding yes. Yet, while we may want to put 2020 behind us, we need to understand the implications that the challenges of 2020 will have not only on 2021, but for the foreseeable future.

Telecommuting is not a new concept, nor are the tax issues related to it. However, the existence of a remote workforce brought on by COVID has changed the nexus landscape for many taxpayers. Working from home or other remote locations in response to governmental advisories was thought to be just a temporary event. The business community has adapted to this "new normal," recognizing that what was first thought to be temporary may be permanent, or certainly continue longer than first anticipated. As businesses evaluate the location of their workforce nexus, the sub-issues related to it may be one of the major SALT issues to be addressed in 2021. Specifically, does the location of the remote workforce impose additional corporate income or other business tax filing requirements? How will the states apply the factor presence nexus thresholds if there are employees working remotely in the state? Could the location of a remote workforce change the composition of the current filing group? Does the presence of telecommuting employees working remotely affect the computation of the apportionment formula? What, if any, impact does the presence of remote employees have on sales and/or use tax collection requirements? Along with these fundamental nexus questions come other administrative issues related to state withholding on telecommuting employees who are working remotely. Will there be new payroll tax registration requirements placed on the employer? States have begun to issue policies addressing these issues. Some of those policies have angered neighboring states, giving rise to what may be some very interesting SALT litigation. Litigation aside, it is clear that as these issues evolve, additional guidance setting out the various states' approach to the enforcement of tax obligations resulting from the existence of a remote workforce will be needed.

June 2021 will mark the third anniversary of the *Wayfair* decision. Thus, we are well into the post-*Wayfair* era. Taxpayers will have had two plus years to evaluate their tax collection and filing obligations considering their business operations and state nexus thresholds. As a result, audits testing compliance with the various state economic thresholds may increase. 2021 is also likely to see more state taxing authorities move beyond sales tax implications of the decision and apply the *Wayfair* analysis to income taxes. For example, California has asserted that out-of-state sellers using marketplace fulfillment platforms may be subject to income taxes. This is a concept that may spread across taxing jurisdictions.

On November 3 the electorate in several states defeated tax measures that would have provided those states with much-needed revenue. The need for revenue at both the state and local levels is likely to lead to both new tax proposals and a revival of some old proposals in the 2021 legislative sessions. Taxing traditional services is not a new concept, but revenue needs may expand the tax base to include digital services such as digital advertising or other data collection services. On the income tax side states may reconsider their earlier decisions to decouple from some provisions of the TCJA such as those on global intangible low-taxed income, foreign-derived intangible income, or IRC section 163(j). While the electorate may have defeated several tax proposals, it also approved several ballot measures that would increase state and local revenues. Traditional revenue generators such as increased rates and broader tax bases have been joined by some nontraditional generators. The

[51] Apologies to the poet Robert Burns.

November election also saw the enactment of ballot measures approving sports betting and the legalization of recreational marijuana. Sports betting is now legal in more than 50 percent of the states. The taxes imposed on sports betting provide a new revenue stream for both state and local jurisdictions. Similarly, the legalization of recreational marijuana has created an entirely new opportunity to generate revenue at the state level as well as for local jurisdictions.

With 2020 behind us but unlikely to ever be forgotten, we need to move forward and address the challenges that 2021 will bring.