



# 2023 Year-End Tax Planning

For Privately-Held Businesses

# MEET THE SPEAKERS



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Slides are in the Chat.



# Poll Question 1

Did you attend AAFCPAs' Individual Tax & Wealth Preservation webinar on Tuesday?



# Federal Update

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# NET OPERATING LOSSES



## Carryback of NOL removed

Historically could carry back two years

CARES Act extended carry back for  
2018 – 2020

Current rules provide indefinite carryforward



## Limitation on NOL use

Offset 80% of taxable income with new losses

Historic losses fully utilized

FIFO ordering



# EMPLOYEE RETENTION TAX CREDIT

- Fully refundable tax credit based on qualified wages and health plan expenses
- Credit can still be claimed via amended payroll filings (Form 941-X)
  - 2020 claims must be filed by April 15, 2024
  - 2021 claims must be filed by April 15, 2025
- Moratorium on new credits claims through end of 2023

# Withdrawing an ERTC Claim

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- You can use the ERTC claim withdrawal process if all of the following apply:
  - You made the claim on an adjusted employment tax return (Forms 941-X, 943-X, 944-X, CT-1X).
  - You filed your adjusted return only to claim the ERTC, and you made no other adjustments.
  - You want to withdraw the entire amount of your ERTC claim.
  - The IRS has not paid your claim, or the IRS has paid your claim, but you haven't cashed or deposited the refund check.

Employer identification number (EIN)   -

Name (not your trade name)

Trade name (if any)

Address

Number Street Suite or room number  
 City State ZIP code  
 Foreign country name Foreign province/county Foreign postal code

**Return You're Correcting...**

Check the type of return you're correcting.

941  
 941-SS

Check the ONE quarter you're correcting.

1: January, February, March  
 2: April, May, June  
 3: July, August, September  
 4: October, November, December

Enter the calendar year of the quarter you're correcting.  
 (YYYY)

**Enter the date you discovered errors.**

/  /   
 (MM / DD / YYYY)

Withdrawn

Read the separate instructions before completing this form. Use this form to correct errors you made on Form 941 or 941-SS. Use a separate Form 941-X for each quarter that needs correction. Print within the boxes. You MUST complete all five pages. Don't attach this form to Form 941 unless you're reclassifying workers; see the instructions for line 42.

**Part 1: Select ONLY one of the following options.**

1. Adjustment process to correct the errors. You must check this box if you're correcting both underreported and overreported tax amounts on this form. The amount shown on line 27, if less than zero, may only be applied as a credit to your Form 941, Form 941-SS, or Form 944 for the tax period in which you're filing this form.

2. Claim. Check this box if you overreported tax and are using the claim process to ask for a refund or abatement. Don't check this box if you're correcting ANY underreported tax amounts.

**Part 2: Complete the certifications.**

3. I certify that I've filed or will file Forms W-2 as required.

**Note:** If you're correcting underreported tax amounts only, go to Part 3 on page 2 and skip lines 4 and 5. If you're correcting overreported tax amounts, for purposes of the certifications on lines 4 and 5, Medicare tax doesn't include Additional Medicare Tax. Form 941-X can't be used to correct overreported amounts of Additional Medicare Tax unless the amounts weren't withheld from employee wages or an adjustment is being made for the current year.

4. If you checked line 1 because you're adjusting overreported federal income tax, social security tax, Medicare tax, or Additional Medicare Tax, check all that apply. You must check at least one box. I certify that:

Write "Withdrawn" in left margin of form

Write your name, position in the company or organization, signature and date in the right margin of form

John Doe, President, John Doe, Date (MM/DD/YYYY)

**Scenario 1: You haven't received a refund and haven't been notified your claim is under audit.**

Fax the signed copy of your return using your computer or mobile device to the IRS's ETRC claim withdrawal fax line at 855-738-7609.



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**Scenario 2:** You haven't received a refund and you've been notified your claim is under audit.

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- If you've been assigned an examiner, communicate with your examiner about how to submit your withdrawal request directly to them.
- If you haven't been assigned an examiner, respond to your audit notice with your withdrawal request, using the instructions in the notice for responding.

## Scenario 3: You received a refund check but haven't cashed or deposited.

- Prepare the **claim withdrawal request from scenario 1**, but don't fax the request.
- Write "**Void**" in the endorsement section on the back of the refund check.
- Include a **note** that says, "ERTC Withdrawal" and briefly explain the reason for returning the refund check.
- Make **copies for your tax records** of the front and back of the voided check, the explanation notes and the signed and dated withdrawal request page.
- Don't staple, bend or paper clip the voided check; include it with your claim withdrawal request and **mail it** to the IRS at:
  - **Cincinnati Refund Inquiry Unit**  
**PO Box 145500**  
**Mail Stop 536G**  
**Cincinnati, OH 45250**



# Research & Development Costs

- Notice 2023-63
- IRS provided guidance on:
  - Definition of software development
  - Treatment of contract research
  - Interaction of Sec. 174 with long term contracts
  - Certain dispositions
- Although these costs must be capitalized, this does not affect a company's ability to take R&D credits



# Inflation Reduction Act

- Expanded or extended tax credits for individuals and businesses
  - Qualifying Advanced Energy Project Credit (Sec 48C)
  - Advanced Manufacturing Production Credit (Sec 45X)
  - New Energy Efficient Home Credit (Sec 45L)
  - Commercial Building Deduction (Sec 179D)
- In most cases, these credits can be sold, creating a benefit, even if a company does not currently have taxable income
- Corporate AMT if revenues > \$1B
- 1% excise tax on share buybacks
- \$79 billion of IRS funding



# Keys Take-aways

- Although a company may have substantial NOLs generated in years after 2020, it is important to remember that the losses may not completely offset income
- Consider whether it is appropriate to review ERTC claims
- Analyze the effect of R&D capitalization on taxable income when tax planning
- Evaluate whether adopting green energy alternatives can benefit your company



# Poll Question 2

Have you or do you plan to utilize any of these credits before year end?



# State & Local Tax (SALT) Update

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# STATE TAX TRENDS

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- 2023 is 3<sup>rd</sup> consecutive year of substantial state tax reform and relief
- Since 2021:
  - 25 states have cut individual tax rates,
  - 13 states have cut corporate income tax rates and
  - 2 states have cut sales tax rates
- Taxpayer friendly reforms:
  - Repeal of throwback/throwout
  - Permanent full expensing of machinery & equipment even as bonus depreciation is being phased out for federal tax purposes
- Many states experiencing revenue growth well above pre-pandemic level
- Competitiveness among states
- Starting to think about how to tax NFTs and crypto?



# Significant State Tax Developments

## CORPORATE TAX

- Massachusetts
- New Jersey
- New York
- Ohio

## SALES TAX

- Retail delivery fees
- Digital services
- Cannabis
- Chicago **PPLT** Tax

## INDIVIDUAL INCOME TAX

- SALT Fairness and Deficit Reduction Act
- “Wealth” taxes

# MULTISTATE TAX COMMISSION & PL 86-272



## What is the MTC?

An organization working with states and taxpayers to promote uniformity and avoid duplicative taxation within the confines of the US Constitution

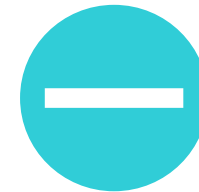
Helping taxpayers comply with complicated state laws



## What is PL 86-272?

Enacted in 1959 to limit states' abilities to subject businesses to corporate income tax

Outdated now due to change in how sales are made



## MTC Interpretation

2021 – added a new section re: internet activity

List of unprotected activities

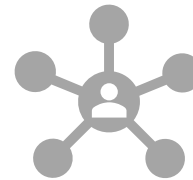
Does not have force of law and states are not obligated to adopt

# MULTISTATE TAX COMMISSION & PL 86-272 (Cont'd)



**CA**

1st state to adopt  
Enforcing retroactively



**NY**

In the process of adopting  
Departs from the MTC language to  
include interacting with customers  
in any way via the internet  
May be favorable or unfavorable for  
taxpayer



**Other States**

NJ  
OR

# CONFORMITY WITH FEDERAL TAX LEGISLATION

- SECTION 174 – Capitalization and amortization of R&D
- SECTION 163(j) – Limitation on business interest expense
- SECTION 168(k) – Bonus depreciation
- SECTION 951A – Global Intangible Low-Taxed Income (GILTI)



# State Tax Implications of Remote Workers

- PAYROLL TAX WITHHOLDING
  - Based on where employees are performing services
  - Reciprocity / Credits
- CONVENIENCE RULES
- SPLIT TIME
- UNEMPLOYMENT



# PASS- THROUGH ENTITY (PTE) TAX

## Pass-Through Entity Taxes

- PTE's (S corps, partnerships) generally elect to be taxed at entity level for state income tax
- Tax assessed at highest individual rate in most states and PTE deducts entire amount
- Reduces each owner's distributive share of ordinary income and avoids limitation

## Current Landscape

- IRS has provided confirmation for state PTE tax deductibility
- 36 states have a PTE tax regime in place
- Only CT is a mandatory PTE tax

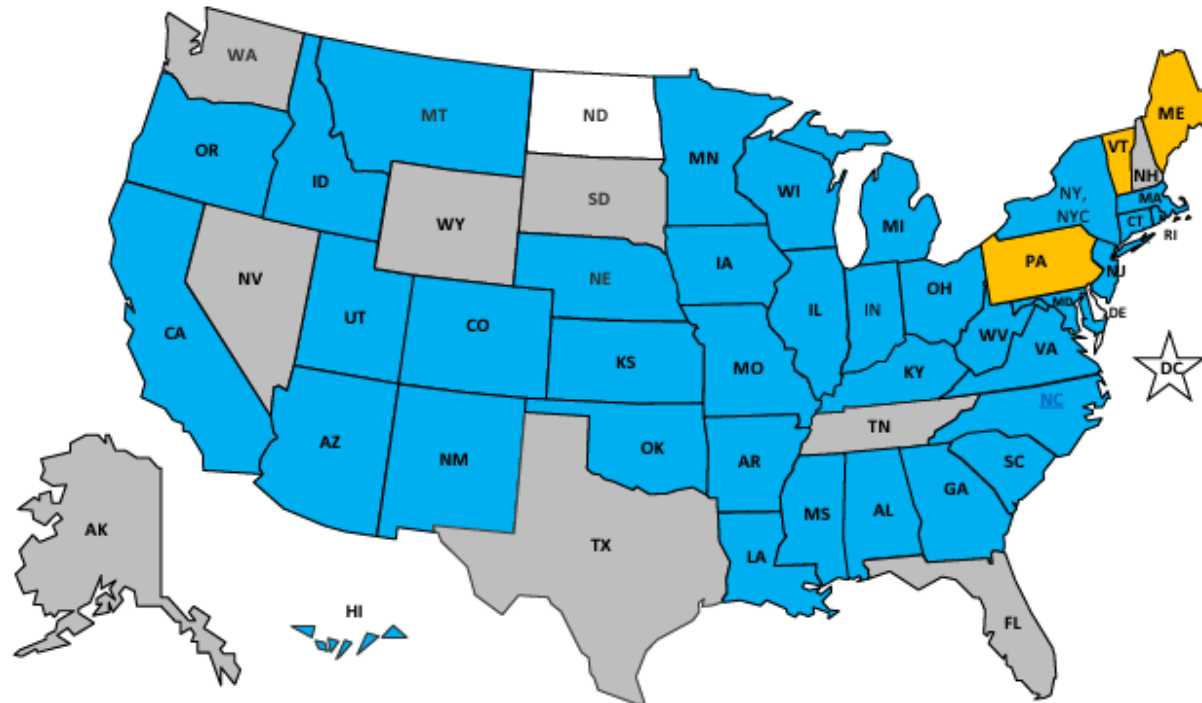
## Future Considerations

- Federal SALT deduction cap sunsets after 2025
- Potential legislation to extend duration or increase cap
- CT will become elective in 2024

# State PTE Tax Map

## States with Enacted or Proposed Pass-Through Entity (PTE) Level Tax

As of August 10, 2023



- 36 states (& 1 locality) that enacted a PTE tax since TCJA SALT deduction limitation, effective for 2021 (or earlier) unless noted:

[AL](#), [AR](#)<sup>1</sup>, [AZ](#)<sup>1</sup>, [CA](#), [CO](#)<sup>3</sup>, [CT](#)<sup>4</sup>, [HI](#)<sup>2</sup>, [GA](#)<sup>1</sup>, [IA](#)<sup>1</sup>, [ID](#), [IL](#), [IN](#)<sup>1</sup>, [KS](#)<sup>1</sup>, [KY](#)<sup>1</sup> (& [KY](#)), [LA](#), [MA](#), [MI](#), [MD](#), [MN](#), [MO](#)<sup>1</sup>, [MS](#)<sup>1</sup>, [MT](#)<sup>2</sup>, [NC](#)<sup>1</sup>, [NE](#)<sup>3</sup>, [NJ](#), [NM](#)<sup>1</sup>, [NY](#), [OH](#)<sup>1</sup>, [OK](#), [OR](#)<sup>1</sup>, [RI](#), [SC](#), [UT](#)<sup>1</sup>, [VA](#), [WI](#), [WV](#)<sup>1</sup>, and [NYC](#)<sup>1</sup>

<sup>1</sup> Effective in 2022

<sup>2</sup> Effective in 2023 or later

<sup>3</sup> Retroactive to 2018

<sup>4</sup> Mandatory 2018-2023, elective starting 2024

- 3 states with proposed PTE tax bills:  
ME - [LD 1891](#) introduced (session ended)  
PA - [SB 659](#) and [HB 1584](#) introduced  
VT - [SB45](#) passed Senate, in House (session ended)

- 9 states with no owner-level personal income tax on PTE income:  
AK, FL, NH, NV, SD, TN, TX, WA, WY

- 3 states with an owner-level personal income tax on PTE income that have not yet proposed or enacted PTE taxes:  
DC, DE, and ND



# STATE TAX ISSUES FOR NONPROFITS

- Equating “nonprofit” with “tax exempt” may be true for federal and state income taxes but not necessarily when it comes to property or sales & use tax
- Sales BY nonprofits versus sales TO nonprofits
- Not all states offer sales tax exemptions, or the definitions may be very specific
- Sales to private schools versus public schools
- Employees generally only create nexus if they are soliciting contributions in the state
- May need to register with the Secretary of State and file annual reports



# State Credits & Incentives

## CREDIT vs INCENTIVE

- Credits generally claimed after completion of activity
- Incentives generally negotiated before the action occurs

## VARIOUS FORMS

- Income Tax Credits, Property Tax Credits, Sales Tax Credits, Withholding Tax Credits, Rebates, Refunds, Grants, Cash, Non-Cash

## TRANSFERABILITY

- Some credits offer ability to transfer to other entities
- Some credits (i.e., Historical, Film, etc.) can be bought and sold, providing tax saving opportunities



# STATE REGISTRATIONS

- Secretary of State
- Payroll Tax
- Sales & Use Tax



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Nexus Study

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Multistate SALT Analysis

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State Credits & Incentives

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Due Diligence / Mergers & Acquisitions

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Voluntary Disclosure Agreements

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Amnesty Programs

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Cost/Benefit Analysis

# **Strategic Resolution and Planning**

# Poll Question 3

How confident are you your business complies in all states where it has nexus for sales and income/franchise tax?



# International Tax Pitfalls & Planning

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# Payments Made to Foreign Persons

- Fixed or determinable, annual or periodic (“FDAP”) income paid to the foreign person
- Form 1042 and Form(s) 1042-S due annually on March 15th
- Most types of U.S. source income received by a foreign person are subject to a U.S. tax of 30%
- A reduced rate, including exemption, may apply if there is a tax treaty between the foreign person's country of residence and the United States

# Reportable Payment Examples

- Interest, dividends, royalties
- Bank deposit interest
- Board members who are not US person who attend meetings in the US
- Foreign independent contactors who perform services in the US
- Foreign vendors for:
  - Consulting services
  - Legal services
  - Rents/Lease of real property
  - Software/License payments
  - Royalty payments





# Proper Documentation Required

- Relevant documentation required for Forms W-8
- 30% withholding is automatic if no Form W-8 has been submitted to the withholding agent or payer
- Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting: Used by foreign individuals
  - Used by foreign individuals
- Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting
  - Used by foreign entities





# Schedules K-2 & K-3 & Domestic Filing Exception

- Goal is to be more transparent when it comes to reporting for foreign activities
- Domestic Filing Exception:
  - No or limited foreign activity
  - All partners/shareholders must be U.S. citizens or resident aliens
  - Partner/shareholder notification
  - No Schedule K-3 requests by partner/shareholder one month before the return due date



# U.S. Partnerships with Foreign Partners

- Form 8804: Annual Return for Partnership Withholding Tax (Section 1446)
  - Reconciliation of total **Effectively Connected Taxable Income** and withholdings to foreign partners
- ECTI Withholdings:
  - 37% for non-corporate foreign partners
  - 21% for corporate foreign partners
- Filed with Form 1065 and are due either March 15<sup>th</sup> or September 15<sup>th</sup> each calendar year

# Permanent Establishment (PE)



Establishment

- Typically based on physical presence/connection such as:
  - Fixed place of business in another country
  - Dependent agents operating within another country
- Can apply in situations such as:
  - US company doing business abroad
  - Foreign company doing business in US
- PE standards differ country by country, reference any treaties

# Canadian Tax Considerations

## WHO MAY BE LIABLE?

- Selling to Canadian customers
- Employees providing services in Canada
- Leasing goods/equipment
- Soliciting business in Canada

## WHAT CONSTITUTES PERMANENT ESTABLISHMENT?

- Fixed place of business
- Providing services for more than 183 days/year
- Canadian employees habitually executing contracts

## TYPES OF TAXES

- Canadian Corporate Income Tax
- Goods & Services Tax (GST, HST, PST)
- Customs and Trade for duties, tariffs, etc.





# PE – U.S. Tax Implications for Foreign Businesses

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- If Permanent Establishment Exists
  - U.S. tax return filing requirement
  - Taxed based on applicable treaty rates
  - FDAP/ECI/Branch Profits Tax
- Protective Return (Form 1120-F)
  - PE exposure is minimal and no ECI
  - Preserves rights to deductions/credits (tax on net vs. gross income).
  - Begins Statute of Limitations

# FinCEN Beneficial Ownership Information Reports

- **Corporate Transparency Act of 2021**
  - Beneficial Ownership: individual who either (1) exercises substantial control or (2) maintains ownership of 25% or more of the company
  - Reporting Company applies to all U.S. and even foreign companies registered to do business in the U.S. with some exceptions
- **Filing Timing**
  - January 1, 2025 for businesses formed before December 31, 2023
  - 30 days from date of formation for businesses formed after December 31, 2023
  - No further filings unless change in beneficial ownership, then 30 days after
- **Penalties**
  - \$500 per day, up to \$10,000 plus up to two years of imprisonment
- **Protecting Small Business Information Act of 2023**



# Other International Updates & Considerations

- Global Intangible Low-Taxed Income (GILTI)
  - Tax rate increasing to 13.125% from 10.5% in 2026
  - GILTI deduction decreasing to 37.5% from 50% in 2026
- Foreign Derived Intangible Income (FDII)
  - FDII deduction decreasing to 21.875% from 37.5% in 2026



# Poll Question 4

Are you confident your international tax obligations are being address?





# Closing Thoughts

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# Questions



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# Upcoming Webinars

[aafcpa.com/webinars](http://aafcpa.com/webinars)



**Cannabis Tax Webinar**

November 7, 2023



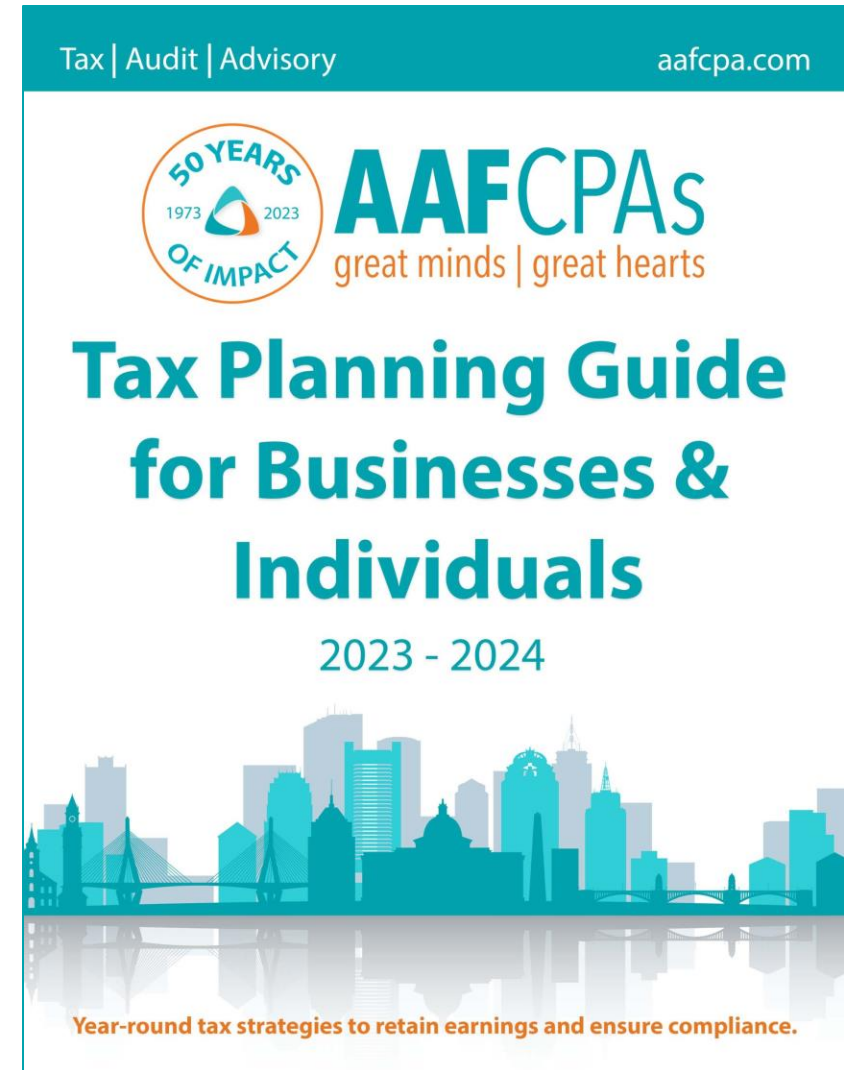
**Cannabis Business Transactions for  
Growth & Exit Webinar**


November 21, 2023



# 2023 – 2024 Tax Planning Guide for Businesses & Individuals

We welcome the opportunity to help you map out a tax plan that takes full advantage of all strategies available to you.





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