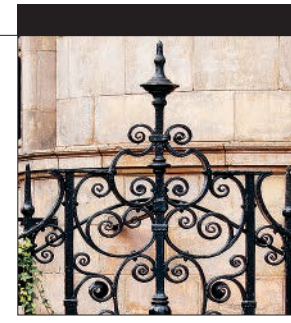

State Income Taxation of Trusts: Some Lessons of *Kaestner*

A U.S. Supreme Court decision restricting state taxation of trust income provides guidance for planning but raises many questions.

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On 6/21/2019, the Supreme Court of the United States published its decision in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust* [1] (*Kaestner*). It holds that, by reason of the due process clause[2] of the Fourteenth Amendment of the U.S. Constitution, a state may not impose its income tax on undistributed income of a trust merely because a beneficiary, who was eligible to receive but did not receive any distribution from the trust in the years in question, was a resident of the state. In essence, the decision was unanimous, although Justice Alito filed a concurring opinion, to which Chief Justice Roberts and Justice Gorsuch joined. That concurring opinion will be further discussed below because it may temper certain statements made in the court's opinion.

The decision is limited to the facts of the case which in *Kaestner* is narrow and seems to mean that a state, such as North Carolina, may not impose its income tax on undistributed trust income merely because a beneficiary who resides in the state is eligible to receive trust distributions. The decision does not provide the parameters of when a state may impose its tax on undistributed trust income. But it appears to be filled with significant discussion of the issue. That discussion may inform states on how to restructure their state income tax laws so they can impose their state income tax on undistributed income of a trust. It also should inform practitioners on how to try to structure, and trustees how to administer, trusts to avoid a state tax. Although the court's opinion is narrow, the implications to draftspersons and trustees seem to be broad.

It is worth noting that the *Kaestner* decision was based solely on due process. Another ground that taxpayers have used to try to avoid having a state impose its income tax on undistributed trust income is the commerce clause contained in Article I, Section 8, Clause 3 of the Constitution. But that was not addressed by the Court, even though the trial court in North Carolina did address it, and found that the Commerce Clause also foreclosed income taxation of the trust's undistributed income.

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Reasoning of the Court

The Due Process Clause of the Fourteenth Amendment provides: "No state shall … deprive any person of life, liberty, or property, without due process of law."

The U.S. Supreme Court noted that the Due Process Clause requires sufficient nexus to the taxing state to support imposition of a tax. Quoting the 1992 *Quill*[3] opinion, the *Kaestner* Court indicated that nexus requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." The Due Process Clause also requires that there be a connection between the taxing state and the trust income being taxed. Because the beneficiaries did not receive or have a right to income, the Court concluded there was no such connection.

The Due Process Clause requires addressing the specific relationship between the resident of the taxing state and the trust income that the state seeks to tax. Each person fulfills different functions in the creation and continuation of every trust, so that the specific terms of that relationship have to be sufficient to sustain a tax. This will vary depending on whether the resident is a settlor, beneficiary, or trustee.[4]

In *Quill*, the Supreme Court specifically examined the differences between the "minimum contacts" nexus required by the Due Process Clause and the "substantial nexus" required by the Commerce Clause. *Quill* was overturned, in part, last year in the *Wayfair* case.[5]

Essentially, the U.S. Supreme Court agreed with the decision of the Supreme Court of North Carolina that the state could not impose its tax on the undistributed income of the trust because the state "lacks the minimum connection with the object of its tax that the Constitution requires."

The court found that North Carolina's only connection to the trust in the tax years in question was the state residency of the trust beneficiaries to whom the trustee chose not to distribute any of the income. The trustee's contacts with the beneficiary were "infrequent." The trustee maintained trust documents and records in New York, and the trust asset custodians were located in Massachusetts. The trust also maintained no physical presence in North Carolina, made no direct investments in the state, and held no real property there.

But before turning to additional statements of the court, it seems appropriate to briefly discuss the general rules on the income taxation of trusts.

Summary of income taxation of trusts and their beneficiaries

For federal income tax purposes, trusts and their beneficiaries are taxed on trust income under a unique set of rules, unlike corporations and their shareholders (including S corporations) or partnerships and their partners or other tax entities and their beneficiaries or owners. In fact, Section 641(b) provides that trusts and decedents' estates are to be taxed in the same manner as individuals are taxed, except as otherwise provided in the Code.[6]

One of the differences between taxation of an individual, on the one side, and a trust[7] or estate, on the other, is that a trust or estate is entitled to an income tax deduction for its distributable net income (DNI)[8] that is distributed, or treated as distributed, to a beneficiary who must include the DNI in income on his or her personal tax returns.[9] To the extent an estate or trust is not entitled to distribute its income and claim a DNI deduction, the income will be taxed to the estate or trust. The issue dealt with in *Kaestner* was the ability of a state to tax such undistributed income.

What more the Court said

Although the court limited its holding to the precise facts before it, many of its statements may be informative as to when a state might impose its income tax on trust income that is not taxed to a beneficiary.

The court stated, in part, "The Court has already held that a tax on trust income distributed to an in-state resident passes muster under the Due Process Clause. *Maguire v. Trefry*, 253 U.S. 12, 16–17 (1920). So does a tax based on a trustee's in-state residence. *Greenough* [*v. Tax Assessors of Newport*, 331 U.S. 486 (1947)] at 498. The Court's cases also suggest that a tax based on the site of trust administration is constitutional. See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Curry v. McCanless*, 307 U.S. 357, 370 (1939)."

The Court noted that the trustee resided out of state, trust adminis-

1 2019 WL 2552488, 588 U.S. ____ (2019).

2 The Due Process Clause limits states to imposing only taxes that "bea[r] fiscal relation to protection, opportunities and benefits given by the state." Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940).

3 Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

4 See Berry, "U.S. Supreme Court: State Violated Due Process by Taxing Trust," Wealth Planning, 6/21/2019.

5 South Dakota v. Wayfair, Inc., 585 U. S. ___ (2018).

6 In fact, Section 641(c) provides that they will be taxed the same as individuals, except as provided in Subchapter J. However, sections outside of Subchapter J provide some of the unique treatment of trusts and decedents' estates. See, e.g., Section 167 providing for the treatment of depreciation on property held by a trust or an estate, and the treatment for those entities is somewhat different. Throughout this article, any reference to "Section" is to a section of the Internal Revenue Code of 1986 as amended.

7 Some trusts, commonly called grantor trusts, have their income, deductions, and credits against tax attributed to the trust's grantor or to someone who has certain powers to demand the income or corpus of the trust. See Sections 671 through 679. Whenever the term "trust" is used in this article, it means a trust that is not such a grantor trust.

8 See Section 643(a) for the definition of DNI.

9 See Sections 651, 652, 661, and 662.

10 UTC § 108(a).

11 See, e.g., Mercantile-Safe Deposit and Trust Company v. Murphy, 15 N.Y.2d 579 (N.Y. 1964); Kassner v. Division of Taxation, 2013 N.J. Tax LEXIS 1 (1/3/2013); 2015 N.J. Tax LEXIS 11 (2015); Linn v. Department of Revenue, 2013 Il. App. 4th 121055 (12/18/2013); McNeil v. Commonwealth of Pennsylvania, 2013 Pa. Commw. LEXIS 168 (2013).

12 Fielding v. Commissioner of Revenue, 2018 WL 3447690 (Minn. 7/18/2018), *aff'g* 2017 WL 2484593.

13 Cynthia Bauerly, Commissioner, Minnesota Department of Revenue v. William Fielding, Trustee of the Reid and Ann MacDonald Irrevocable GST Trust for Maria V. Macdonald, et al., No. 18-664.

tration was split between New York (where the trust's records were kept) and Massachusetts (where the custodians of its assets were located), and the trustee made no direct investments in North Carolina. Do these statements mean that if some trust administration occurred (or trust records were kept) in North Carolina and/or there had been a direct investment there that the state could impose its income tax on the trust's undistributed income? Perhaps. It also warrants noting that it may be increasingly uncertain how the location of trust administration will be determined as more of these activities are automated, outsourced, and cloud based. What is the situs of cloud-based records? As to administration, investment advisors, back office operations, and other activities that comprise trust administration activities may be located remotely in various states.

The Uniform Trust Code determines a trust's "principal place of administration" based on the connection to a particular jurisdiction. This is based on the location where part or all of the administration of the trust occurs, and the location of the trustee's principal place of business.[10] Does the mere chance location of a trust company back office operation in a particular state subject to tax any trust administered by that trust company in that state?

The Court mentions in footnote 3 that there were only two meetings between the beneficiaries and the trustee in the tax years in question, both of which took place in New York. Does that suggest that if there had been several meetings with the beneficiary that took place in North Carolina that its decision would have been different? How many meetings in the state might that require? What if meetings were held by web conference with an out-of-state trustee?

The Court also mentions that the trustee gave the beneficiary accountings of trust assets and legal advice concerning the trust. It seems somewhat curious that the court mentions the foregoing factors, as the North Carolina statute does not look to such factors in its statute to impose its tax on trust income. Why are they mentioned? Is the Court saying that states cannot add those factors (e.g., giving accountings and legal advice to the beneficiaries) to other factors to permit the state lawfully to impose its income tax? Perhaps, the implication is the opposite, that if state statutes had a variety of factors to consider, the weight of those factors at some point might permit the state to levy its income tax on undistributed income.

North Carolina's only connection to the trust in the tax years in question was the state residency of the trust beneficiaries that the trustee chose not to distribute any of the income to.

It might also be that, even though the North Carolina taxing statute did not list any connection to the state other than the beneficiary's residence being there, that it would have held that it would have found its application to the *Kaestner* trust would not have been a violation of the Due Process Clause if some other factor, such as having a North Carolina trustee, had been present. That is, the court may have been implying that, even though the statute does not use any factor other than the residence of a beneficiary, which alone would violate the Constitution, the application of the tax would be lawful if some other factor (such as the residence of the trustee) were present. It simply seems uncertain. Despite the uncertainty, these points do provide important guidance to practitioners and trust officers as to the structure and administration of trusts when avoiding state income taxation is a goal. This will be discussed below.

The Court also mentioned that the settlor did not reside in North Carolina. Many states use the settlor's domicile as the factor or a factor in imposing its tax on undistributed trust income although it seems appropriate to note that some state courts have held that the settlor's domicile alone cannot provide the premise for taxation of the trust.[11] The Minnesota Supreme Court in *Fielding* held that domicile of the settlor alone was insufficient to permit taxation as it would violate due process.[12] The Supreme Court has denied certiorari in that case.[13]

The Court held "that the presence of in-state beneficiaries alone does

not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain ever to receive it," but the Court added "we do not imply approval or disapproval of trust taxes that are premised on the residence of beneficiaries whose relationship to trust assets differs from that of the beneficiaries here" and the court added (in footnote 10) "We have no occasion to address, and thus reserve for another day, whether a different result would follow if the beneficiaries were certain to receive funds in the future." Again, despite the narrowness of the opinion and the uncertainty of how additional factors might be weighed by a court, practitioners and trust officers may evaluate other contacts of trusts and their beneficiaries to possibly deflect state taxation.

Before trying to figure out to what extent such statements indicate when a state may impose its tax on undistributed income of a trust, it is appropriate to take a look at some of what Justice Alito said in his concurring opinion. It seems he may be indicating that the Court's opinion may suggest a ground for a state to impose its tax on undistributed income beyond what he sees as precedent. For example, in the sole footnote to his opinion, he stated, in part, that *Brooke v. Norfolk*,[14] held that "even if the children had a right [to all the trust income], it would not, alone, justify taxing the trust corpus." Unfortunately, the footnote does not indicate whether it is intended to mean only income attributed to corpus (such as capital gain in the "normal case"[15]) could not be taxed or if it means something else.

What states might do

First determine what the state statute provides. Even if several additional factors would weigh in favor of allowing a state to impose its tax on the trust (e.g., settlor was domiciled in the state when the trust became irrevocable, one or more trustees reside in the state, or the trust holds assets in the state), North Carolina presumably could not have imposed its tax because the statute was premised on only one factor: A North Carolina resident was a beneficiary to whom the trustee could make distributions. In other words, in determining if the state could impose its tax, one first must see what the basis is for the tax under that state's law. The mere fact that the state could have adopted an additional ground for taxation that would have been constitutional may not mean the state can impose the tax if that additional ground is not set forth in the state taxing statute but, perhaps, the Supreme Court might be indicating that it might. It simply is not certain and if a state might do so, it would mean uncertainty in the application of the tax. In any case, might states start adopting statutes listing a multiple of factors to shore up their right to tax?

It might be that governing law could be an important factor in allowing the state to impose its tax on the trust income.

For example, New York imposes its tax on undistributed trust income only if, among other conditions, the trust was created by a New Yorker.[16] Hence, even if one concludes that one or more other factors (e.g., one or more trustees reside in New York), New York will not impose its tax unless the grantor resided in New York when the trust became irrevocable. In other words, even if New York could impose its income tax on undistributed income of the trust because the trust is administered there and there are New York trustees, the New York tax would not be imposed if the grantor were not a New Yorker.

North Carolina imposed its tax if the trust had no relationship with the state other than one or more beneficiaries residing there. If the grantor had resided there or North Carolina law governed the trust, the result might have been different but presumably only if the state statute so provided, although this is not entirely certain.[17]

What factors the states use to tax

Indeed, states impose their income tax on trusts on a variety of factors. Exhibit 1 contains a table summarizing state income taxation of trusts, which is adapted from an article by Richard Nenno.[18] According to the Nenno article, all of the taxing states tax a nongrantor trust[19] based on one or more of the following five criteria:

1. If the trust was created by the will of a testator who lived in the state at death.
2. If the trustor of an inter vivos trust lived in the state when he or she placed assets in the trust, or when the trust became irrevocable.
3. If the trust is administered in the state.
4. If one or more trustees live in, or do business in, the state.
5. If one or more beneficiaries live in the state.

Nonetheless, the article notes that "Louisiana taxes an inter vivos trust if the trust specifically provides that Louisiana law governs, but it does not tax such a trust if the trust specifies that the law of another state applies. Idaho and North Dakota

consider the designation of its law as a factor in determining whether a trust is a resident trust. Otherwise, the designation of a state's law to govern a trust has no bearing on its classification." It might be that governing law could be an important factor in allowing the state to impose its tax on the trust income, as apparently Louisiana, Idaho, and North Dakota do. In fact, if the law of a state governs the trust, that may allow access to that state's courts to resolve legal issues related to the trust and that might be found to be a sufficient ground to tax the trust's undistributed income.

So, it seems that, even if the grantor was a Louisiana resident, the beneficiaries are all in that state, the trustees live there, and the trust is administered there, Louisiana will not tax the undistributed income of the trust if the law of some other state governs the trust.[20] Although the Supreme Court in *Kaestner* did not pass on this issue, the decision may suggest, because it did not list governing law as a factor that might be considered, that a state may not tax such income merely because the trust is governed by the law of that state. It would not be simple, however, to avoid having a state resident create the trust if the grantor, in fact, lives there when the trust is created (or becomes irrevocable). Probably, the easiest way to avoid state income taxation is to have no trustee in the state, no trust asset in the state, and for no trust administration to occur there.

California and other states impose their tax on the undistributed income of the trust if there is a California resident trustee even if no other state factor is present that might be used as a factor to impose its tax (e.g., the grantor lived in California when the trust was created). In other words, the California statute imposes the tax if there is a California trustee (although if there is also at least one non-California trustee, a proportionate tax is imposed) even if the grantor was never there and there is no other connection to the state.[21]

The California statute also imposes its tax if there are one or more noncontingent trust beneficiaries who reside there. The meaning of "noncontingent beneficiary" is not entirely certain[22] but it does not appear to include a person who is merely eligible but who does not receive a distribution from the trust. Connecticut imposes its income tax if the grantor resided there when the trust became irrevocable and if the trustee could distribute income to a Connecticut beneficiary (that is, even if the beneficiary is contingent, apparently meaning one who is eligible to receive a distribution even if the beneficiary does not receive one, in contrast to California where a beneficiary's residence can trigger state income tax only if he or she is noncontingent). *Kaestner* indicates that this latter factor alone is insufficient to allow a state to impose its income tax although, perhaps, coupled with the grantor being a Connecticut resident it might be sufficient.

In any case, although *Kaestner* did not specify what factors would be sufficient for a state to impose its income tax on the undistributed income of a trust, states may decide to change their statutes to provide a list of factors, which if present, will serve as the basis to tax. Obviously, a state statute imposing its tax if all the factors listed by the Nenno article, cited above, are present may be sufficient constitutionally to impose the tax but it might provide a relatively easy way for a trust to avoid the state income tax.

For example, not having a trustee in the state would limit the choice of trustees but, perhaps, that could be overcome by having an out-of-state entity (e.g., an S corporation) owned by a state resident act as the trustee. Nonetheless, that may not "work" if the state may constitutionally use another or an alternative factor, such as if trust administration occurred in the state. Indeed, as noted else-

[14] 277 U.S. 27 (1928).

[15] See Section 643(a)(3).

[16] New York Tax Law § 605.

[17] *Cf.* Cowan v. First Ins. Co., 608 P.2d 394 (Haw. 1980).

[18] See Nenno, "Bases of State Income Taxation of Nongrantor Trusts, State Survey," American College of Trust and Estate Counsel (ACTEC), updated 7/5/2019 (State Survey).

[19] A nongrantor trust is a trust that is not a grantor trust which is one where the income, deduction, and credits against tax are attributed, under Section 671, to the trust's grantor (and in one case, pursuant to Section 678, to the person who has the unfettered right to withdraw the trust property). A nongrantor trust is taxed as a separate individual taxpayer as a general rule. See Section 641(b). But see Sections 651, 652, 661, and 662.

[20] It might be that Louisiana would argue that all those factors suggest that Louisiana really is the governing law. *Cf.* Restatement (Second) of Conflict of Laws section 270 that the validity of a trust may be determined, not by the law declared in the trust, but the law of the state having the primary interest in the issue.

[21] For this purpose, the residence of a corporate fiduciary of a trust means the place where the corporation transacts the major portion of its administration of the trust. Calif. Revenue and Tax Code § 17742. Where the taxability of income under this chapter depends on the residence of the fiduciary and there are two or more fiduciaries for the trust, the income taxable is to be apportioned according to the number of fiduciaries resident in California.

[22] "California Code of Regulations Title 18, Section 17742(b), defines a contingent beneficiary as one whose 'interest is subject to a condition precedent,' meaning a condition must be satisfied in order for the beneficiary's interest in the trust to vest or become noncontingent. Conversely, a beneficiary whose interest is vested is a noncontingent beneficiary. While there is little authority on the subject, FTB Technical Advice Memorandum 2006-0002 provides that, generally, a beneficiary whose beneficial interest is subject to the trustee's sole and absolute discretion has a contingent interest until the trustee decides to distribute the property." Babic, "Income Taxation of Trusts in California," Tax Insider (7/26/2018) available at https://www.thetaxadviser.com/newsletters/2018/jul/income-taxation-trusts-california.html.

[23] Justice Alito states in his concurring opinion: "In the case of intangible assets held in trust, we have previously asked whether a resident of the State imposing the tax has control, possession, or the enjoyment of the asset. See *Greenough v. Tax Assessors of Newport*, 331 U.S. 486, 493–495 (1947); *Curry* [v. *McCanless*, 307 U.S. 357 (1939)] at 370–371; *Safe Deposit & Trust Co. of Baltimore v. Virginia,* 280 U.S. 83, 93–94 (1929); *Brooke v. Norfolk*, 277 U.S. 27, 28–29 (1928). Because a trustee is the legal owner of the trust assets and possesses the powers that accompany that status—power to manage the investments, to make and enforce contracts respecting the assets, to litigate on behalf of the trust, etc.—the trustee's State of residence can tax the trust's intangible assets. *Greenough*, supra, at 494, 498."

where in this article, California provides that, if there is a corporate fiduciary, the trust will be deemed to have a California trustee if the trust, in fact, is administered there.

Factors that might lawfully permit a state tax

The court seems to indicate that any of these three factors might be sufficient for a state to impose its tax on undistributed tax income:

1. The presence of an in-state trustee.
2. Significant administration of the trust in the state.
3. The presence of beneficiaries residing in the state who have control, possession, or the enjoyment of the trust.[23]

Of course, at least some of these beg the question of what they are. For example, what does it mean for a resident to have control, possession, and enjoyment of a trust? Indeed, that the beneficiary may be entitled to the entire trust at a later time (such as reaching a certain age) may not be sufficient especially if the beneficiary would succeed to the asset only if alive at that time. In fact, in *Kaestner*, the beneficiary was to receive her share of the trust upon reaching age 40. But the trustees "decanted" the trust so it would last for her entire lifetime.[24] It might be that the action of decanting to a long-term trust, thereby eliminating the beneficiary's near-term access to trust corpus, was a positive factor in the *Kaestner* court reaching its conclusion. While it remains unclear whether termination at a specified age, especially in the near future, might support state taxation, practitioners and trust officers might consider decanting into a long-term trust, as was done in *Kaestner*.

Another or alternative factor a state might use is whether a resident is a de facto trustee or holds powers similar to a trustee. In TSB-A-04(7)I,[25] New York ruled that, even though there was a named trustee, members of the "trust committee" were trustees for New York income tax purposes because they had responsibilities and powers of a trustee. That opinion, not official precedent even in New York, suggests that a trust protector or other (e.g., a "director") who can direct the trustee in carrying out fiduciary duties may also be treated as a trustee for New York income tax purposes.

Perhaps, if the residence of a trustee is a sufficient ground under *Kaestner* for a state to tax the trust's undistributed income, then it seems somewhat likely that the residence of a director or trust protector with such or similar authority also would be sufficient. This factor too may be one practitioners and trust officers might reconsider. Perhaps, naming out-of-state people, or interposing an out-of-state entity through which the director may operate might provide adequate insulation.

States, such as North Carolina, certainly must change the grounds upon which they seek to impose tax on undistributed trust income if they wish to collect such a tax. For example, the state might seek to impose its tax only if a state resident created the trust and there is a state resident that acts as a trustee (or a similar capacity). Of course, that will make it relatively easy to avoid the state tax by not having an in-state trustee. And it presumably would force the state to weigh certain matters carefully. By providing that the presence of an in-state trustee will result in state income taxation, probably no informed taxpayer would use an in-state trustee. Indeed, as is well known, many of the large trust institutions in the U.S. have "affiliates" in many states, including one or more that do not impose an income tax on trust income.

In any case, imposing the tax if there is a resident trustee presumably means trust business in the high-tax state will diminish or entirely disappear. That means fewer people will be employed in the state in the trust industry. That likely means a smaller economy and lower tax revenues (as fewer employees means lower state income and other state taxes).

Might states adopt alternative tests to try to have a broad base tax but one that would withstand an attack on the grounds of lack of due process? (States also need to be concerned about violating the Commerce Clause as well, as mentioned earlier). Note that California imposes its tax on alternative grounds: the presence of a non-contingent beneficiary or a California trustee. California's first leg might fall under *Kaestner* but its second might stand. So other states might adopt alternative tests such as these, with each providing a ground to tax:

1. One or more in-state beneficiaries control, possess, enjoy,

[24] See, generally, Zeydel and Blattmachr, "Tax Effects of Decanting—Obtaining and Preserving the Benefits," 111 J. Tax'n 288 (November 2009). It seems that both the North Carolina Supreme Court and the U.S. Supreme Court "accepted" decanting as valid and lawful action that would be respected for tax purposes.

[25] This is available at www.tax.ny.gov/pdf/advisory_opinions/income/a04_7i.pdf.

[26] 249 Conn. 172 (1999).

[27] 689 A.2d 539 (D.C. Cir. 1997).

[28] See "SCOTUS Won't Review Dispute Over Minnesota Taxing Trust Income," Bloomberg Tax, 6/28/2019, available at https://news.bloombergtax.com/daily-tax-report/scotus-wont-review-dispute-over-minnesota-taxing-trust-income.

[29] California law provides that the residence of a corporate fiduciary of a trust means the place where the corporation transacts the major portion of its administration of the trust. Calif. Revenue and Tax Code § 17742.

[30] Even holograms (persons appearing essentially in three dimensions through electronics) may soon be available. Go to www.linkedin.com/search/results/content/?keywords=hologram%20teleconferencing&origin=SWITCH_SEARCH_VERTICAL.

or are entitled to receive trust assets.
2. The presence of an in-state trustee (or anyone holding trustee-like powers).
3. The trust is administered in whole or in part in the state.
4. The trust has state-source income or assets.

Chase Bank cases. Two cases involving the Chase Manhattan Bank may deserve special discussion: *Chase Manhattan Bank v. Gavin*[26] and *District of Columbia v. Chase Manhattan Bank*.[27] The Connecticut decision relies on the one from the District of Columbia, where the court held that it would be consistent with the Due Process Clause to tax the annual net income of a testamentary trust created by the will of an individual who died while domiciled in the District, given the continuing supervisory relationship which the District's courts have with respect to administration of such a trust, even though the trustee, trust assets, and trust beneficiaries were all presently located outside the District. Indeed, the court specifically takes note of but rejects several decisions in other states holding that due process requires a greater connection between the trust and the taxing jurisdiction than the residence of the settlor.

The Connecticut case involved trusts also formed under the will of a domiciliary of the taxing jurisdiction that was admitted to probate there, similar to what occurred in the District of Colombia, as well as one lifetime trust. The Connecticut Supreme Court held the state could tax not only the testamentary trusts, but the lifetime trust created by a state resident even though the only other factor considered by Connecticut statute was that the trust had a Connecticut beneficiary. These cases, as the district court acknowledges in its opinion, are contrary to several other cases that had been decided by that time and there have been more since then.

However, it seems doubtful that the D.C. court or the Connecticut Supreme Court would change its opinion notwithstanding the *Kaestner* case, or the several other cases that have held that the mere domicile of the creator of the trust is not a sufficient ground to impose its tax. Hence, a trustee wishing to challenge the imposition of the income tax imposed by one of those jurisdictions would have to seek certiorari from the U.S. Supreme Court which seems quite doubtful in light of the denial by the court of certiorari in the *Fielding* case where the Supreme Court of Minnesota held that the state could not impose its income tax on the sale of assets by the trust created by a Minnesotan where the sole trustee resided out of that state.[28] (Several other factors were present in *Fielding*.)

Might states adopt alternative tests to try to have a broad base tax but one that would withstand an attack on the grounds of lack of due process?

What practitioners and trustees should do

Practitioners likely should ask clients who have or are planning to create trusts whether they wish the trusts to avoid state income tax. Some might decide the presence of a particular trustee is so important that paying state income tax on undistributed trust income is acceptable. However, there may be alternatives. For example, if an individual or institution is being chosen on account of investment acumen, perhaps merely having the trust hire that person might be sufficient to accomplish the client's goal and without making the person a trustee. If it is not, the client (or the trust), perhaps, could create a holding entity (e.g., such as a limited partnership) which would have the desired advisor as general partner.

Other decisions, however, may be very personal, such as the decision on whether and how to bestow benefits from the trust to beneficiaries. Even that, however, might be accomplished by the desired person forming an out-of-state entity (perhaps, an S corporation) which would be trustee but ensuring little if any trust administration occurs in a state that would impose its tax if the trust is administered there.[29] With communication systems such as Skype, GoToMeeting, Webex, and others,[30] the number of actual in-person meetings probably can be minimized.

Several states (i.e., Alaska, Delaware if there is no Delaware beneficiary, Florida, South Dakota, Texas, New Hampshire, Washington state, and Wyoming) do not seek to impose income tax on undistributed trust income. Of course, several other factors (such as the time for which assets may be held in trust under any applicable rule against perpetuities or other law) also should be considered in choosing to create a trust under laws of a particular state. Some states (e.g., Alaska) permit nonresidents to direct original probate of their wills in such states, so a trust created under the nonresident's will would never be administered under the laws of the domicile state which, as perhaps indicated by the Chase Manhattan Bank cases discussed earlier, may help avoid state income tax on trusts created under the will. To avoid having state-source income which might be used (as New York does) as a ground to tax all of the trust income

(although New York also requires that the trust be created by a New Yorker), any asset that produces or might produce that income should be held in a separate trust, perhaps, with somewhat different terms and at least one different trustee.

Trustees need to consider whether they should file claims for refunds or at least protective claims for refunds (if available under local law) for a refund of state (and, in some jurisdictions, state and local) income taxes. It is difficult to conclude that a state law that imposes a state income tax may lawfully do so regardless of the connection with the state. Perhaps, if the creator of the trust was a state resident, the trustee is a state resident, the trust is administered there and all current beneficiaries are state residents, then one might conclude that the possibility of obtaining a refund is remote, unless the state statute imposing the tax is unconstitutional as in *Kaestner*. Trustees need also consider whether they should not pay income tax imposed by a state system that may be unlawful. In some situations, it may be better to pay the tax and file a claim for refund to avoid penalties.

Planning considerations

The following observations might be useful for practitioners:

Use of decanting. The *Kaestner* case notes: "First, the beneficiaries did not receive any income from the Trust during the years in question. Second, they had no right to demand Trust income or otherwise control, possess, or enjoy the Trust assets in the tax years at issue. Third, they also could not count on necessarily receiving any specific amount of income from the Trust in the future." Does this suggest that any trusts that might have a "5/5" power described in Section 2514(e), a HEMS (health, education, maintenance, and support) standard, or other provisions that might give the beneficiary any rights to demand trust income or otherwise a right to control, possess, or enjoy trust assets, or a trust that terminates at a specified age, should be decanted now to remove those potential tax strings? Would a HEMS standard with an independent trustee be deemed control in the beneficiary merely because there is a definite standard for distribution?

Trustees need to consider whether they should file claims for refunds or at least protective claims for refunds (if available under local law) for a refund of state income taxes.

Perhaps, it might be noted again that in the *Kaestner* case the trust was decanted from the original trust that was to terminate at a specified age. Consideration might also be given to whether effectuating a nonjudicial modification to curtail beneficiary control might taint the result as evidencing beneficiary control (in contrast to a decanting effectuated by the trustee).

Nongrantor trust. Practitioners and trustees might consider reviewing the possible benefits of converting a grantor trust to a nongrantor trust to save state income taxes if the grantor is subject to such taxes. Nonetheless, exercising caution is important. What if the Bernie Sanders-type estate tax proposal of including grantor trusts in the grantor's gross estate is eventually enacted?[31] It might be wise to retain grantor trust status for a trust if such a trust was created before the effective date of legislation that adversely affected such a trust (if doing so avoids estate tax inclusion of the trust).

Restrict distributions. The trustee may choose not to distribute any of the income to the beneficiary in the taxing jurisdiction. What might this mean if a person in a non-fiduciary capacity directed the trustee to make a distribution to a named person? Then the decision would not be in the trustee's discretion. Perhaps, the recipient might not be deemed a "beneficiary" in a traditional sense. Might this change the analysis?

For example, the taxpayer's parent creates a trust for the taxpayer's descendants. The taxpayer is not named a beneficiary of the trust. However, the trust states that the taxpayer's college roommate shall have a power, held in a non-fiduciary capacity, to direct the trustee to make a distribution to the taxpayer.[32] Under the *Kaestner* analysis, the taxpayer would have no authority to influence the trust.

Choice of laws. Having the trust be subject to governing law of a different jurisdiction than the taxing jurisdiction may help. The trust in *Kaestner* was subject to New York law, not North Carolina law. Decanting might cure this defect if a particular trust was formed under the laws of a taxing state, such as Louisiana.

Residence of trustees. The residence of individual trustees is a crucial factor. In the *Kaestner* case, no trustee lived in North Carolina. How will this apply in terms of an institutional trustee? Perhaps, this suggests the benefit of using an institutional general trustee based in a tax-friendly jurisdiction in lieu of a friend or family trustee in the taxing jurisdiction. That

[31] "For the 99.8 Percent Act," S. 309 116th Cong. (2019).

[32] See discussion in O'Connor, Gans, and Blattmachr, "SPATs: A Flexible Asset Protection Alternative to DAPTs," 46 ETPL 3 (February 2019).

is an important planning step that too often is not used as those creating trusts often name family members as trustees who may live in a taxing state. It may prove much less costly to name an institutional trustee in a no-tax state and pay its annual fee.

Trust protector. The *Kaestner* Court did not address other common positions in a modern trust. What of a trust protector? Trust investment director? Various power holders? Might all of these positions, if the individuals named reside in a taxing state, taint the trust as subject to that state's tax system? So, consideration should probably be given where the person named as a trust protector resides. Perhaps, a trust protector should act in a non-fiduciary capacity and/or reside in a state without a state income tax. Another option might be for the trust to name an entity, e.g. a limited liability company (LLC) formed in a tax-friendly state (presumably the same tax-friendly state where the trust is based) as trust protector (or investment advisor, etc.) and have the individual desired provide services as a manager of that LLC. Will that suffice to prevent a high-tax state from taxing the trust?

Location of records. Thought should be given to the physical location of trust records. In *Kaestner*, the trustee kept the trust documents and records in New York, not in North Carolina. In a modern digital age, how relevant will this be when most if not all records might consist of cloud-based digital records? Will moving all records to the cloud solve the issue?

Location of assets. Consideration should be given to where any trust asset custodian is located. Is it relevant where a large institutional investment advisor is located as to the state taxation? Yet this seems to be a factor noted by the Court.

Location of office. The trust should not rent or own an office in the taxing state. If this taint exists, are alternative arrangements available?

Location of investments. The trust should not have any direct investments in the taxing state. (In fact, it is uncertain what is meant by a "direct" investment other than perhaps the acquisition of rental real estate in the taxing state.) Might this suggest that any, even an insignificant, investment in the taxing state might taint the entire trust? Might those administering trusts be advised to divide the trust with one component trust holding any investments in the state, and all other investments be held in a separate trust?

Some states take the position that any active business in their state will allow the entire income of the trust to be taxed by the state. If that situation affects a trust, consideration may be given to dividing the trust.

Many trust documents permit the trustee to divide the trust for a variety of reasons. If not, state law might permit division. If that is not the case, decanting may provide another possible way to cure this state tax issue.

Frequency of meetings. The number of meetings between the trustee and beneficiary may be relevant. The court noted: "the trustee's contacts with Kaestner were 'infrequent.'" It is not clear what the import of this factor mentioned by the court is to the analysis. Might the court be suggesting that the more meetings, the more influence the beneficiary might be viewed as having over access to trust income? That would not seem appropriate as it is the terms of the trust and the powers not given to the beneficiary, not the number of meetings, that would seem to be the relevant factor. But in the *Kaestner* case, even if there were more meetings than two, that would not affect the terms of the trust which in the instant case gave the trustee sole discretion as to distributions.

The language in *Kaestner* suggests that the beneficiary's right to control is relevant. ("[T]he extent of the in-state beneficiary's right to control, possess, enjoy, or receive trust assets.") Is this a suggestion that a large number of meetings might indicate a beneficiary's right to control? This seems unlikely. But, what if there was an implied agreement found between the beneficiary and trustee suggesting that the beneficiary may have "control"?

Location of trust property. The trust should not own real or tangible personal property in the taxing jurisdiction. What if the real property is held in an entity, such as a limited liability company that is not a disregarded entity, that would characterize the property as an intangible asset not real estate. Would that suffice to avoid the state taxation of the trust? Would the result be different if the entity is disregarded for tax purposes? Alternatively, as with a business activity in the state, consideration may be given to segregating real or tangible personal property in a taxing state into a separate trust.

Location of meetings. Geographic location of trustee/beneficiary meetings was noted in *Kaestner*. What does this mean in an electronic age when web meetings are so common?

Distribution of corpus. The *Kaestner* court noted that the trust did not terminate at a specified age, meaning distributing corpus to the beneficiary residing in the state in question. If the trust does provide for a corpus distribution, consider decanting the trust, which is what the Kaestner family did.

If the trust distributes at age 25 all assets to the beneficiary, would that suffice to permit the state to tax the trust? What if the beneficiary is one year old and the trust is to be distributed to the beneficiary at age 75? Would that suffice for tax nexus? Although this is all unclear, the more "modern" way to draft many trusts as long term or even perpetual is certainly a safer option.

Authority to make loans. What if the trust instrument permitted the trustee to loan funds to the beneficiary? Would a loan taint the beneficiary so as to cause undistributed trust income to be subject to state income tax? What if it was not the trustee but another person, perhaps in a nonfiduciary capacity, that directed that a loan be made to the beneficiary? Would that taint the trust accumulated income as taxable?

Personal-use property. What if the trust owns personal-use property, such as a home, and permits the beneficiary to use it? If the property is located in the taxing state, might that be a sufficient nexus to tax undistributed income under *Kaestner?* But if the property were located in another state would the use of property permit such other state to argue that the beneficiary resident in its state received a benefit from the trust even though no income was distributed?

Do trustees have a duty to resign to save taxes?

Certainly, trustees need to consider the impact of taxes in administering a trust.[33] It does not seem that any court has held that a trustee has a duty to resign the trusteeship to save taxes. As mentioned above, some alternative is available—such as forming an out-of-state entity that may act as trustee in place of one whose in-state presence is a ground for taxation.

Conclusion

The *Kaestner* decision clarifies that a state may not impose its income tax on undistributed trust income merely because a state resident is eligible to receive but has not received income from the trust. That means any state that imposes its tax on that basis must revise its law to provide an additional or other factor to successfully impose its tax. It suggests that trustees should review their trusts to see if claims for refunds should be filed. Practitioners should confer with their clients as to whether they wish to avoid state income tax on undistributed trust income and, if they do, each practitioner should guide his or her clients on how that might be accomplished. It may also be appropriate for some trustees to consider resigning and substituting an alternative person or entity to avoid unnecessary state (or state and local) income tax. ■

[33] See, generally, Sherman Wells Sylvester & Stamelman LLP, "Being a Trustee: What You Need to Know," available at www.shermanwells.com/sitefiles/27913/trusts-estates-being-a-trustee-january-2016.pdf.

EXHIBIT 1
State Survey of Taxation of Nongrantor Trusts

State	Citations	Top 2018 Rate	Trust Created by Will of Domiciliary/ Resident	Inter Vivos Trust Created by Domiciliary/ Resident	Trust Administered in State	Trust With Resident Trustee/ Fiduciary	Trust With Resident Beneficiary	Tax Dept. Website
Alabama	Ala. Code §§ 40-18-1(33), 40-18-5(l)(c); Ala. Admin. Code r. 810-3-29-.07(2)(b)-(c); instructions to 2018 Ala. Form 41 at 2.	5.00% on taxable income over $3,000	✓ 1	✓ 1				revenue.alabama.gov
Alaska	No income tax imposed.							www.dor.alaska.gov
Arizona	Ariz. Rev. Stat. §§ 43-1011(5)(a), 43-1301(5), 43-1311(B); instructions to 2018 Ariz. Form 141AZ at 1, 21.	4.54% on taxable income over $158,996				✓		www.azdor.gov
Arkansas	Ark. Code Ann. §§ 26-51-201(a)(9), (10), (b), (d), 26-51-203(a); 2018 Ark. Regular Tax Table at 7.	6.90% on net income over $79,300	✓ 2	✓ 2				www.dfa.arkansas.gov
California	Cal. Rev. & Tax. Code §§ 17041(a)(1), 17043(a), 17742(a); Cal. Const. Art. XIII, § 36(f)(2); instructions to 2018 Cal. Form 541 at 11.	13.30% on taxable income over $1 million				✓	✓ 3	www.ftb.ca.gov
Colorado	Colo. Rev. Stat. §§ 39-22-103(10), 39-22-104(1.7); instructions to 2018 Colo. Form 105 at 3, 4; 2018 Colo. Form 105 at 1.	4.63% on taxable income			✓			www.colorado.gov/pacific/tax
Connecticut	Conn. Gen. Stat. §§ 12-700(a)(9)(E), 12-701(a)(4)(C)–(D); Conn. Agencies Regs. § 12-701(a)(4)-1; instructions to 2018 Form CT-1041 at 6, 16; 2018 Form CT-1041 at 2.	6.99% on taxable income	✓	✓ 4				portal.ct.gov/drs
Delaware	30 Del. C. §§ 1102(a)(14), 1601(8); 2018 Del. Form 400-I at 2; 2018 Del. Form 400 at 2.	6.60% on taxable income over $60,000	✓ 5	✓ 5		✓ 5		www.revenue.delaware.gov
District of Columbia	D.C. Code §§ 47-1806.03(a)(10), 47-1809.01, 47-1809.02; instructions to 2018 D.C. Form D-41 at 6, 7.	8.95% on taxable income over $1,000,000	✓	✓				otr.cfo.dc.gov
Florida	No income tax imposed.							floridarevenue.com

EXHIBIT 1 (Continued)
State Survey of Taxation of Nongrantor Trusts

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Georgia	O.C.G.A. §§ 48-7-20(b)(1), (d), 48-7-22; instructions to 2018 Ga. Form 501 at 6.	6.00% on taxable net income over $7,000					✓ 2	dor.georgia.gov
Hawaii	Haw. Rev. Stat. §§ 235-1, 235-4.5(a), 235-51(d); Haw. Admin. Rules § 18-235-1.17; instructions to 2018 Haw. Form N-40 at 1, 13.	8.25% on taxable income over $40,000			✓ 5	✓ 5		tax.hawaii.gov
Idaho	Idaho Code §§ 63-3015(2), 63-3024(a); Idaho Admin. Code Regs. 35.01.01.035.01, 35.01.01.075.03(e); instructions to 2018 Idaho Form 66 at 1, 10.	6.925% on taxable income over $11,279	✓ 6	✓ 6	✓ 6	✓ 6		tax.idaho.gov
Illinois	35 Ill. Comp. Stat. 5/201(a), (b)(5.4), (c), (d), 5/1501(a)(20)(C)–(D); Ill. Admin. Code tit. 86, § 100.3020(a)(3)–(4); instructions to 2018 Form IL-1041 at 4; 2018 Form IL-1041 at 2, 3.	6.45% on net income	✓	✓				www2.illinois.gov
Indiana	Ind. Code §§ 6-3-1-12(d), 6-3-2-1(a)(3); Ind. Admin. Code tit. 45, r. 3.1-1-21(d); instructions to 2018 Ind. Form IT-41 at 1, 3; 2018 Ind. Form IT-41 at 1.	3.23% on taxable income			✓			www.in.gov/dor
Iowa	Iowa Code § 422.5(1)(i), (6); Iowa Admin. Code r. 701-89.3(1)–(2); 2018 Iowa Form IA 1041 at 2.	8.98% on taxable income over $71,910			✓ 6	✓ 6		tax.iowa.gov
Kansas	Kan. Stat. Ann. §§ 79-32,109(d), 79-32,110(a)(2)(F), (d); instructions to 2018 Kan. Form K-41 at 2; 2018 Kan. Form K-41 at 4.	5.70% on taxable income over $30,000			✓			www.ksrevenue.org

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Kentucky	Ky. Rev. Stat. Ann. §§ 141.020(2)(a), 141.030(1); 103 Ky. Admin. Regs. 19:010; instructions to 2018 Ky. Form 741 at 2; 2018 Ky. Form 741 at 1.	5.00% on taxable income				✓ 5		revenue.ky.gov
Louisiana	La. Rev. Stat. Ann. §§ 47:300.1(3), 47:300.10(3); instructions to 2018 La. Form IT-541 at 1.	6.00% on taxable income over $50,000	✓		✓ 7, 8			www.revenue.louisiana.gov
Maine	Me. Rev. Stat. Ann. tit. 36, §§ 5102(4)(B)–(C), 5111(1-F), 5403; instructions to 2018 Form 1041ME at 1, 2.	7.15% on taxable income over $50,750	✓	✓				www.maine.gov/revenue
Maryland	Md. Code Ann., Tax–Gen. §§ 10-101(k)(1)(iii), 10-105(a)(1)(viii), 10-106(a)(1)(iii); instructions to 2018 Md. Form 504 at 1, 5, 6.	5.75% (plus county tax between 1.75% and 3.20%) on taxable net income over $250,000	✓ 5	✓ 5	✓ 5			www.marylandtaxes.gov
Massachusetts	Mass. Gen. Laws ch. 62, §§ 4, 10(a),(c); Mass Regs. Code tit. 830, § 62.10.1(1); instructions to 2018 Mass. Form 2 at 4, 26; 2018 Mass. Form 2 at 2.	5.10% on taxable income (12.00% for short-term gains and gains on sales of collectibles)	✓ 5	✓ 2, 5				www.mass.gov/topics/taxes
Michigan	Mich. Comp. Laws §§ 206.16, 206.18(1)(c), 206.51(1)(b); instructions to 2018 MI-1041 at 2, 3; 2018 MI-1041 at 1.	4.25% on taxable income	✓	✓ 9				www.michigan.gov/taxes
Minnesota	Minn. Stat. §§ 290.01 Subd. 7b, 290.06 Subd. 2c, Subd. 2d; instructions to 2018 Minn. Form M2 at 1, 13.	9.85% on taxable net income over $133,350	✓ 10	✓ 10	✓ 11			www.revenue.state.mn.us
Mississippi	Miss. Code Ann. § 27-7-5(1)(c); instructions to 2018 Miss. Form 81-110 at 3, 11.	5.00% on taxable income over $10,000			✓			www.dor.ms.gov

EXHIBIT 1 (Continued)
State Survey of Taxation of Nongrantor Trusts

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Missouri	RSMo §§ 143.011, 143.061; 143.331(2)–(3); instructions to 2018 Form MO-1041 at 4, 10.	5.90% on taxable income over $9,253	✓ 12	✓ 12				dor.mo.gov
Montana	Mont. Code Ann. § 15-30-2103; instructions to 2018 Mont. Form FID-3 at 1, 2, 13, 15-16; 2018 Mont. Form FID-3 at 2.	6.90% on taxable income over $17,900	✓ 6	✓ 6	✓ 6	✓ 6	✓ 6	mtrevenue.gov
Nebraska	Neb. Rev. Stat. §§ 77-2714.01(6)(b)–(c), 77-2715.03(3), 77-2717(1)(a)(ii); Neb. Admin. Code tit. 316, Ch. 23, REG-23-001; instructions to 2018 Neb. Form 1041N at 7, 8.	6.84% on taxable income over $15,890	✓	✓	✓			www.revenue.nebraska.gov
Nevada	No income tax imposed.							tax.nv.gov
New Hampshire	No income tax imposed on nongrantor trusts.							www.revenue.nh.gov
New Jersey	NJSA §§ 54A:1-2(o)(2)–(3), 54A:2-1(b)(6); instructions to 2018 Form NJ-1041 at 1, 24.	10.75% on taxable income over $5,000,000	✓ 13	✓ 13				www.state.nj.us/treasury/taxation
New Mexico	N.M. Stat. Ann. § 7-2-7(C); instructions to 2018 N.M. Form F1D-1 at 2, 5.	4.90% on taxable income over $16,000			✓	✓		www.tax.newmexico.gov
New York State	N.Y. Tax Law §§ 601(c)(1)(B)(i), 605(b)(3); 20 NYCRR § 105.23; instructions to 2018 N.Y. Form IT-205 at 2, 10.	8.82% on taxable income over $1,077,550	✓ 13	✓ 13				www.tax.ny.gov
New York City	N.Y. Tax Law §§ 1304(a)(3)(A), 1304-B(a)(1)(ii), 1305; Admin. Code City of N.Y. §§ 11-1701, 11-1704.1, 11-1705; instructions to 2018 N.Y. Form IT-205 at 17.	3.876% on taxable income over $50,000	✓ 13	✓ 13				www.tax.ny.gov
North Carolina	N.C. Gen. Stat. §§ 105-153.7(a), 105-160.2; 2018 N.C. Form D-407 at 1.	5.499% on taxable income					✓ 14	www.ncdor.gov
North Dakota	N.D. Cent. Code § 57-38-30.3(1)(e), (g); N.D. Admin. Code § 81-03-02.1-04(2); 2018 N.D. Form 38 at 2.	2.90% on taxable income over $12,700			✓ 6	✓ 6	✓ 6	www.nd.gov/tax
Ohio	Ohio Rev. Code Ann. §§ 5747.01(I)(3), 5747.02(A)(3), (D); instructions to 2018 Ohio Form IT 1041 at 4.	4.997% on taxable income over $217,400	✓	✓ 5				www.tax.ohio.gov

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Oklahoma	Okla. Stat. tit. 68, §§ 2353(6), 2355(C)(1)(f), (G), 2355.1A; Okla. Admin. Code § 710:50-23-1(c); instructions to 2018 Okla. Form 513 at 2, 14.	5.00% on taxable income over $7,200	✓	✓				www.ok.gov/tax
Oregon	Or. Rev. Stat. §§ 316.037, 316.282(1)(d); Or. Admin. R. 150-316.0400(3); instructions to 2018 Or. Form 41 at 3; 2018 Or. Form 41 at 3.	9.90% on taxable income over $125,000			✓	✓		www.oregon.gov/dor
Pennsylvania	72 P.S. §§ 7301(s), 7302; 61 Pa. Code § 101.1; instructions to 2018 Form PA-41 at 4; 2018 Form PA-41 at 1.	3.07% on taxable income	✓ [15]	✓ [15]				www.revenue.pa.gov
Rhode Island	R.I. Gen. Laws §§ 44-30-2.6(c)(3)(A)(II), (E), 44-30-5(c)(2)–(4); 280-RICR-20-55-7.7; instructions to 2018 Form RI-1041 at 1-1; 2018 RI-1041 Tax Rate Schedules at 1.	5.99% on taxable income over $7,950	✓ [5]	✓ [5]				www.tax.ri.gov
South Carolina	S.C. Code Ann. §§ 12-6-30(5), 12-6-510(A), 12-6-520; instructions to 2018 Form SC1041 at 1, 3.	7.00% on taxable income over $14,860			✓			dor.sc.gov
South Dakota	No income tax imposed.							dor.sd.gov
Tennessee	Tenn. Code Ann. §§ 67-2-102(2), 67-2-110(a); instructions to 2018 Tenn. Form INC. 250 at 1.	3.00% on income (interest and dividends only)					✓	www.tn.gov/revenue
Texas	No income tax imposed.							www.comptroller.texas.gov/taxes
Utah	Utah Code Ann. §§ 59-10-104(2)(b), 59-10-202(2)(b), 75-7-103(1)(i)(ii)–(iii); instructions to 2018 UT Form TC-41 at 3, 6, 11-12; 2018 UT Form TC-41 at 1.	4.95% on taxable income	✓ [16]		✓ [16, 8]			www.tax.utah.gov
Vermont	32 V.S.A. §§ 5811(11)(B), 5822(a)(5), (6), (b)(2); instructions to 2018 Vt. Form FIT-161 at 2; 2018 Vt. Form FIT-161 at 2.	8.75% on taxable income over $9,350	✓	✓				www.tax.vt.gov

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Virginia	Va. Code Ann. §§ 58.1-302, 58.1-320, 58.1-360; 23 Va. Admin. Code § 10-115-10; instructions to 2018 Va. Form 770 at 1, 9.	5.75% on taxable income over $17,000	✓	✓	✓			www.tax.virginia.gov
Washington	No income tax imposed.							dor.wa.gov
West Virginia	W. Va. Code §§ 11-21-4e(a), 11-21-7(c); W. Va. Code St. Rs. § 110-21-4, 110-21-7.3; instructions to 2018 W. Va. Form IT-141 at 1, 5.	6.50% on taxable income over $60,000	✓	✓				www.tax.wv.gov
Wisconsin	Wis. Stat. §§ 71.06(1q), (2e)(b), 71.125(1), 71.14(2), (3), (3m); instructions to 2018 Wis. Form 2 at 1, 18.	7.65% on taxable income over $252,150	✓	✓ [17]	✓ [18]			www.revenue.wi.gov
Wyoming	No income tax imposed.							revenue.wyo.gov

[1] Provided that trust has domiciliary or resident fiduciary or current beneficiary for more than seven months during tax year.
[2] Provided that trust has resident fiduciary.
[3] Other than beneficiary whose interest is contingent.
[4] Provided that trust has resident noncontingent beneficiary.
[5] Provided that trust has resident beneficiary.
[6] Provided that other requirements are met.
[7] Unless trust designates governing law other than Louisiana.
[8] Testamentary trust created by nonresident; inter vivos trust created by resident or nonresident.
[9] Unless trustee, assets, administration, and beneficiaries are outside Michigan.
[10] Post-1995 trust only.
[11] Pre-1996 trust only.
[12] Provided that trust has resident income beneficiary on last day of tax year.
[13] Unless trust has no trustee, asset, or source income in state and trustee files informational return.
[14] Unless trust does not have resident trustee and resident beneficiaries have not received income, have no right to demand it, and are uncertain ever to receive it (*Kaestner*, 2019 WL 2552488 (S. Ct., 6/21/2019)). Tax might be eliminated in other situations.
[15] Unless settlor is no longer resident or is deceased and trust lacks sufficient contact with Pennsylvania to establish nexus.
[16] Post-2003 trust having Utah corporate trustee may deduct all nonsource income but must file Utah return if must file federal return.
[17] Trust created or first administered in Wisconsin after 10/28/1999, only.
[18] Irrevocable inter vivos trust administered in Wisconsin before 10/29/1999, only.