



MULTISTATE TAX COMMISSION

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Nexus Program Director's November 16, 2020 Update on Significant Nexus Law Developments Since July 28, 2020

See PowerPoint concerning states that have enacted economic nexus statutes or promulgated regulations or notices implementing economic nexus, as well as states that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales.

Rulings or Administrative Actions

Arkansas

The Arkansas Department of Finance and Administration determined in Opinion No. 20190925 dated August 20, 2020 that a peer-to-peer vehicle rental platform fits within the Arkansas definition of “marketplace facilitator” and is required to collect and remit applicable gross receipts taxes and vehicle rental taxes on facilitated car rental transactions, to the extent the platform has economic or physical presence nexus in the state.

The Department also issued Opinion No: 20200321 dated May 12, 2020, determining the circumstances when an Online Travel Company will be considered a marketplace facilitator and required to collect gross receipts tax on hotel room transactions and car rental transactions.

California

The Franchise Tax Board has sent notices to Amazon FBA sellers that were registered for sales tax concerning whether they may also have income tax and franchise tax nexus. Paul Jones, “California Seeks Income Tax Payments From Amazon Sellers,” Tax Analysts, November 2, 2020.

The Franchise Tax Board issued “frequently asked questions” on September 11, 2020 clarifying its position concerning nexus for companies with workers teleworking in California as a result of the Governor’s COVID-19 executive order N-33-20 issued March 19, 2020, stating that an out-of-state corporation will not be considered “doing business” in California for purposes of satisfying the payroll factor creating liability for franchise tax, nor will it cause loss of protection under P.L. 86-272, if the

corporation has an employee temporary teleworking in California as a result of that executive order.

The CDTFA has published on August 25, 2020 proposed regulations to amend Regulation 1706, Drop Shipments, to clarify that certain marketplace sales are not considered drop shipment transactions.

Colorado

The Colorado Department of Revenue has issued guidance in September 2020 for marketplace facilitators and sellers in the form of regulations 1 CCR 201-4 and 1 CCR 201-5 and a summary of those documents.

District of Columbia

The Office of Tax Administration published OTR TAX NOTICE 2020 – 07 on September 3, 2020 providing that it will not seek to impose corporation franchise tax or unincorporated business franchise tax nexus solely on the basis of employees or property used to allow employees to work from home temporarily located in the District during the period of the declared public emergency and public health emergency, including any further extensions by the Mayor and for 90 days after the Mayor declares an end to the public emergency. The presence of employees under these conditions will not cause a business to lose the protections of Public Law 86-272.

Georgia

The Georgia Department of Revenue published on September 23, 2020 Policy Bulletin FET-2020-01 providing guidance on implementation of its recently enacted Transportation Services Tax.

Illinois

The Illinois Department of Revenue has issued proposed regulations amending 86 Ill. Adm. Code 131 to implement the Leveling the Playing Field for Illinois Retail Act, which imposes retailers' occupation tax collection obligations on remote sellers and marketplace facilitators, and concerns the sourcing of sales transactions by remote sellers, marketplace facilitators and in-state sellers for purposes of sales and use tax, and guidance for remote sellers, marketplace facilitators, and marketplace sellers. The Department has also published Information Bulletin FY 2021-2 dated September 2020 to explain these proposed regulations and the legislation.

The Department has also finalized regulations effective August 26, 2020 implementing its marketplace facilitator use tax collection law, amending 86 Ill. Adm. Code 150.

Indiana

The Indiana Department of Revenue has published INFORMATION BULLETIN #204 September 2020 to provide guidance concerning county innkeepers' taxes, including a marketplace facilitator's (including OTCs and peer-to-peer property rental platforms) obligation to collect such tax.

Maine

Maine Revenue Services published on October 19, 2020 a tax alert advising that employers should continue to calculate an employee's withholding as if the Maine resident was still working out of state, if the Maine resident is teleworking in Maine as a result of the pandemic. Such employee presence also will not trigger corporate income tax or sales tax nexus. Aaron Davis, "Maine Won't Tax Remote Workers During Pandemic," *TAX NOTES STATE*, VOLUME 98, OCTOBER 26, 2020.

Massachusetts

Massachusetts Department of Revenue issued 830 CMR 62.5A.3 on October 16, 2020 clarifying that nonresidents who normally worked in the state but now work remotely because of the COVID-19 pandemic will continue paying Massachusetts's income tax and be subject to employer's withholding tax on such work income.

Mississippi

The Mississippi Department of Revenue published Notice 72-20-09 on September 16, 2020 announcing that effective July 1, 2020, pursuant to HB 379, the sale of food made through a third-party delivery service is removed from the definition of "retail sale." The food delivery service does not need to collect sales tax where the delivery service allows customers to order food to be delivered from a restaurant of the customer's choosing and pay for the food through the delivery service's app or website. The restaurant will charge the regular retail rate of tax and any applicable local taxes on the selling price charged by the restaurant for the food.

Missouri

The Missouri Department of Revenue issued LR 8116 on September 25, 2020 determining that for a retailer with retail shoe stores in Missouri that also had online sales fulfilled from a warehouse outside the state, Missouri use tax, not sales tax,

would apply to the online sales when the orders were fulfilled from outside the state, and the retailer was required to collect it.

New Mexico

The New Mexico Department of Taxation & Revenue published in September 2020 Bulletin B-200.34, explaining how the New Mexico gross receipts tax applies in various scenarios involving sales of food by retail food stores when delivery to the customer is made by a third-party delivery service.

New York

The New York Department of Taxation and Finance and published in October 2020 “Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax” reiterating its “convenience of the employer” rule.

North Carolina

North Carolina Department of Revenue published an FAQ in September 2020 providing guidance to remote sellers, marketplace facilitators and marketplace sellers concerning its recently enacted marketplace facilitator tax collection law, Session Law 2019-246.

Pennsylvania

Pennsylvania Department of Revenue revised on August 6, 2020 its previously issued Bulletin 2019-14 providing notice that effective for tax years beginning January 1, 2020 or after, the Department will make a rebuttable presumption that economic nexus for corporate net income tax purposes will exist if the corporation has \$500,000 or more in gross receipts sourced to Pennsylvania.

The Department has also extended until the earlier of June 30, 2021, or 90 days after the Proclamation of Disaster Emergency in Pennsylvania is lifted previously provided guidance that non-residents previously commuting to work in Pennsylvania prior to the pandemic but now working remotely from home as a result should continue to source their employment income to Pennsylvania, and residents who prior to the pandemic were commuting out-of-state to work but are now working from home as a result should continue sourcing that income out-of-state. Nexus for sales tax or corporate income tax will not be triggered by presence in the state attributable to the pandemic.

City of Philadelphia has provided revised Wage Tax guidance (November 5, 2020): a non-resident employee is not subject to the Wage Tax when the employer *requires* him or her to perform a job outside of Philadelphia including working from home. If a Philadelphia employer requires a non-resident to perform duties outside the city, he or she is exempt from the Wage Tax for the days spent fulfilling that work.

Rhode Island

Rhode Island Division of Taxation has extended its emergency regulation, 280-RICR-20-55-14, by 60 days to November 18, 2020. Income of employees who are nonresidents temporarily working outside of Rhode Island solely due to the COVID-19 pandemic will continue to be treated as Rhode Island-source income for Rhode Island withholding tax purposes. In addition, Rhode Island will not require employers located outside of Rhode Island to withhold Rhode Island income taxes from the wages of employees who are Rhode Island. Residents temporarily working within Rhode Island solely due to the COVID-19 pandemic. Checkpoint, "Rhode Island withholding for employees working remotely during COVID-19-regulation extended," Thomson/Reuters Tax & Accounting, September 14, 2020.

South Carolina

South Carolina Department of Revenue published SC INFORMATION LETTER #20-24 dated August 26, 2020 extending the relief set forth in SC Information Letter #20-11 is extended through December 31, 2020. SC Information Letter #20-11 provided temporary relief regarding a business's establishment of nexus (income and sales) solely because an employee is temporarily working in a different work location due to COVID-19 and provided guidance with respect to employer withholding requirements for these employees.

Tennessee

Tennessee Department of Revenue published in October 2020 Occupancy Tax Notice # 20-20, providing notice that Short-Term Rental Unit Marketplaces are Responsible for Collecting Occupancy Taxes on Marketplace Rentals pursuant to Public Chapter 787 (2020), effective January 1, 2021.

Tennessee Department of Revenue issued LETTER RULING # 20-07 on October 8, 2020 providing that foreign limited partnership domiciled outside the U. S. whose only activity in Tennessee was the ownership of mortgages on property in Tennessee is not "doing business in Tennessee" and is, therefore, not subject to Tennessee's franchise and excise taxes because its activities are limited to those identified in TENN. CODE ANN. § 67-4-2004(14)(C).

Tennessee Department of Revenue published in September 2020 FAQ's for marketplace facilitators and sellers entitled "How should a marketplace seller notify the Department if they have a contractual agreement with a marketplace facilitator whereby the marketplace seller will collect Tennessee sales tax?"

Tennessee Department of Revenue published Revenue Ruling #20-08, determining that the Tennessee franchise tax did not apply to a foreign corporation that does not have income effectively connected to a U.S. trade or business, due to an exception at TENN. CODE ANN. § 67-4-2004(49)(B) to that effect. The Taxpayer is a foreign entity that is classified as a corporation for federal income tax purposes. The Taxpayer is registered with the Tennessee Secretary of State to do business in Tennessee. The Taxpayer's business activities in Tennessee involve storing inventory at a toll manufacturer's facility in the state. The Taxpayer's Tennessee inventory includes the raw materials used by the toll manufacturer, as well as finished goods. The finished goods are stored at the Tennessee manufacturer's facility until the Taxpayer ships the goods to its customers, some of which are in Tennessee. The Taxpayer states it has no income that is effectively connected with the conduct of a U.S. trade or business for purposes of Internal Revenue Code ("I.R.C.") § 864(c).

Texas

Texas Comptroller of Public Accounts published in August 2020 202008002L providing guidance to remote sellers.

Virginia

Virginia Department of Taxation published effective August 26, 2020 Guidelines for the Motor Vehicle Rental and Peer-to-Peer Vehicle Sharing Tax explaining implementation of 2020 Senate Bill 735, which created the Virginia Motor Vehicle Rental and Peer-to-Peer Vehicle Sharing Tax effective October 1, 2020, explaining circumstances when peer-to-peer vehicle sharing platform is required to collect the tax.

Washington

Washington Department of Revenue in Det. No. 18-0255, 39 WTD 156 (November 2, 2020) denied the taxpayer's petition challenging a B&O tax assessment for lack of nexus. The taxpayer was a marketplace seller who provided inventory to the marketplace facilitator that situation some of that inventory into Washington for purposes of fulfilling sales. The taxpayer argued lack of nexus, because the marketplace facilitator, not the taxpayer, made the decision to place the inventory in

Washington. The Department determined that the taxpayer establishes physical presence nexus in Washington through inventory delivered to an online Marketplace Facilitator outside Washington where the taxpayer contractually agreed to permit the Marketplace Facilitator to electronically relocate taxpayer's inventory, and the Marketplace Facilitator moved taxpayer inventory into Washington.

Wisconsin

Wisconsin Department of Revenue has published Guidance Document Number: 100144 on October 15, 2020, including a list of lodging marketplace common questions, explaining lodging marketplace's responsibilities for collecting various lodging taxes.

Legislation

Connecticut

Connecticut has enacted H.B. 7006, providing that out-of-state businesses and their employees performing disaster-related or emergency-related work in the state won't be required to file taxes in Connecticut in most instances. Lauren Loricchio, "Connecticut Enacts Nexus Rules for Disasters, Emergencies," Tax Analysts, October 6, 2020.

New Jersey

S. 3064 was introduced in the New Jersey Legislature on October 19, 2020 to require the State Treasurer to issue report concerning New York's taxation of New Jersey residents' income.

Vermont

The Vermont Legislature enacted 2020 Act No. 175, which requires marketplace facilitators to commence collection of the universal service charge on retail sales of prepaid wireless telecommunications service subject to the sales and use tax, effective July 1, 2021.

Cases

Alabama

The Alabama Circuit Court recently ruled in favor of the Alabama Department of Revenue in *Black Eagle Minerals, LLC v. Alabama Department of Revenue*, Case No. CV-2018-900328.00 (Cir. Ct. Montgomery County, Ala., July 27, 2020), a decision in which the court ruled against the taxpayer's commerce clause challenge of Alabama's pass-through entity (PTE) nonresident owner mandatory composite return filing statute Ala. Code Section 40-18-24.2 and -24.3. The decision is now pending on

appeal. See Kelvin Lawrence and Bruce Ely, "Taxpayer Appeals Loss in Rare Constitutional Challenge to Composite Return Statute," Bloomberg Law News, 2020-09-20T14:16:58756-04:00.

California

In *AROYA INVESTMENT I, LLC*, OTA Case No. 19074982, the California OFFICE OF TAX APPEALS, denied the \$800 LLC franchise tax refund request of the taxpayer, a foreign LLC not registered to do business in California, with a minority non-managed interest in 1155 Island Avenue, LLC (Island), which did business in California and owned, operated, leased, financed, and managed a facility on property valued at approximately \$65 million. The taxpayer had a direct profit, loss, and capital interest in Island, consisting of a percentage of 0.7830849, which had a value (\$54,771) in excess of the \$50,000 in property threshold under the statutory "bright-line nexus" test to be considered "doing business" in California for purposes of the franchise tax.

In *Online Merchants Guild v. Maduros*, the Guild filed a lawsuit dated September 29, 2020 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA SACRAMENTO DIVISION, challenging the California Department of Tax and Fees Administration's efforts to collect back sales taxes from Amazon FBA sellers, claiming that those efforts violate the Internet Tax Freedom Act, the Due Process Clause, the Commerce Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and 42 U.S.C. § 1983, seeking to enjoin the Department and obtain attorneys fees and damages.

District of Columbia

Attorney General Karl Racine has filed a lawsuit on August 27, 2020 alleging that Instacart, an online grocery delivery platform and marketplace facilitator failed to collect sales tax on its service and delivery fees and charged customers deceptive service fees. Andrea Muse, "AG Sues Instacart for Unpaid Sales Tax, Deceptive Fees," *TAX NOTES STATE*, SEPTEMBER 7, 2020.

Louisiana

In *Robinson v. Jeopardy Productions Inc*, No. 2019 CA 1095, the Louisiana Court of Appeals affirmed the trial court's October 21, 2020 dismissal of the Louisiana Department of Revenue's petition against Jeopardy Productions Inc. (Jeopardy) seeking franchise and corporate income tax from royalty income, for lack of personal jurisdiction. Jeopardy, the popular television show, had licensing agreements with CBS Television and other entities for royalty income from the show or trademarks. In turn,

CBS had agreements with various Louisiana television stations broadcasting the show. During the tax years 2011-2014, Jeopardy earned a total of \$3,622,595 in royalty income from licensing agreements attributed to Louisiana. Louisiana Department of Revenue filed suit against Jeopardy to collect franchise and corporate taxes on that royalty income. Jeopardy filed a declinatory exception raising the objection of lack of personal jurisdiction, arguing that it did not transact any business in Louisiana and that Jeopardy's contacts through unrelated third parties in Louisiana do not rise to the level of minimum contacts required by due process of law. Jeopardy maintained that it merely received royalty income from the licensing of its intellectual property by independent third parties that are not agents of Jeopardy.

Minnesota

In *YAM Special Holdings, Inc. v. Commissioner*, the Minnesota Supreme Court upheld on August 12, 2020 Minnesota income tax on the apportioned gain income from the sale of a partial interest of YAM, an Arizona S corporation and a member of a unitary business (Go Daddy) as not violating due process, such gain income being business income and there being sufficient contacts between the unitary business and Minnesota.

New Hampshire

The governor of New Hampshire filed on October 19, 2020 a motion for leave to file bill of complaint in the U.S. Supreme Court challenging Massachusetts Department of Revenue 830 CMR 62.5A.3. See Caroline Vargas, "New Hampshire Governor to Sue Massachusetts DOR Over Tax Reg," Tax Analysts, October 19, 2020.

New Jersey

In *Preserve II, Inc. v. Director*, DOCKET NO. A-1331-17T3, the Appellate Division of the Superior Court of New Jersey on September 9, 2020 upheld the Tax Court's earlier determination that New Jersey's assessment against for corporation business tax and denial of refund claims of a foreign corporation with an interest in 2 limited partnerships that built and sold homes in New Jersey on the foreign corporation's New Jersey source income from that activity. The foreign corporation claim to be only a passive investor, so nexus was lacking. The Tax Court, relying on BIS, determined that the lines were blurred between the various entities involved, so disagreed that the foreign corporation's interest was merely passive.

Congress and Other Federal Activities

AICPA sent a letter dated August 27, 2020 to Congress urging including of

ENACTMENT OF SECTION 403 OF S. 4318 AND S. 3995 - THE REMOTE AND MOBILE WORKER RELIEF ACT OF 2020 in the ongoing coronavirus relief legislative negotiations. So far, nothing has emerged from those efforts.

Richard Cram
Director, National Nexus Program