



MULTISTATE TAX COMMISSION

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## **Nexus Program Director's November 16, 2022 Update on Nexus Law Developments Since August 1, 2022**

### **Rulings or Administrative Actions**

#### Arizona

The Department published on its website extensive tax compliance guidance for remote sellers and marketplace facilitators dated October 2022.

#### Colorado

The Department has published guidance on its website and for comment proposed 1 CCR 201-20, Rules 43-4-218 and 39-21-116.5 to implement the new \$.27 retail delivery fee that that retailers must remit on deliveries for taxable sales of tangible personal property to Colorado customers effective July 1, 2022 pursuant to SB 21-260. Denver and Aurora have exempted those fees from their local sales taxes. Emily Hollingsworth, "Colorado Cities Exempt Retail Delivery Fee From Local Sales Tax," *Tax Analysts Tax Notes State*, September 4, 2022.

The Department is accepting cryptocurrency for tax payments, effective September 1, 2022. Emily Hollingsworth, "Colorado Now Accepts Cryptocurrency for Tax Payments," *Tax Analysts Tax Notes State*, September 26, 2022.

#### Illinois

The Department has amended 86 Ill. Admin. Code § 100.3200 by removing the stipulation regarding treaties with foreign countries in determining whether a taxpayer is subject to tax. For taxable years ending on or after December 31, 2022, if jurisdiction is otherwise present, due to income-producing activities conducted by the taxpayer, the foreign country or political subdivision is not considered as being without jurisdiction by reason of a treaty between that foreign country or political subdivision and the United States, aligning with the MTC model rule. State Tax Update, *Checkpoint*, September 12, 2022.

#### Indiana

The Department published October 1, 2022 Sales Tax Information Bulletin # ST96 to provide comprehensive sales tax sourcing guidance.

#### Louisiana

The Sales and Use Tax Commission for Remote Sellers published on September 20, 2022 regulation LAC 61:III.2905 to authorize and provide guidance for its voluntary disclosure program.

#### Michigan

The Michigan Department of Treasury has published FAQ's in August 2022 to provide guidance to marketplace facilitators and sellers.

The Department published the Michigan Treasury Update dated August 2022 providing income tax guidance on cryptocurrencies, indicating that the federal income tax treatment of them also dictates state tax treatment in Michigan.

#### Minnesota

The Department published revised Sales Tax Fact Sheet 177 in August 2022 providing sales tax guidance on Nonfungible Tokens, indicating that they are taxable as when the underlying product (such as a digital product, admission, food or beverages, collectable item, etc.) is taxable in Minnesota.

#### Nevada

The Tax Commission has amended regulations in September 2022 providing for certification by car-sharing programs that the owners of shared vehicles have paid sales tax on the purchase of such vehicles, and concerning other reports to be filed by such programs.

#### New Mexico

The Taxation and Revenue Department has published proposed regulations August 9, 2022 clarifying that digital advertising is subject to gross receipts tax. Paul Jones, "New Mexico Proposes Digital Ad Tax Regs," Tax Analysts Tax Notes State, August 15, 2022.

The Taxation and Revenue Department has published New Mexico Bulletin entitled "Marketplace Providers and the Sale of Lodgings or Accommodations" dated October 2022 to provide gross receipts tax guidance to marketplace providers and marketplace sellers.

#### New York

The Department of Taxation and Finance has published TSB-M-22(1)S dated August 30, 2022 to provide guidance on the new peer-to-peer car sharing tax of 3% to be

collected and remitted by the peer-to-peer car sharing program administrator, effective September 1, 2022.

### Oregon

The City of Portland has adopted market-based sourcing rules for sales of services and intangibles applicable to its income tax, aligning its apportionment rules with the state's, effective January 1, 2022. Paul Jones, "Portland Adopts Market-Based Sourcing Rules," *Tax Analysts Tax Notes State*, September 30, 2022.

### Texas

The Texas Comptroller published Private Letter Ruling No. PLR20220524125452 dated July 15, 2022 determining that a peer-to-peer car sharing platform is not responsible for collecting and remitting the gross rental receipts tax. The owner of the motor vehicle is required to obtain a Texas Motor Vehicle Rental Permit and remit gross rental receipts tax on the rental of any motor vehicle rented in Texas.

### Utah

The Department published Publication 4 dated October 2022 providing guidance to taxpayers concerning its voluntary disclosure program.

### Virginia

The Department has published guidance entitled "2022 Guidelines for the Application of the Retail Sales and Use Tax to Sales of Accommodations Facilitated by Accommodations Intermediaries" to implement House Bill 518 and Senate Bill 651, which require accommodations intermediaries to collect and remit sales/use taxes and local accommodations taxes, effective October 1, 2022. That legislation also provides that when more than one accommodations intermediary is involved in the transaction, they can enter into an agreement as to which party is required to collect and remit the applicable taxes.

### Wyoming

The Department published comprehensive sales and accommodations tax guidance dated October 1, 2022 and effective January 1, 2023 entitled "Lodging Services and Marketplace Facilitators."

## **Legislation**

### California

California Legislature enacted in September 2022 SB 301, effective July 1, 2023, which requires online marketplaces to collect and store high-volume third-party sellers' tax

and address information and other data in an effort to combat the resale of stolen goods online. Paul Jones, "California Will Require Marketplace Sellers to Disclose Tax Information," *Tax Analysts Tax Notes State*, October 10, 2022.

California Legislature enacted in August 2022 SB 1312, providing an exclusion from the definition of "marketplace facilitator" for a "vehicle rental broker," such as an online travel company. Car rental companies will be solely responsible for collecting the applicable tax. Laura Mahoney, "California Bill Excludes Travel Sites from Car Rental Sales Tax," *Bloomberg Daily Tax Report*, August 9, 2022.

#### New York

L. 2022, S9454 (c.555) amends the Administrative Code to provide that for tax years beginning on or after January 1, 2022, corporations deriving receipts of \$1 million or more from New York City sources will be subject to the Business Corporation Tax (BCT). A corporation with less than \$1 million, but at least \$10,000 of receipts from City sources, will also be subject to the BCT if the corporation is part of a unitary group that, in the aggregate, derives receipts from City sources of \$1 million or more. These threshold amounts may be adjusted annually to reflect changes in the Consumer Price Index ("CPI"). Also, a corporation with at least ten credit card customers or merchant locations, or ten customers and locations, in the City, will be considered to be doing business in the City if it is part of a unitary group of which the aggregate of all members of such group having at least ten customers or merchant locations, or ten customers and locations, within the city, meets (1), (2), or (3) of the previous paragraph.

#### Cases

##### California

In *American Catalog Mailers Association v. Franchise Tax Board*, Superior Court of California, San Francisco County, the ACMA filed its complaint in August 2022 seeking declaratory and injunctive relief that FTB 1050 and TAM 2022-01, which follow portions of the Commission's revised Statement of Information on P.L. 86-272, contradict P.L. 86-272, violate the California APA, and cannot be applied retroactively. The FTB filed its demurrer in October 2022, seeking dismissal of the complaint for violation of the "pay first/litigate later" rule, lack of standing and lack of a case or controversy.

In *Online Merchants Guild v. Maduros*, the U.S. District Court for the Eastern District of California dismissed the lawsuit challenging as unconstitutional and unlawful for other

reasons the California Department of Tax and Fee Administration assessments for back sales/use taxes on marketplace sellers with inventory nexus in the state, based on the Tax Injunction Act. The Guild has appealed this dismissal to the Ninth Circuit, Case No. 21-16911, and oral argument was heard in October 2022. Paul Jones, "Amazon Sellers Urge Ninth Circuit to Allow Challenge to California Sales Tax," *Tax Analysts Tax Notes State*, October 24, 2022.

### Chicago

The City of Chicago and Apple settled in July 2022 their lawsuit in *Apple Inc. vs. City of Chicago, et al*, No. 2018 L 050514, in which Apple challenged the constitutionality of the Chicago's imposition of its amusement tax on third-party streaming services, video rentals and subscriptions to Apple TV+ and Apple Fitness+ sold to customers with Chicago addresses, Apple agreeing to collect the tax prospectively starting September 15, 2022. Michael J. Bologna, "Apple Avoids Back 'Netflix Taxes' Owed to Chicago in Settlement," Bloomberg Daily Tax Report, August 16, 2022.

### Detroit

In *Apex Laboratories International Inc. v. City of Detroit*, Docket no. 16-000724-R, the Michigan Tax Tribunal on August 19, 2022 held that a Delaware holding company (Apex) lacked substantial nexus with Detroit for Detroit income tax purposes, although it had a Detroit mailing address and its officers were employees of its parent, which was located in Detroit. Its sole purpose was to hold ownership of stock in a Canadian company, Labstat, and the transaction at issue concerned gain on the sale of its ownership interest in that stock. The stock sale was consummated in Canada, and Apex had no employees, property and made no sales in Detroit. Under post-*Wayfair* analysis, Apex lacked "purposeful availment" of protections and benefits from Detroit.

### District of Columbia

In *District of Columbia v. Maplebear, d/ b/ a Instacart*, No. 2020 CA 003777B, Superior Court of D.C., in which the District alleged that Instacart failed to properly disclose the nature of fees added to food deliveries and failed to collect sales tax, the parties entered into a consent order and judgment dated August 2022 whereby Instacart is to pay the district \$1.8 million and release its claim on \$739,057 in sales tax paid in protest in settlement and agrees going forward that it is a marketplace facilitator obligated to collect sales tax on the full amount charged to the customer for food deliveries. Christopher Jardine, "Instacart Agrees to \$2.74 Million Settlement in D.C. Deceptive Fees Suit," *Tax Analysts Tax Notes State*, August 29, 2022.

### Illinois

In *City of East St. Louis v. Netflix, et al*, No. 3:21-CV-561-MAB, in U. S. District Court for the Southern District of Illinois, the court granted the defendants' motion to dismiss the class action complaint filed by various municipalities claiming that Netflix and other providers of streaming services were in violation of the Illinois Cable and Video Competition Law for failing to obtain authorization as a "video service" or "programming" provider and pay provider fees, in that streaming services fell outside the statutory definition of "video service." Andrea Muse, "Federal Judge Dismisses Local Fee Suit Against Video Streaming Platforms," *Tax Analysts Tax Notes State*, October 3, 2022.

### Louisiana

An out-of-state jewelry business filed suit in November 2021 in federal court against Louisiana Department of Revenue and several parishes in *Halstead Bead, Inc. v. Kimberly Lewis, et. al*, United States District Court for the Eastern District of Louisiana, Civil Action No. 2:21-cv-02106, asserting that Louisiana's locally administered sales tax system violates the Commerce Clause under the *Pike* test by imposing an undue burden on remote sellers, violates Due Process, seeking a declaratory judgment to that effect and injunction. The federal district court granted the defendants' motion to dismiss, without prejudice, on May 23, 2022, based on the Tax Injunction Act divesting the court of jurisdiction. Plaintiffs appealed the ruling to the Fifth Circuit on June 21, 2022, where the matter is pending.

### Maryland

On October 20, 2022, Judge Asti of the Circuit Court of Anne Arundel County granted plaintiff Comcast's motion for summary judgment and denied the Comptroller's motion, holding that Maryland's digital advertising tax violated the Internet Tax Freedom Act as a discriminatory tax, as well as the Commerce and Due Process Clauses. The federal lawsuit challenging the same act remains pending. Andrea Muse, "Judge Issues Order Invalidating Maryland Digital Advertising Tax," *Tax Analysts Tax Notes State*, October 24, 2022.

Oral argument is scheduled for November 29, 2022 in the federal lawsuit, *Chamber of Commerce v. Franchot*, in which all counts were dismissed based on the Tax Injunction Act, except for the challenge to the tax pass-through provision, which remains pending. Christopher Jardine, "Maryland to Continue Defending Digital Ad Tax, AG Tells Federal Judge," *Tax Analysts Tax Notes State*, November 2, 2022.

### Massachusetts

The Massachusetts Supreme Judicial Court accepted review on May 12, 2022 of the Massachusetts Appellate Tax Board's dismissal of the Commissioner's sales/use tax assessment against a remote seller based on the "cookie nexus" regulation, 830 CMR 64H.1.7, in *U.S. Auto Parts Network Inc. v. Commissioner*. Amy Hamilton, "Quill Overkill? State Assertions of Pre-*Wayfair* Nexus," *Tax Analysts Tax Notes State* (May 17, 2022). The matter has been briefed and is currently pending.

#### Michigan

In *Hofmeister v. City of Jackson*, No. 358159, plaintiff employee filed suit in Jackson Circuit Court claiming that the City was unlawfully withholding income tax on wages while the employee was working from home outside the city due to the pandemic. The Jackson Circuit Court granted the defendant City's motion for summary judgment, and the Michigan Court of Appeals affirmed on September 29, 2022, based on the fact that the employee did not file the form to change the employee's wage withholding with his employer.

#### Missouri

In *Boles v. City of St. Louis*, No. 2122-CC00713 filed with the Circuit Court for the City of St. Louis, plaintiff employee challenges St. Louis's earnings tax on wages earned outside of the city. Prior to the pandemic, the city had refunded such taxes, but during the pandemic, the city did not permit refunds, contending that under the statute authorizing the tax, employees working remotely for a St. Louis employer were "rendering" or "delivering" those employment services to the employer in St. Louis, since they were performed via the internet. The case remains pending. Paul Jones, "Parties in St. Louis Earnings Tax Dispute Argue over State Statute," *Tax Analysts Tax Notes State*, September 8, 2022.

#### Nevada

In *City of Reno v. Netflix, et. al*, No. 21-16560, the 9<sup>th</sup> Circuit Court of Appeals on October 28, 2022 affirmed the district court's dismissal for failure to state a claim of the City of Reno's complaint alleging that Netflix, Inc. and Hulu, LLC failed to pay franchise fees under Nevada's Video Services Law (VSL) for the video streaming services they provide, determining that the VSL provided municipalities no private right of action.

#### North Carolina

The Department has appealed to the North Carolina Supreme Court the business court's dismissal as unconstitutional for lack of nexus of its sales tax assessment against an out-of-state direct mail seller on direct mail delivered to North Carolina

addresses in *Quad Graphics, Inc. v. North Carolina Department of Revenue*, No. 407A21. The taxpayer successfully argued to the business court that because title passed to the purchaser upon deposit of the direct mail with the common carrier, which occurred out-of-state, those direct mail sales were out-of-state and not subject to North Carolina sales tax. Oral argument took place on August 30. Andrea Muse, "North Carolina Justices Consider Differences Between Sales and Use Taxes," *Tax Analysts Tax Notes State*, September 5, 2022.

## Ohio

*City of Maple Heights v. Netflix et al*, No. 2021-864, is lawsuit by Ohio municipalities pending before the Ohio Supreme Court seeking to hold video streaming services liable for local franchise taxes. Perry Cooper, "We Won in Kansas' Netflix and Hulu Tell Ohio in Tax Dispute," *Bloomberg Daily Tax Report State*, October 24, 2022.

In *Morsy v. Dumas*, No. CV 21 946057, Court of Common Pleas, Cuyahoga County, Ohio, on September 26, 2022, the court granted the plaintiff employee's motion for summary judgment, determining that Section 29 of H.B. 197 (authorizing the Cleveland income tax on wages of employees of Cleveland employers working remotely) was constitutional as to Ohio residents, but could not be legally applied to non-residents (plaintiff is a Pennsylvania resident working for a Cleveland employer remotely from Pennsylvania during the pandemic), enjoining enforcement of the law as to plaintiff's wages, and requiring a refund of Cleveland tax on those wages. The City has appealed the order to the Ohio Court of Appeals on October 19, 2022.

In *Schaad v. Alder*, Appellate Case No. C- 2100349, Ohio Court of Appeals, First Appellate District, the taxpayer, represented by The Buckeye Institute, challenged the constitutionality of the municipal income tax authorized pursuant to HB 197, which allows employers to base withholding for the tax on the employer location, even when the employee is working from home due to COVID. A number of similar cases are pending against other municipalities concerning this provision. Andrea Muse, "Ohio Institute Appeals Ruling Upholding Local Remote Tax Provision," *Tax Analysts Tax Notes State*, September 15, 2021. In its February 7, 2022 order, the Court of Appeals affirmed the trial court's dismissal of the complaint. The Ohio Supreme Court granted review of the decision on June 7, 2022. "Ohio High Court Takes on Cincinnati Telecommuter Tax Case," *Bloomberg Daily Tax Report State* (June 7, 2022). The matter remains pending.

## Oregon



The Oregon Tax Court entered its decision dated August 23, 2022 in *Santa Fe Natural Tobacco Company v. Department of Revenue*, TC 5372, upholding the Department's income tax assessment against an out-of-state tobacco manufacturer based on loss of P.L. 86-272 protection for non-solicitation activity, based on the company's requirement that its wholesalers within the state guarantee taking returns from retailers of unsold cigarettes, and its representatives visiting retailers in the state and taking "pre-book orders" from those retailers and forwarding those to Oregon wholesalers that then filled the orders.

#### Pennsylvania

In *Online Merchants Guild v. Hassell*, No. 179 M.D. 2021, the Commonwealth Court of Pennsylvania ruled on September 9, 2022 in favor of the Guild, holding that it was a due process violation for the Department to view marketplace sellers participating in the Amazon FBA Program with inventory in Amazon facilities in Pennsylvania as having income tax and sales tax nexus, because Amazon controlled the location of inventory, not the marketplace seller. The Department had sent nexus questionnaires to those marketplace sellers, and the Guild successfully challenged those in court. The Department does not intend to appeal.

#### Texas

In *Coppell v. Hegar* and *Round Rock v. Hegar*, the Texas district court on August 10, 2022 determined that the Comptroller's local sales tax sourcing rules were adopted in violation of the Administrative Procedures Act.

#### Washington

In Det. No. 21-0044, 41 WTD 355 (2022), the Administrative Review and Hearings Division of the Department determined that an out-of-state patent law firm's sales of services in procuring patents for its clients should be sourced to the headquarters locations of those clients, and based on that sourcing methodology, the law firm's sales exceeded the \$267,000 annual sales threshold for B&O tax nexus, so the law firm was subject to B&O tax assessment for the audit period. The B&O tax sourcing provisions provide that services are sourced to the location where the benefit of the service is received. The law firm argued unsuccessfully that its sales of patent procurement services should be sourced to Washington based on the fraction of 1/64, since a patent provides protection in all 50 states plus U.S. territories, a total of 64 states and territories.

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