



MULTISTATE TAX COMMISSION

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Nexus Program Director's November 10, 2021 Update on Significant Nexus Law Developments Since July 27, 2021

Rulings or Administrative Actions

Alabama

The Department of Revenue published a notice dated July 26, 2021 advising marketplace facilitators, particularly food delivery services, that they are obligated to collect sales tax on facilitated sales and need to register not later than October 1, 2021. Michael Bologna, Tripp Baltz, "DoorDash, Instacart on Notice to Collect Taxes in Alabama," Bloomberg Law News, August 9, 2021.

Arizona

The Department of Revenue published a notice dated October 14, 2021 that effective September 29, 2021, peer-to-peer car sharing rentals are subject transactions privilege tax to be collected by the platforms, pursuant to S.B. 1720 enacted earlier this year. Paul Jones, "Arizona Outlines New Tax Rules for P2P Car Rentals," *Tax Analysts Tax Notes State*, October, 18, 2021.

California

Regulation 1706, "Drop Shipments," has been proposed for amendment in September 2021 to clarify that marketplace sales in which the marketplace facilitator is registered and collecting California sales/use tax are not considered drop shipments under the regulation and are not subject to California's "drop shipper rule," which requires drop shippers with nexus to collect sales/use tax on drop shipments to California customers.

The CDTFB has posted Publication 109 "Internet Sales" dated October 2021 to provide comprehensive guidance to remote sellers, marketplace facilitators and sellers on sales/use tax compliance concerning internet sales.

Colorado

The Department of Revenue published a comprehensive updated Sales Tax Guide dated August 2021 and available online.

The Department issued GIL 21-004 dated July 30, 2021 to provide guidance clarifying that Colorado's corporation factor presence nexus thresholds (\$500,000 in sales or 25% of total sales) apply in determining whether a partnership has substantial nexus, and specifically in determining nexus for a partnership rendering management, distribution, or administration services to a registered investment company.

The City of Aurora is expected to join Colorado's Sales and Use Tax System providing central administration of local sales tax for joining municipalities, 76% of home rule municipalities having now joined. Michael Bologna, "Integration Has Arrived," *Bloomberg Law News*, September 10, 2021.

Hawaii

Department of Taxation published guidance dated August 10, 2021 reminding taxpayers that rent their cars through a peer-to-peer car sharing app that rentals are subject to general excise tax and they must register, if a marketplace facilitator is not collecting the tax.

Iowa

Department of Revenue published detailed guidance in October 2021 on its website for marketplace facilitators and sellers regarding sales/use tax compliance.

Illinois

Department of Revenue published in October 2021 proposed amendments to regulations implementing the Leveling the Playing Field for Illinois Retail Act, which concerns remote sellers, marketplace facilitators and sellers, their obligations to collect sales/use tax and addressing local tax sourcing issues. The Department published Information Bulletin FY 2022-04 dated October 21, 2021 providing guidance on remote seller and marketplace facilitator tax collection responsibilities under the Act. The Department published a Compliance Alert CA 2021-02-A dated October 2021 advising that marketplace facilitators for food and beverage establishments must collect the Metropolitan Pier and Exposition Authority Food and Beverage Retailers' Occupation Tax effective October 1, 2021.

The Department has developed Form CRT 63 (dated October 2021) "Sales Through Marketplace Facilitator Certificate" whereby facilitators will certify to their marketplace sellers that they are obligated to collect sales/use tax on facilitated sales.

The Department published Information Bulletin FY 2022-05 dated October 2021 advising that effective August 27, 2021 (implementing S. 2066), licensed auctioneers

are excluded from the definition of marketplace facilitator, but internet auction listing services will continue to be considered marketplace facilitators for purposes of sales/use tax collection obligations.

Indiana

Department of Revenue has published Information Bulletin #57 Sales Tax dated September 2021 providing its drop shipment rules, stating that the retailer, not the drop shipper, is obligated to collect and remit Indiana sales tax on sales of taxable items drop shipped to Indiana customers, if the retailer has either physical or economic nexus with Indiana.

Kansas

The Department has published Notice 21-14 dated November 1, 2021 to provide guidance to marketplace facilitators concerning implementation of Senate Bill 50 and the new marketplace facilitator tax collection requirements.

The Department has published Notice 21-17 dated November 1, 2021 to provide sales/use tax guidance for remote sellers enacted in Senate Bill 50.

The Department has published Notice 21-23 dated November 1, 2021 to provide guidance that as a result of Senate Bill 50, the click-thru nexus provisions previously found at K.S.A 79-3702(h)(2) and (j) are no longer in effect.

Louisiana

By Executive Order No. 2021 JPE 13, due to Hurricane Ida, the Louisiana election previously scheduled for October 9, 2021 is postponed to November 13, 2021. At this election, voters will vote on whether to approve a constitutional amendment providing for centralized administration of Louisiana home rule local sales taxes.

Maine

The Department published on September 1, 2021 the Business Guide to Sales, Use and Service Provider Tax.

Maryland

The Maryland Comptroller filed proposed regulations on August 30, 2021 to administer the new digital advertising tax, providing definitions, and sourcing the digital advertising revenues based upon the portion of devices accessing the digital advertising that are located within the state.

The Comptroller published a comprehensive List of Tangible Personal Property and Services Subject to Sales Tax dated October 1, 2021.

Massachusetts

Department of Revenue released guidance on September 16, 2021 that compensation earned by nonresident taxpayers after September 13 will be sourced based on their actual work location, regardless of their work location before the COVID-19 pandemic. Carolina Vargas, "Massachusetts DOR Issues Updated Tax Return Guidance for Telecommuters," Tax Analysts Tax Notes State, September 17, 2021. The Department had previously advised that during the pandemic, employment income of nonresident workers who had formerly commuted to work at Massachusetts employer locations but were working remotely due to the pandemic would still be sourced to Massachusetts.

Montana

The Montana Department of Revenue published guidance on October 1, 2021 providing that Montana residents working remotely in another state and nonresidents or part-year residents working remotely from Montana may have an income tax obligation to Montana on such income.

Nebraska

The Department of Revenue published guidance dated July 27, 2021 that through July 29, 2021, it will not require employers to change the state which was previously established in their payroll systems for income tax withholding purposes for employees who are telecommuting or temporarily relocated to a work location within or outside Nebraska due to the COVID-19 pandemic. Beginning on July 30, 2021, employers must review their payroll systems for income tax withholding purposes for employees working at a location that is in a different state.

New Jersey

The Division of Taxation has published guidance that effective October 1, 2021, its policy of temporary waiver of nexus standards for corporate income tax and sales tax for out-of-state companies with remote workers working in the state due to COVID for will expire, and thereafter, nexus will be based on where the company's workers are performing the work. TB-78R and TB-79R will once again apply as the nexus standards.

New Mexico

The Department published on July 2, 2021 proposed destination-based sourcing rules for the gross receipts tax and use tax.

The Department published FYI-206 dated July 2021 to provide guidance to marketplace providers and sellers concerning collection of the gross receipts tax.

The Department published FYI-230 dated August 2021 to provide guidance concerning the use tax.

Nevada

Department of Taxation published a notice that pursuant to SB 389, peer-to-peer car sharing programs are subject to new licensing and fee provisions effective October 1, 2021.

New York

New York Tax and Finance Department has issued letters to taxpayers claiming to have moved out of state during the pandemic requesting verification of residency status. Donna Borack, "New York Widens Scope of Tax Audits Targeting Remote Workers," *Bloomberg Law News*, August 12, 2021.

Pennsylvania

The Department published SALES AND USE TAX BULLETIN 2021-03 (September 16, 2021), providing that remotely provided help supply services are subject to Pennsylvania sales/use tax if delivered to or used in Pennsylvania and stating examples in which the provider is located in another state working remotely, and the temporary help services are used in Pennsylvania and thus subject to Pennsylvania sales/use tax.

South Carolina

The Department has published Information letter # 21-22 extending to December 31, 2021 the relief granted in SC Information Letter #20-11 providing 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 providing guidance with respect to employer withholding requirements for these employees.

Tennessee

The Department published MF 12 dated October 21, 2021 providing that an unregistered remote marketplace seller can purchase inventory from a Tennessee supplier using a resale exemption certificate and provide that inventory to the marketplace facilitator (who will be collecting sales/use tax on sales of that inventory to consumers). Also, effective January 12, 2022, the Tennessee Department of Revenue has repealed Tenn. Comp. R. & Regs. 1320-05-01-.96, a rule that provides for the imposition of sales tax on drop shipments.

Texas

The Comptroller has frozen Rule 3.334, which provides for destination sourcing of local sales taxes, during the pendency of litigation challenging the rule in *City of Round Rock v. Hegar*.

In *STAR 202109035H* (July 20, 2021), the Comptroller determined that the Petitioner used its website to solicit sales of tangible personal property (heating, air conditioning, and indoor air quality equipment) to customers nationwide on its website, including customers in Texas, Petitioner sold taxable items to Texas residents and those items were delivered to Texas, and Petitioner had an employee in Texas operating under the authority of Petitioner. The ALJ found that, for purposes of Texas franchise and sales tax, Petitioner was an out-of-state seller engaged in business in Texas and was subject to Texas franchise and Texas sales and use tax.

Utah

The Department has published Sales and Use Tax Information for Marketplace Sellers and Marketplace Facilitators, Publication 71 (revised 9/21).

Virginia

The Tax Commissioner has published “Guidelines for the Application of the Retail Sales and Use Tax to Sales of Accommodations Facilitated by Accommodations Intermediaries” explaining that Senate Bill 1398 changed the application of the Retail Sales and Use Tax to sales of accommodations facilitated by accommodations intermediaries beginning September 1, 2021. The legislation makes similar changes to the local transient occupancy taxes, which apply to the state imposed transient occupancy taxes in certain localities because these taxes are administered by local governments in the same manner as their local transient occupancy taxes.

Wisconsin

The Department published a notice dated October 28, 2021 that marketplace providers will be collecting the tax and filing returns with municipalities that are locally administering the municipal room tax., effective October 31, 2021.

The Department published Withholding Tax Update 2021-1 dated November 1, 2021 advising that from March 13, 2020 through December 31, 2021, Wisconsin relaxed its enforcement of nexus provisions on an out-of-state business if its only Wisconsin activity was having an employee working temporarily from the employee's home during this national emergency (COVID-19). This nexus relief applied to out-of-state businesses that would otherwise be required to file Wisconsin sales/use tax, withholding tax, and income/franchise tax returns. Beginning January 1, 2022, the above nexus relief no longer applies. Previous guidance in Wisconsin Tax Bulletin 211 and 2020 Wisconsin Withholding Tax Update is superseded.

West Virginia

The State Tax Department has published TSD-445 dated August 2021 providing clarification that streaming services are subject to sales/use tax.

Legislation

Alaska

HB 4005 has been introduced in special session of the Alaska Legislature proposing a state-wide sales tax, as a partial solution to the state's fiscal issues. One concern raised is that it should require central administration of local taxes. Paul Jones, "COST Urges Changes to Alaska Sales Tax Proposal," *Tax Analysts Tax Notes State*, October 19, 2021.

California

Governor Newsom signed A.B. 1402 on September 30, 2021, adding a requirement that marketplace facilitators commence collecting the lead acid battery recycling fee, lumber products assessment, electronic waste recycling fee, and the tire fee. Paul Jones, "California Requires Online Marketplaces to Collect Fees for Third-Party Sales," *Tax Analysts Tax Notes State*, October 8, 2021.

Florida

S.B. 512 was pre-filed in the Florida Legislature on October 15, 2021, which would require advertising platforms to collect and remit tax on vacation rentals in

the state. Lauren Loricchio, "Florida Bill Would Expand Transient Rentals Tax Collection Obligations," *Tax Analysts Tax Notes State*, October 18, 2021.

New Hampshire

SB 103, effective October 9, 2021, provides that an out-of-state business or an out-of-state employee who is present in the state or conducts operations in the state to perform disaster-related or emergency-related work during a disaster response period shall be deemed to have insufficient presence to require payment of taxes or fees or the submission of tax filings to the state, with the exception of transactional taxes.

HB 15, effective October 1, 2021, requires marketplace facilitators to collect the meals and rooms tax.

Cases

Arkansas

In *City of Ashdown, Arkansas v. Netflix, Inc. and Hulu, LLC*, No. 4:20-cv-4113 in U.S. District Court, Western District of Arkansas, the court granted the defendants' motion to dismiss a class action lawsuit brought by Arkansas municipalities claiming that the defendants, as video service providers, failed to pay required franchise fees under the Video Services Act. The court determined that defendants fit within the Act's public internet exclusion, because they were providing streaming services over the internet, so were not subject to the franchise fees.

California

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. Amy Hodges, "Amazon Sellers' California Tax Case Stalls in Federal Court," *Tax Analysts Tax Notes State*, October 18, 2021.

In *City of Lancaster v. Netflix et al*, Superior Court of California, No. 21STVC01881, the court granted the defendants' demurrer (with plaintiff leave to amend) on September 20, 2021 against a class action brought by California municipalities seeking to hold Netflix and Hulu liable for franchise under the Digital Infrastructure and Video Competition Act (DIVCA) in providing online video streaming services. The court determined that the Act provided no private right of action to municipalities and that Netflix and Hulu were not using the public infrastructure under the Act.

Illinois

In *Rubinas v. Maduros*, No. 1:21-CV-00096, the U.S. District Court for the Northern District of Illinois, in reliance on the Tax Injunction Act, denied the plaintiff's motion for declaratory and injunctive relief against the DCTFA's attempts to collect back sales/use tax on the plaintiff's sales to California customers through the Amazon FBA Program. Amy Hodges, "Federal Judge Again Declines Action in Amazon Fulfillment Case," Tax Analysts Tax Notes State, September 21, 2021.

Maryland

The Comptroller's motion to dismiss is pending in *Chamber of Commerce v. Franchot*, No. 1:21-cv-410-DKC, U.S. District Court for the District of Maryland, a lawsuit challenging the legality of Maryland's digital advertising tax legislation. A new judge has been assigned to the case, after the previously assigned judge recused herself.

Nevada

In *City of Reno, Nevada v. Netflix Inc.*, No. 3:20-cv-00499-MMD-WGC, the U.S. District Court for the District of Nevada dismissed a class action lawsuit by municipalities claiming that streaming companies owed franchise tax under the video service provider law, determining that the streaming companies were not providing video services. Andrea Muse, "Nevada Federal Court: Netflix, Hulu Not Liable for Local Franchise Fees," Tax Analysts Tax Notes State, September 10, 2021.

New York

The New York Supreme Court in *New York v. B&H Foto Electronic Corp*, No. 452106/2019, dismissed a false claims act claim filed by the New York Attorney General against a photo and equipment dealer concerning its receipt of payments from the manufacturer based on the amount of goods sold. The claim asserted that those payments should have been treated as manufacturer coupons and subject to sales tax as "receipts." The court agreed with the dealer those payments were not subject to sales tax and were distinguishable from manufacturer's coupons. Jennifer McLoughlin, "Judge Tosses New York AG's False Claim Act Suit Against Retailer," Tax Analysts Tax Notes State, September 23, 2021.

In *New York v. Sotheby's*, No. 452192/202, the court denied the taxpayer's motion to dismiss the false claims act complaint alleging that the taxpayer knowingly used false information concerning a resale exemption certificate concerning sales tax on the sale of an auctioned item.

Ohio

In *NASCAR Holdings Inc. v. McClain*, NASCAR, No. 2021-0578, Ohio Supreme Court, NASCAR has challenged as unconstitutional the Board of Tax Appeals' affirmation of the Department's CAT assessment based on siting its broadcast and media revenues to Ohio based on population and Nielsen ratings.

In *Schaad v. Alder*, Appellate Case No. C- 2100349, Ohio Court of Appeals, First Appellate District, the taxpayer, represented by The Buckeye Institute, is challenging 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 *Morsey v. Dumas, et al.*, Ohio Ct. Com. Pl., No. CV 21 946057, the court denied the City of Cleveland, Ohio's motion to dismiss a complaint filed by a Pennsylvania resident who had commuted to work to Cleveland but worked from home during COVID and asserted that withholding on wages under Cleveland's income tax on wages earned at home was unlawful. Alex Ebert, "Pennsylvania Exec Can Pursue Remote Work Income Tax Suit in Ohio," *Bloomberg Law News*, October 4, 2021.

Apple appealed its CAT assessment to the Board of Tax Appeals, claiming the Department failed to allow a \$961 million deduction for its sales to businesses with Ohio distribution centers and failed to consider that Apple claimed only a 30% commission on its e-book and app store sales. Alex Ebert, "Apple Seeks to Slash Ohio Tax on App, Distribution Center Sales," *Bloomberg Law News*, August 11, 2021.

Oregon

Estate of Evans v. Oregon Department of Revenue, No. SC S067899, Ohio Supreme Court, upheld the Department's inclusion in the taxable estate the principal assets of Montana Trust, intangibles, designated as QTIP, of which the decedent, an Oregon resident, was the income beneficiary for life. The estate claimed lack of due process, because the decedent did not own or control those assets. The decedent had received a \$750,000 lump sum distribution from the trust as settlement of a dispute, and continued to receive monthly income distributions from the trust. The court relied on *Curry v. McCanless*, 307 US 357 (1939) and *Whitney v. State Tax Commission of New York*, 309 US 530 (1940) in holding that the decedent's lifetime interest in the income of the trust assets, intangibles (including the right to receive principal distributions if needed), provided sufficient minimum contacts to establish due

process, and in distinguishing *Kaestner v. North Carolina* (in which the resident trust beneficiary had received no income from the out-of-state trust and had only a contingent interest).

In *Global Hookah Distributors, Inc. v. Oregon Department of Revenue*, No. TC 5272 (August 6, 2021), the Oregon Tax Court upheld the Department's assessment for tobacco products tax (TPT) on the taxpayer's remote sales of tobacco and other products to Oregon residents for time periods prior to the *Wayfair* decision. Those sales ranged from under \$10,000/year to over \$180,000/year during the audit period. The taxpayer claimed lack of commerce clause substantial nexus and due process minimum contacts. The court determined that the *Quill* physical presence rule, although overruled in *Wayfair*, did not apply to TPT, and the taxpayer's sales to Oregon customers were sufficient to establish both commerce clause as well as due process nexus, with the tax "fairly related" to the benefits received by the taxpayer.

South Carolina

Amazon Services LLC v. South Carolina Department of Revenue, Appellate Case No. 2019-001706, considering the issue of whether Amazon owes sales/use tax on its facilitated sales prior to enactment of South Carolina's marketplace facilitator tax collection law, has now been fully brief before the South Carolina Court of Appeals. Amy Hamilton, "South Carolina Marketplace Facilitator Case Moves to Next Level, *Tax Analysts Tax Notes State*, August 19, 2021.

Texas

In *City of New Boston v. Netflix Inc.*, the U.S. District Court for the Eastern District of Texas dismissed without prejudice New Boston's class action suit on behalf of municipalities seeking franchise fees for providing video services. Jennifer McLoughlin, "Texas Federal Court Tosses Franchise Fee Suit Against Hulu, Netflix, *Tax Analysts Tax Notes State* (October 4, 2021)

Amnesties

Pennsylvania

Department of Revenue has established a temporary 90-day voluntary disclosure program (first published on its website approximately 2/10/2021) for unregistered retailers with inventory in Pennsylvania, providing waiver of penalties and a limited lookback period for payment of back taxes commencing January 1, 2019. This program has been extended as a result of the following litigation: *Online Merchants Guild v. Hasell*, No. 1: 21-CV-369, U.S. District Court for the Middle District of Pennsylvania.

Nexus Director's Update
November, 2021

Connecticut

The Department of Revenue Services is implementing a tax amnesty program commencing November 1, 2021 and expiring January 31, 2022, more information is available on the Department's website.

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