



MULTISTATE TAX COMMISSION

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Nexus Program Director's April 21, 2022 Update on Significant Nexus Law Developments Since November 10, 2021

Rulings or Administrative Actions

Alabama

The Department amended its Regulation 810-6-2-.90.04 providing sales/use tax guidance to marketplace facilitators and sellers effective August 20, 2021.

The Department published a Notice dated February 11, 2022 advising that rental facilitators are required to collect and remit rental tax for leases made to Alabama customers or comply with the notice and reporting requirements.

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 proposed amendment was approved December 2, 2021.

In *Special Notice L-829* dated November 2021, CDTFA reminded sales and use taxpayers that beginning January 1, 2022, marketplace facilitators registered with, or required to be registered with, CDTFA must collect and pay the following on behalf of marketplace sellers:

- Electronic Waste Recycling Fee
- California Battery Fee
- Lumber Products Assessment, and
- California Tire Fee.

The CDTFA published on January 5, 2022 its Discussion Paper on proposed amended Regulation 1684.5, *Marketplace Sales* to implement AB 147, the Marketplace Facilitator Act and provide guidance to businesses on the new law.

The FTB has published Technical Advice Memorandum 2022-01 dated February 14, 2022 adopting certain P.L. 86-272 factual scenario interpretations similar to those

included in the revised "Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272," adopted August 4, 2021 (although that Statement is not expressly referenced in the Memorandum).

Colorado

Colorado Governor Polis announced on February 23, 2022 that the state will accept cryptocurrency tax payments. Caroline Vargas, "Colorado to Accept Cryptocurrency for Tax Payments," *Tax Analysts Tax Notes State*, March 2, 2022.

The Department has published its annually updated and extensive Sales Tax Guide on March 2022.

Connecticut

The Commissioner of Revenue Services issued guidance dated December 1, 2021 that sales and use tax may apply to peer-to-peer car sharing transactions as leases if the vehicle owner is a "retailer," and that peer-to-peer car sharing platforms may qualify as "marketplace facilitators," but peer-to-peer car sharing transactions are not considered taxable as an enumerated service.

Delaware

The Division of Revenue published Technical Information Memorandum 2022-02 dated January 31, 2022 to provide income tax guidance concerning remote worker wages, indicating that for 2021, employees working at home outside the state working for Delaware employers may report those as out-of-state wages if: (a) the taxpayer's employer directed the employee to work from home and directed that employees were not permitted to work at the Delaware location, or (b) the employer strongly encouraged remote work and required an employee to seek advance permission to return to the office in person. Delaware follows the "convenience of the employer" rule concerning taxation of remote worker wages.

Florida

The Department published a notice on December 21, 2021 advising that as of January 1, 2022, Peer-to-peer (P2P) car-sharing platforms will be required to collect and remit taxes and rental surcharges on vehicle rentals. Lauren Loricchio, "State to Tax P2P Car-Sharing Platforms," *Tax Analysts Tax Notes State*, January 3, 2022.

The Department published Emergency Rule 12AER21-23 effective January 1, 2022, to provide guidance to remote sellers and marketplace providers concerning new requirements to collect sales/use tax.

Iowa

The Department published guidance in February 2022 concerning 2021 Senate File 608 changes requiring pass-through entities with nonresident members to file Iowa's composite return and pay income or franchise tax on such members' Iowa-source income, applicable to tax years 2022 or after.

Illinois

The Department published Information Bulletin FY 2022-04 dated October 2021 to provide guidance to remotes sellers and marketplace facilitators on implementation of the Leveling the Playing Field for Illinois Retail Act.

The Department published Information Bulletin FY 2022-10 dated January 2022 advising local governments that it will make available to them a local sales/use tax rates and boundary database as of February 1, 2022 to facilitate implementation of destination-based sourcing.

The Department published amendments to Regulation Title 86, Part 131 to implement the Level the Playing Field for Illinois Retail Act, effective January 26, 2022.

The Department published Publications 116 and 117 dated January 2022 providing guidance concerning marketplace facilitators' requirements to collect the Chicago soft drink tax and the Metropolitan Pier and Exposition Authority food and beverage tax.

The Department published in March 2022 an updated Illinois (In-State) Retailer's Sales Tax Responsibilities Flowchart for implementation of the Level the Playing Field for Illinois Retail Act.

Indiana

The Department published Information Bulletin #28 dated February 2022 entitled "Application of State and County Income Taxes to Residents with Out-of-State Income and Nonresidents with Indiana Source Income."

Kansas

The Department has published Notice 21-24 dated January 7, 2022 to provide guidance to marketplace facilitators that sell or provide lodging concerning requirements to register and collect sales/use tax and transient guest tax under Senate Bill 50.

Louisiana

The Louisiana Sales and Use Tax Commission for Remote Sellers currently administers remote sellers sales/use tax and has proposed regulations to put in place full authority to enter into voluntary disclosure agreements with remote sellers. The Commission is able to offer penalty waiver to remote sellers voluntarily coming forward under certain circumstances. Michael Bologna, "Louisiana Offers Penalty Relief to Delinquent E-Sellers," Bloomberg Law News, January 18, 2022.

Maine

Maine Revenue Services has published SALES, FUEL & SPECIAL TAX DIVISION INSTRUCTIONAL BULLETIN NO. 43, updated February 2, 2022, to provide registration and other tax compliance guidance to remote sellers.

Maine Revenue Services has updated its income tax nexus questionnaire in January 2022.

Maine Revenue Services has published in March 2022 amended regulations to implement its factor presence nexus standard for corporate income tax, enacted during the 2021 session.

Maryland

The Comptroller has adopted regulations implementing the new digital advertising tax. Saleem A. Shareef, "Maryland Comptroller Adopts Digital Advertising Gross Revenues Tax Regulations," *Checkpoint State Tax Update*, December 3, 2021.

The Comptroller published a Tax Alert dated February 1, 2022 advising that a shared motor vehicle used for peer-to-peer car sharing and made available on a peer-to-peer car sharing program would be considered a "short-term vehicle rental" subject to sales tax.

Massachusetts

The Department published a Remote Seller and Marketplace Facilitator FAQs updated January 11, 2022, providing detailed sales/use tax compliance guidance.

Michigan

Michigan Department of Treasury has published Revenue Administrative Bulletin 2021-21 dated December 21, 2021 entitled "Sales & Use Tax Nexus Standards for Remote Sellers," and Revenue Administrative Bulletin 2021-22 dated December 21,

2021 entitled "Sales & Use Tax-Marketplace Facilitators and Sellers," providing detailed sales/use tax guidance to remote sellers, marketplace facilitators and sellers.

Minnesota

Minnesota Department of Revenue has published updated (January 12, 2022) sales/use tax guidance for marketplace providers entitled "Sales Tax for Marketplace Providers."

Nevada

The Nevada Tax Commissioner has published draft regulation LCB File R004-22I dated January 12, 2022 to provide tax compliance guidance to marketplace facilitators.

New Jersey

Division of Taxation published notice on April 12, 2022 effective for tax years 2019 and after, that although a combined group is a taxpayer and taxed as one taxpayer pursuant to N.J.S.A. 54:10A-4(h) and N.J.S.A. 54:10A-4(z); for the purposes of N.J.S.A. 54:10A-4.7(a), P.L. 86-272 protection for a member will be determined on an entity-by-entity basis. Previously, the policy was that one member in the combined group has nexus and sufficient activities in New Jersey to be taxed based on income, no member that has nexus with New Jersey may claim P.L. 86-272 protection.

North Carolina

The Department has published a redacted private letter ruling dated February 28, 2022 addressing the question of whether an affiliate of a group of original equipment manufacturers that established a B2B platform whereby those manufacturers could list their inventory for sale to their customers, qualified as a "marketplace facilitator." The Department determined that the affiliated entity did.

Ohio

The Department published an FAQ in November 2021 providing sales/use tax compliance guidance for remote sellers and marketplace facilitators.

Rhode Island

The Department has promulgated 280-RICR-20-25-8, its regulations providing detailed taxpayer guidance concerning corporate business tax nexus, effective January 4, 2022. The Department has also promulgated 280-RICR-20-70-25 to provide taxpayer guidance concerning use tax, effective January 4, 2022.

South Carolina

The Department has published Information Letter # 21-31 dated December 31, 2021 extending to March 31, 2022 the relief granted in SC Information Letter #20-11 providing temporary relief regarding a business's establishment of nexus (income and sales tax) 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. The Department has circulated a draft revenue ruling for comment in March 2022 that would extend until June 30, 2022 the relief granted in SC Information Letter #20-11.

Texas

The Comptroller has published tax compliance guidance 202201003L for remote sellers dated January 5, 2022.

The Comptroller has published 202203015L Publication 94-105 "Local Sales and Use Tax—A Guide to Sellers" dated March 2022.

Washington

In Determination No. 20-1028, 41 WTD 100 (2022), the Administrative Review and Hearings Division, Washington Department of Revenue, upheld a B & O tax assessment against an out-of-state wholesaler selling goods to in-state wholesalers. The taxpayer claimed lack of "transactional nexus," because title to the goods passed to the buyer upon delivery to third-party carrier, which occurred outside of Washington. The Department pointed out that under Washington law, sales of tangible personal property are destination-sourced, regardless of where title passes to the buyer, and possession by a shipping company is not considered possession by the buyer for B&O tax purposes. Also, the taxpayer had sufficient economic presence in Washington during the audit period, because its sales sourced to Washington exceeded the economic nexus threshold.

In Determination No. 20-0059, 41 WTC 133 (2022), the Administrative Review and Hearings Division, Washington Department of Revenue, upheld a B & O tax and sales tax assessment against a Washington company whose owner resided outside of the United States and claimed lack of physical presence nexus. The Department determined that physical nexus existed under RCW 82.04.067 and WAC 458-20-193 by the fact that the company was using the owner as its registered agent in the state, owned a bank account in the state, and utilized a Washington mailbox and answering service.

In Determination No. 15-0128, 39 WTD 191 (2020), the Department upheld an assessment against an out-of-state video game development company that sent representatives to an annual 3-day video game trade show held in Washington for three consecutive years, which established nexus for purposes of B&O tax.

Wisconsin

The Department has proposed in February 2022 Rules Tax 11.55 and 11.88 to provide tax compliance to marketplace providers.

Legislation

Alaska

The Juneau, Alaska Assembly passed an ordinance imposing its 5% sales tax on sales of goods on cruise ships docked in its harbor, starting January 2022. Paul Jones, "Juneau Assembly Votes to Require Sales Tax Remittance by Cruise Ships," Tax Analysts Tax Notes State, December 16, 2021.

Colorado

House Bill 22-1027 has extended the local small (less than \$100,000 in annual sales) retailers' exception from destination sourcing of sales/use tax from February 1, 2022 to October 1, 2022.

House Bill 22-1099, effective January 1, 2023, imposes requirements on online marketplaces to obtain and verify identifying information from high-volume (200 transactions and \$5,000 in platform sales within 12-month period) third-party sellers using those platforms, in an effort to stem fraudulent sales of stolen merchandise on such platforms. Additional identifying information and disclosure requirements are imposed on such sellers with \$20,000 or more in annual platform sales.

Colorado Legislature approved SB 32, simplifying local sales and use tax reporting by prohibiting Colorado's approximately 70 home-rule cities from requiring remote sellers to obtain local business licenses as long as the retailer has a state standard retail license. Beginning on July 1, 2022, local taxing jurisdictions may no longer charge remote retailers or retailers with only incidental physical presence in the local taxing jurisdiction for a general business license. Starting July 2023, local taxing jurisdictions may not require such remote sellers to separately apply for a retail license, and if a local license is required, the local jurisdiction shall automatically issue it. Eversheds Sutherland *Digital Tax Bytes*, April 3-12, 2022.

Idaho

The Legislature enacted HB 677, providing that no out-of-state taxing entity may tax an Idaho business for conducting sales or other business taking place within the state of Idaho between an Idaho business and a nonresident who is physically present within the state of Idaho while engaging in the business transaction. The new law is intended to counteract an apparent Oregon Department of Revenue interpretation that the Oregon Commercial Activity Tax applies to Idaho businesses making such sales to Oregon customers.

Illinois

The Legislature enacted HB 1091, effective January 1, 2023, imposing new information and verification requirements on marketplace facilitators in identifying high-volume (200 transactions and \$5,000 in platform sales within 12-month period) third-party sellers using those platforms, in an effort to stem fraudulent sales of stolen merchandise on such platforms. The new law also gives the Attorney General additional enforcement powers concerning violations and organized crime activities concerning online merchandise sales.

Louisiana

House Bill 681 is pending in the House of the 2022 Louisiana Legislature to provide for a fall 2022 voter referendum question on whether a constitutional amendment should be adopted so that local sales/use taxes will be centrally administered. A similar initiative failed to get the necessary votes last fall. Paul Jones, "Louisiana Lawmakers Again Considering Centralized Sales Tax Collection," *Tax Analysts Tax Notes Today State*, April 8, 2022.

New York

New York enacted the Peer-to-Peer Car Sharing Program Act (S. 6715), effective March 22, 2022, which imposes certain assessment fees. "New York Governor Signs Law Enacting Peer-to-Peer Car Sharing Program, Imposing Excise Tax Assessment Fees," *Bloomberg Law News*, December 30, 2021.

Utah

Utah has enacted SB 39, providing an income tax exemption for temporary workers in the state, based on the Multistate Tax Commission Uniformity Project language. Paul Jones, "Utah Adopts Mobile Workforce Bill Based on MTC Model," *Tax Analysts Tax Notes Today State*, March 28, 2022.

Virginia

Virginia has enacted HB 518, effective October 1, 2022, requiring accommodation intermediaries to collect and remit sales and transient occupancy taxes to the state or local jurisdiction, as appropriate.

Cases

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. The Guild has appealed this dismissal to the Ninth Circuit, Case No. 21-16911. Laura Mahoney, Amazon Sellers Appeal Dismissal of California Tax Suit, *Bloomberg Law News*, November 15, 2021.

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 CDTFA'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. The case is now on appeal to the Seventh Circuit, Case No. 21-2903.

In *Apple, Inc. v. City of Chicago*, No. 18 L 050514, challenging the constitutionality of Chicago's amusements tax on streaming services, the Circuit Court of Cook County dismissed the complaint for lack of specificity, but granted leave to amend on March 11, 2022.

Indiana

The Indiana Commercial Court, Cause No. 49D01-2008-PL-026436, on January 18, 2022 denied the defendants' motion to dismiss plaintiff municipalities' complaint that defendants failed to comply with the Indiana Video Service Franchises Act in not obtaining necessary permits and paying franchise fees when providing streaming services in *City of Fishers, et al v. Netflix et al*.

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 Department has filed a motion to dismiss, which motion is pending. The local parishes have also raised the Tax Injunction Act as a basis for dismissal.

In *Lopinto v. Expedia.com*, No. 21-CA-132, the Court of Appeal of Louisiana on December 23, 2021 upheld judgment for the defendant online travel companies (OTCs) against a local parish that had sued the OTCs for failure to collect sales and lodging taxes. The court determined that the OTCs did not fit within the statutory definition of "dealer" so did not have a tax collection obligation.

Maryland

On March 4, 2022, the court granted Comptroller's motion to dismiss based on the Tax Injunction Act Counts I (Internet Tax Freedom Act violation), II (Commerce Clause violation), and III (Due Process violation) 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. Count IV, concerning the provision in the tax law disallowing pass-through of the tax, was allowed to proceed. Concerning Count IV, the parties have entered into a stipulation dated April 4, 2022 agreeing that taxpayers can indirectly pass the subject tax on to their customers and requesting briefing and oral argument on the Comptroller's motion to dismiss and the plaintiffs' motion for summary judgment concerning Count IV.

In *Comcast v. Comptroller*, Anne Arundel County Circuit Court, the court denied the state's motion to dismiss on most counts, determining that plaintiffs challenging Maryland's digital advertising tax as unconstitutional and in violation of the Internet Tax Freedom Act, were not required to exhaust administrative remedies. Andrea Muse, "Maryland Judge Allows Digital Ad Tax Challenge to Proceed," *Tax Analysts Tax Notes Today State*, March 15, 2022.

Massachusetts

Oral arguments took place in January 2022 in *VAS Holdings & Investments LLC v. Commissioner of Revenue* pending before the Massachusetts Supreme Judicial Court concerning the Department's assessment on capital gains income against a corporate nonresident owner selling its interest in an LLC doing business in the state. The taxpayer contends lack of nexus due to the fact that the nonresident owner and the LLC were not part of a unitary business. The Department argues that such gain is taxable as Massachusetts-source income.

In *U.S. Auto Parts Network, Inc. v. Commissioner of Revenue*, Mass. App. Tax Bd., No. C339523, opinion dated December 7, 2021, the Board held that the Department's cookie nexus regulation could not be applied against a remote seller of auto parts for uncollected sales/use tax and *Wayfair* sales/use tax economic nexus standard also could not be applied retroactively.

New York

The New York Supreme Court—Appellate Division ruled on April 12, 2022 in favor of New York City's corporate tax assessment, affirming the New York Tax Appeals Tribunal in *GOLDMAN SACHS PETERSHILL FUND OFFSHORE HOLDINGS (DELAWARE) CORP v. New York Tax Appeals Tribunal et al*, Case No. 2021-02517. New York City imposed its corporate tax on the gain from the sale by the taxpayer, a nonresident corporate owner, of its interest in an LLC doing business in New York City. The taxpayer challenged the assessment as unconstitutional and lacking nexus, in that the taxpayer and the LLC were not engaged in a unitary business. The City took the position that the gain income is properly taxable as New York City source income.

In *Matter of Parikh v. Schmidt*, New York Supreme Court, Appellate Division, Slip Op 06893 dated December 9, 2021, the taxpayer, a New Jersey company specializing in the sale and installation of hotel furnishings, was assessed by the New York Department of Taxation and Finance for sales tax on sold furnishings shipped from New Jersey by common carrier to purchasers in New York. The taxpayer claimed that because the common carrier took possession of the property in New Jersey as designees of the purchasers, the sales were New Jersey sales, not subject to New York sales tax. However, the taxpayer was unable to substantiate that claim, and the sales were therefore destination-sourced to New York.

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. Briefing by the parties is underway.

Ohio

In *NASCAR Holdings Inc. v. McClain*, NASCAR, No. 2021-0578, Ohio Supreme Court, NASCAR has challenged as unconstitutional the Board of Tax Appeals affirmance of the Department's CAT assessment based on situsing its broadcast and media revenues to Ohio based on population and Nielsen ratings. Oral arguments were presented in January. Andrea Muse, "Ohio Supreme Court Mulls NASCAR Sourcing Dispute," *Tax Analysts Tax Notes Today State*, January 26, 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.

In *The Buckeye Institute v. Kilgore*, No. 21-AP-193, the Ohio Court of Appeals affirmed the trial court's dismissal of a constitutional challenge to Columbus's local income tax imposed on remote workers and authorized pursuant to HB 197. Andrea Muse, "Ohio Appeals Court Affirms Dismissal of Remote Tax Challenge," *Tax Analysts Tax Notes Today State*, December 2, 2021. The Institute has sought review by the Ohio Supreme Court. Amy Hodges, "Ohio Think Tank Soldiers On in Remote Worker Tax Dispute," *Tax Analysts Tax Notes Today State*, March 23, 2022. The Ohio Supreme Court denied review on March 29, 2022. Ohio High Court Passes on Columbus Telecommuter Tax Case, *Bloomberg Daily Tax Report State*, March 30, 2022.

Oregon

In a December 23, 2021 decision in *Ooma, Inc. v. Dep't of Revenue*, 369 Or. 95 (2021), the Supreme Court of Oregon upheld the Department's assessment for E-911 tax against an out-of-state VOIP service provider, determining that economic nexus existed and the assessment did not violate the commerce clause or due process. The

taxpayer acknowledged its nationwide marketing and promotion campaigns included Oregon, but argued that because those efforts were not targeted toward Oregon customers, these did not show “purposeful availment.” Noting that the taxpayer had received over \$2.2 million in revenue from its Oregon customers, the Court disagreed, providing a very strong due process analysis of the facts.

Washington

In *Citibank South Dakota National Association v. State of Washington Department of Revenue*, Citibank, an out-of-state financial institution claiming no physical presence, has appealed to Superior Court the October 25, 2021 decision of the Board of Tax Appeals (Docket No. 17-109) upholding the Department’s assessment against it for B & O tax from its audit for the period January 2007 through May 2010. The Board determined that nexus existed based on the following facts: Citibank had issued credit cards to customers nationwide, including Washington, issued private label store-branded credit cards through big box retailers and in-state retailers that helped market the cards to Washington customers, had filed over 3000 lawsuits in Washington to collect delinquent debts from customers, had earned income of several hundred million dollars per year allocated to Washington.

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