



MULTISTATE TAX COMMISSION

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Nexus Program Director's August 1, 2022 Update on Nexus Law Developments Since April 21, 2022

Rulings or Administrative Actions

California

The California Department of Tax and Fee Administration Publication 584-ON dated June 1, 2022 provides Online Seller Flowchart Registration and Allocation guidance on registration requirements and local tax allocation for sellers and marketplace sellers.

Colorado

The Department published notice dated June 1, 2022 that its Geographic Information System is now online and the sales tax destination sourcing laws will take effect for all retail businesses effective October 1, 2022.

The Department held a June 23, 2022 stakeholder workgroup meeting to discuss issues concerning implementation of the new \$.27 delivery fee 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. Michael J. Bologna, "Retailers Scramble to Comply with New Colorado Delivery Fee," *Bloomberg Daily Tax Report State* (June 28, 2022).

Connecticut

The Department of Revenue Services published Special Notice 2022(1) to advise that the prepaid wireless 911 fee will go into effect on July 1, 2022, and retailers including marketplace facilitators will be required to collect and remit it.

District of Columbia

The Office of Tax and Revenue published OTR Notice 2022-06 advising that the relief set forth in Office of Tax and Revenue Tax Notice 2020-05 and Office of Tax and Revenue Tax Notice 2020-07 regarding corporation franchise tax or unincorporated business franchise tax nexus (District would not seek to impose nexus for those taxes solely on the basis of employees or property used to allow employees to work from home during the declared public emergency and the public health emergency due to COVID-19) expires on July 16, 2022.

Florida

The Department published in the Florida Administrative Register on March 31, 2022 proposed Rule 12-24.003 requiring remote sellers and marketplace facilitators to file returns and pay use tax electronically, implementing legislation previously enacted in 2021.

Indiana

The Department published in May 2022 Information Bulletin # 89 to provide comprehensive guidance effective July 1, 2022 entitled "Registration, Collection, and Remittance Requirements for Remote Sellers and Marketplace Facilitators."

Kansas

The Department has published Form ST-2B to be used by marketplace sellers to inform the Department that the marketplace seller and marketplace facilitator have agreed that the marketplace seller will collect and remit all applicable taxes on facilitated sales.

Maine

The Bureau of Revenue Services has promulgated regulation Chapter 808: CORPORATE INCOME TAX NEXUS, .04 to implement the factor-presence nexus provisions that became effective January 1, 2022.

Minnesota

The Department published notice on June 8, 2022 that its temporary policy during the pandemic (starting March 13, 2020) not to seek to establish nexus for business income tax or sales/use tax solely because an employee is temporarily telecommuting due to the COVID-19 pandemic will expire on June 30, 2022.

New York

The Department published in April 2022 draft Parts 1 through 3 of the Article 9-A regulations, including "Section 1-2.10 Foreign corporations – Public Law 86-272" that addresses PL 86-272 and activities conducted via the internet, providing examples similar to and conforming with those contained in the "Revisions to Statement of Information on P.L. 86-272" recently approved by the Multistate Tax Commission.

Pennsylvania

The Department published its taxability matrix in Retailer's Information Rev. 717(SU) 05-22 and designated non-fungible tokens as "digital products" subject to sales tax.

Texas

The Texas Comptroller published sales/use guidance as “frequently asked questions” for remote sellers and marketplace providers in Document STAR 202205003L, dated May 13, 2022.

West Virginia

The Department published TSD-372 revised May 2022 to provide sales and use tax nexus guidance to radio and television broadcasters.

Legislation

California

California Legislature is considering SB 301, which would require online marketplaces to collect and store high-volume third-party sellers' tax information and other data in an effort to combat the resale of stolen goods online. Paul Jones, “California Third-Party Seller Tax Information Bill Advances,” *Tax Analysts Tax Notes State* (June 16, 2022).

Hawaii

The Legislature enacted L. 2022 H1971 (Act 77), imposing general excise tax and rental motor vehicle surcharge tax on peer-to-peer car sharing programs effective July 1, 2022. The Department has amended Hawaii Administrative Rules Sections 18-251-1-01 and 18-251-1-02, effective April 14, 2022, to implement this legislation.

Indiana

The Legislature enacted SEA 382, which amended IC 6-2.5-4-18 requiring marketplace facilitators to collect sales tax on facilitated sales to provide that the collection obligation exists regardless of whether the marketplace facilitator has a contractual relationship with the seller.

Louisiana

The Legislature has adopted SB 235 authorizing parishes to contract with the Louisiana Sales and Use Tax Commission for Remote Sellers for the collection of local sales and use tax. The Legislature adopted SB 95 to create the multi-parish audit program. The Legislature has adopted SB 244 to require the legislative auditor and the Louisiana Uniform Local Sales Tax Board to develop a uniform reporting schedule for audit reports for collectors of local parish sales and use taxes compensated based on cost of collection. The Legislature has adopted SB 235 to authorize the Louisiana Sales and Use Tax Commission for Remote Sellers to collect local sales and use taxes for collectors that enter into contracts with the commission. The Legislature did not

take action on HB 861, which would have asked voters to amend the constitution and create a centrally administered Streamlined Sales and Use Tax Commission.

Maine

The Legislature enacted 2022 S.P. 671-L.D. 1937 to clarify an exemption from income tax and withholding tax liability for certain out-of-state suppliers of spirits purchased by the Bureau of Alcoholic Beverages and Lottery Operations.

New Hampshire

The Legislature enacted on June 17, 2022 HB 1097 providing that income earned and received by residents of the state of New Hampshire for services entirely performed within this state shall not be subject to any other state's personal income tax.

Ohio

The Legislature enacted H.B. 515, signed into law June 24, to modify the definition of business income to include income from the sale of an ownership interest if the sale is treated as a sale of assets for federal tax purposes or if the seller "materially participated" in the business during the year of the sale or any of the five tax years before the sale. The law is intended as a disincentive for an Ohio business owner to move out of state before selling the business and avoiding Ohio income tax on the gain, a "loophole" created by *Corrigan v. Testa*. Emily Hollingsworth, "Ohio Modifies Taxation of Ownership Interest Sales," *Tax Analysts Tax Notes State* (June 28, 2022).

Oklahoma

The Legislature enacted SB 1339, which expanded the definition of a marketplace facilitator to include facilitating sales of retail products in any forum. "Product" includes tangible personal property, services, or other transactions that are taxable under the state's sales tax code. Previously, a marketplace facilitator was limited to facilitating sales of tangible personal property. The tax collection obligation would apply to any other taxes administered by the Tax Commission and levied by local jurisdictions on retail sales of products. The new law takes effect January 1, 2023. Emily Hollingsworth, "Oklahoma Expands Definition of Marketplace Facilitator," *Tax Analysts Tax Notes State* (June 21, 2022).

Pennsylvania

The Legislature enacted HB 1342 clarifying tax collection obligations on peer-to-peer car sharing programs, providing for corporate income tax cuts, transition to market-based sourcing of intangibles income, and codification of corporate income tax nexus for taxpayers with \$500,000 or more in Pennsylvania-sourced sales annually. Benjamin

Valdez, "Pennsylvania Enacts Tax Cuts, New Sourcing Rules," *Tax Analysts Tax Notes State* (July 12, 2022).

Vermont

The Legislature enacted S. 53, adopting for corporate income tax single-sales-factor apportionment, repealing the throwback rule, and replacing the *Joyce* method with the *Finnigan* method for determining unitary group nexus and apportionment. Vermont's 80/20 rule is also repealed. Subsidiaries of multinational groups would be counted as members of the unitary group's sales for apportionment, even if 20% or less of its operations are domestic. The minimum tax for businesses with gross receipts below \$500,000 is cut to \$100, but the minimum taxes for businesses above that threshold are raised. Laura Mahoney, Michael Bologna, "Disney Fight Ramps Up in Florida as Vermont Revamps Business Tax," *Bloomberg Daily Tax Report* (June 3, 2022).

West Virginia

The Legislature amended effective July 1, 2022 its Corporate Net Income Tax Rule to conform to HB 2026 enacted in April 2021 that adopted single-sales-factor apportionment, repealed the state's "throwout" rule for corporations, and transitioned the state to market-based sourcing for sales of services and intangibles. Benjamin Valdez, "West Virginia Adopts Rules Reflecting Corporate Tax Changes," *Tax Analysts Tax Notes State* (July 18, 2022).

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.

Kansas

In *Bicknell v. Kansas Department of Revenue*, Docket No. 120,935 (May 2022), the Kansas Supreme Court ruled against the Department, dismissing its income assessment against Mr. Bicknell, and agreeing that he was a resident of Florida and no longer

domiciled in Kansas at the time he sold his business for a large gain. The assessment was based on the Department's view that Mr. Bicknell had not changed his domicile to Florida during the assessment period.

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.

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. The parties have filed supplemental briefs concerning that pending motion. Oral arguments were heard on July 12 and additional briefing requested on the question of whether the provision violates the First Amendment. Andrea Muse, "Judge Has More Questions on Maryland's Digital Ad Tax Passthrough Provision," *Tax Analysts Tax Notes State* (July 18, 2022).

Massachusetts

In *VAS Holdings & Investments LLC v. Commissioner of Revenue*, the Massachusetts Supreme Judicial Court ruled for the taxpayer, dismissing the Department's assessment on capital gains income against a corporate nonresident owner selling its interest in an LLC doing business in the state and determining the assessment lacked statutory authority. The court did indicate that such an assessment could be

constitutional. The taxpayer had contended lack of nexus due to the fact that the nonresident owner and the LLC were not part of a unitary business. The court published a revised opinion at 489 Mass. 669 (May 16, 2022). The Department had argued that such gain was taxable as Massachusetts-source income and moved for reconsideration, which was denied.

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).

Missouri

In *Creve Couer v. Netflix et al.*, Circuit Court of St. Louis County, Missouri, plaintiff's motion for certification of a class of 422 Missouri municipalities was granted on July 11, 2022 concerning plaintiff's claim that defendants Netflix's and Hulu's streaming services were subject to video service provider's fees or franchise fees under the Video Service Providers Act.

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 completed and oral argument is scheduled for August 30.

Ohio

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).

Tennessee

The Tennessee Supreme Court is considering whether Netflix and Hulu are subject to same local franchise fees paid by cable television and internet service companies in *Knoxville v. Netflix, Inc.*, Tenn., No. M2021-01107-SC-R23-CV. Oral argument was heard on May 3, 2022. "Netflix, Hulu Tax Obligation Questioned by Tennessee High Court," *Bloomberg Daily Tax Report* (May 3, 2022).

Washington

In *Jenson Online Inc. et al v. Washington Department of Revenue*, Docket Nos. 19-033, 19-063, 19-066, 20-136, the Washington Board of Tax Appeals granted the Department's motion for summary judgment, determining that the taxpayers, marketplace sellers participating in the Amazon FBA Program with inventory in Amazon facilities in Washington, had nexus with Washington and were responsible for collecting and remitting Washington sales tax on their facilitated sales to Washington customers. The Department had assessed the taxpayers for B&O tax and sales tax on such sales for various time periods between 2010 and 2018. The taxpayers argued unsuccessfully that the assessments violated the Internet Tax Freedom Act as well as due process and the commerce clause.

In *Jon Bargains Inc. v. Washington Department of Revenue*, Docket No. 19-078, the facts were similar to *Jenson Online Inc.*, and the Washington Board of Tax Appeals reached a similar conclusion, granting the Department's summary judgment motion and upholding its assessment for sales tax and B&O tax. The taxpayer, a marketplace seller participating in the Amazon FBA Program, unsuccessfully argued that the assessment violated due process and the commerce clause.

Wisconsin

In *ASAP Cruises, Inc. v. Wisconsin Department of Revenue*, Docket No. 19-I-258, the Wisconsin Tax Appeals Commission granted the Department's motion for summary judgment, upholding the assessment of franchise tax against the taxpayer, an out-of-state seller of travel services (cruises, vacation packages, etc.). The taxpayer had contractual agreements with independent travel consultants residing in Wisconsin to sell travel services. Those travel consultants earned commissions on their sales of travel services to Wisconsin customers. The taxpayer contended that it was selling

Software as a Service, and did not have nexus with Wisconsin. The Commission found that the contractual agreements with Wisconsin travel consultants created nexus and the taxpayer's business was selling travel services.

U.S. Congress

Senate Finance Committee Hearing June 14, 2022

The Committee hearing focused on tax compliance burdens on remote sellers post-*Wayfair*, and whether Congressional action is needed to simplify sales tax compliance for remote sellers. James McTigue Jr. of the Government Accountability Office (GAO) presented a report on compliance costs for remote sellers and revenue increases for states following *Wayfair*. A couple of small businesses presented testimony describing the challenges faced in complying with multiple states' sales tax laws as remote sellers and seeking simplified rates, uniform definitions, protection from retroactive taxation, a consolidated audit process, a phase-in period for any new taxes, and centralized registration and return filing. Craig Johnson, Streamlined Sales Tax Governing Board and Diane Yetter, Sales Tax Institute, stressed the uniformity and simplification accomplishments of the Streamlined Sales and Use Tax Agreement. Committee members discussed various legislative options following the testimony. Benjamin Valdez, "Senate Committee's Wayfair Hearing Focuses on Compliance Burden," *Tax Analysts Tax Notes State* (Vol. 104, p. 1281, June 20, 2022).

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