



MULTISTATE TAX COMMISSION

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Nexus Program Director's April 26, 2023 Update on Nexus Law Developments Since November 16, 2022

Rulings or Administrative Actions

California

The California Department of Tax and Fee Administration (CDTFA) has received public comments from the California Taxpayers Association concerning its proposed amendments to Regulation 1684.5 (Marketplace Sales) implementing California's marketplace facilitator tax collection statute and the statutory definition of "marketplace facilitator."

Colorado

The Department has updated and published its "Colorado Consumer Use Tax Guide" in March 2023.

The Department issued in March 2023 guidance on the administration of the new Colorado Retail Delivery Fee of \$.27 that retailers must charge as of July 1, 2022.

The Department issued in February 2023 guidance that sales tax applies on the full amount charged for rooms and accommodations, including marketplaces offering such services.

Florida

The Department has issued Technical Assistance Advisement No. 22A-012 dated June 16, 2022, determining that the taxpayer seeking guidance, a business that advertised participating dealers' parts online but was not involved in collecting payment from the purchaser and transmitting payment to the seller, was not a "marketplace provider" within the meaning of Florida's definition in its marketplace provider tax collection law.

Indiana

The Department has published Income Tax Information Bulletin #39 entitled "Guidelines for Reporting Income from Indiana Sources by Nonresident Individuals" dated January 2023.

Iowa

The Department has adopted rules implementing 2021 Iowa Acts, Senate File 608, which requires pass-through entities with non-resident owners to file composite returns, effective January 1, 2022.

Kentucky

The Department published guidance that effective January 1, 2023, online travel companies are required to collect the state 1% transient room tax and any local government transient room taxes at the full rental amount of the accommodation, including their service fees.

Louisiana

The Department has adopted regulations at Title 61, Ch. 19, Section 1923, implementing Louisiana's Mobile Workforce Exemption, which exempt nonresident mobile workers' wages for 25 or fewer days working in Louisiana (published in the *Louisiana Register* on February 20, 2023).

The Louisiana Remote Sellers Sales and Use Tax Commission has proposed in February 2023 a draft Remote Sellers Information Bulletin entitled "Guidance on Louisiana Marketplace Sellers, Definition of Marketplace Facilitators and Related Administrative Issues, and Classification of Certain Delivery Services." The Commission also published additional guidance entitled "Requirements and Liability for Remote Sellers."

Minnesota

The Department has published guidance dated March 1, 2023 entitled "Sales Tax for Marketplace Providers."

The Department has published guidance dated April 3, 2023 entitled "Revenue Notice # 23-01: Income Tax – Statutory Resident Trusts – Application of the Due Process Clause Minimum Connections Test." The documents explains how the Department applies the "minimum connections" test under the Due Process Clause to resident trusts for purposes of taxation, in view of *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S. ___, 139 S.Ct. 2213 (2019) and *Fielding v. Commissioner of Department of Revenue*, 916 N.W.2d 323 (Minn. 2018).

Missouri

The Department published in the *Missouri Register* on January 17, 2023 proposed rule 12 CSR 10-114.100 to provide guidance on implementation of Missouri's sales tax

economic nexus threshold that became effective January 1, 2023. The Department published in the *Missouri Register* on February 15, 2023 proposed rule 12 CSR 10-113.200 entitled “Determining Whether a Transaction [I]s Subject to Sales Tax or Use Tax,” and proposed rule 12 CSR 10-113.400 entitled “Marketplace Facilitator” to provide guidance concerning Missouri’s marketplace facilitator tax collection law. The Department has also published an FAQ for marketplace facilitators.

The Department published LR 8216 on November 2, 2022 determining that an out-of-state lessor of printers and copy machines to clients in Missouri has physical presence nexus with Missouri and is required to collect use tax on those lease transactions. In addition, the out-of-state lessor occasionally hired Missouri independent contractors to provide maintenances services and supplies for that equipment.

New Jersey

The Division of Taxation has published Tax Topic Bulletin S&U-5 dated March 2023 and entitled “Making Mail-Order and Internet Sales” to provide sales and use tax as well as corporate business tax guidance.

New York

The New York State Bar Association filed with the Department its “Report No. 1471 on Draft Regulations Regarding P.L. 86-272” dated December 19, 2022, criticizing the Department’s draft regulations, which adopted the most recent Multistate Tax Commission Statement of Information Concerning P.L. 86-272 as to its scope when applied to internet activities.

North Carolina

The Department issued SUPLR 2022-0008 dated December 9, 2022 to a marketplace platform that is an affiliate of certain original equipment manufacturers and is used to advertise parts for customers to order. The platform passes the order on to the manufacturer for processing and does not receive the customer’s payment or fulfil the order. The Department ruled that the platform was not a marketplace facilitator within the meaning of its statutory definition in its marketplace facilitator tax collection law.

North Dakota

The Department published guidance entitled “Sales and Use Tax” in January 2023 for remote sellers and marketplace facilitators.

Oklahoma

The Department published sales tax guidance for remote sellers and marketplace facilitators on January 12, 2023.

Texas

The Texas Comptroller published on January 5, 2023 202301003L REMOTE SELLERS AND MARKETPLACE FREQUENTLY ASKED QUESTIONS

Wyoming

The Department has published updated guidance entitled “Lodging Services and Marketplace Facilitators” dated February 1, 2023. The guidance makes clear that online travel companies are considered marketplace facilitators under Wyoming sales tax law, and when they take the reservation for lodging services, they are responsible for collecting and remitting any applicable taxes to the Wyoming Department of Revenue on the full amount charged to the customer.

Legislation

Arizona

The Arizona Senate on March 27, 2023 passed SB 1325 and sent it to the House for consideration. The bill provides in part for a single average local rate for the transaction privilege tax that remote sellers could apply to their Arizona sales.

Missouri

The Missouri House Committee on Special Tax Reform passed out favorably on April 5, 2023 HB 589, which would exempt remote workers from municipal earnings taxes (such as Kansas City and St. Louis). Matthew Pertz, Missouri House Panel Advances City Earnings Tax Exemption,” *Tax Analysts Tax Notes Today State*, April 7, 2023.

New York

S. 5895 was introduced March 22, 2023 in the New York Senate, proposing a surcharge of \$.25 on online delivery sales in the City of New York, similar to Colorado’s enacted last year.

Ohio

Ohio H.B. 45, signed into law January 6, 2023, authorizes the enactment of a two-month amnesty period on income, sales and use, and excise taxation. *Tax Analysts Summary*, January 24, 2023.

South Dakota

Senate Bill 30 was adopted in February 2023, which eliminates the 200 or more separate transactions/yr. threshold from the South Dakota sales tax economic nexus threshold effective July 1, 2023.

Cases

Alabama

In *Bollinger v. Alabama Department of Revenue*, Docket No. Inc. 22-390-LP, the Alabama Tax Tribunal held in its March 8, 2023 order that Mr. Bollinger, who worked for an Alabama employer in 2020 and moved permanently to Idaho that year, changing domicile but continuing to work remotely for the same Alabama employer, owed Alabama income tax on his wages, which were sourced to Alabama, in that Mr. Bollinger was “engaged in business in Alabama” through his employment with the Alabama employer.

Arkansas

In *City of Ashdown v. Netflix, Hulu*, the Eighth Circuit of the U.S. Court of Appeals affirmed the district court’s dismissal of City of Ashdown’s complaint seeking a declaration that defendant video streaming services providers were required to comply with the Arkansas Video Service Act, determining that the Act provided no express or implied private right of action. Holly Barker,” Ashdown, Arkansas Loses Bid to Revive Netflix, Hulu Class Action,” *Bloomberg Tax Daily Tax Report: State*, November 8, 2022.

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. The court overruled the demurrer on November 17, 2022, allowing the case to proceed, determining that the ACMA had standing and the case was ripe for declaratory judgment. Paul Jones, “California Judge Allows ACMA Suit Over P.L. 86-272 Guidance,” *Tax Analysts Tax Notes State*, November 28, 2023, Vol. 106, p. 797.

In *Grosz v. California Department of Tax and Fee Administration*, No. S278685, the taxpayer, an FBA marketplace seller petitioned on February 21, 2023 for California

Supreme Court review of the Court of Appeal order affirming the lower court's dismissal of his lawsuit seeking to compel the CDTFA to seek uncollected sales tax from Amazon, the marketplace facilitator, on the taxpayer's marketplace sales. The CDTFA had pursued the FBA seller for uncollected sales tax, which prompted the FBA seller's lawsuit. The lower court determined that CDTFA had discretion to interpret California sales tax law as imposing on the FBA seller, not Amazon, the duty to collect sales tax on the FBA seller's marketplace sales. The California State Treasurer, Fiona Ma (also former Chairperson of CDTFA), has submitted an amicus curiae letter in support of the taxpayer, and urging that the CDTFA should have pursued Amazon, not FBA sellers, for the uncollected sales tax.

In *City of Lancaster v. Netflix*, No. B321481, a class action lawsuit is pending in the Court of Appeal brought by municipalities against Netflix and Hulu seeking damages and declaratory judgment for providing streaming services in alleged violation of state franchise agreements. Audrey E.P. Fick, "Netflix, Hulu Owe Fees as Video Service Providers, California Locality Says," *Tax Analysts Tax Notes State*, March 27, 2023.

District of Columbia

Drizly, an alcohol delivery service and marketplace facilitator, entered into a settlement agreement dated November 14, 2022 with the District to pay \$3.2 million in back sales taxes owed since April 1, 2019, the effective date of the District's marketplace facilitator tax collection law. Benjamin Valdez, "D.C. Settles With Alcohol Delivery Company Over Unpaid Taxes," *Tax Analysts Tax Notes State*, November 21, 2022.

Georgia

In *Gwinnett County et al v. Netflix, et al*, No. A22A1172, the Georgia Court of Appeals on March 8, 2023 affirmed the lower court's dismissal of 3 municipalities' suit against several streaming platforms alleging violations of the Georgia Consumer Choice for Television Act for failure to pay franchise fees. The court determined the Act did not provide the municipalities with a cause of action against the streaming platforms.

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. The City filed an appeal with the Seventh Circuit on October 31, 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. The parties and several amici have filed briefs.

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. The Comptroller on December 27, 2022 petitioned for certiorari to the Appellate Court of Maryland for review of this order and has also moved for a stay of enforcement of the order. The Maryland Supreme Court granted the petition on January 20, 2023. The parties and several amici have filed briefs in the Maryland Supreme Court. Andrea Muse, “Digital Ad Tax Unconstitutional, Companies Tell Maryland Supreme Court,” *Tax Analysts Tax Notes State*, April 5, 2023.

Oral argument was held 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 and First Amendment violation claim, which remain pending. Christopher Jardine, “Maryland to Continue Defending Digital Ad Tax, AG Tells Federal Judge,” *Tax Analysts Tax Notes State*, November 2, 2022. On December 2, 2023, the federal district court dismissed the one

remaining count without prejudice, determining that the case was moot, in view of the Judge Asti's ruling. The parties have filed briefs in the plaintiffs' appeal to the Fourth Circuit

Massachusetts

The Massachusetts Supreme Judicial Court ruled against the Commissioner in its opinion dated December 22, 2022, affirming 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*.

Missouri

In *Boles v. City of St. Louis*, No. 2122-CC00713 filed with the Circuit Court for the City of St. Louis, plaintiff employees 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. Paul Jones, "Parties in St. Louis Earnings Tax Dispute Argue over State Statute," *Tax Analysts Tax Notes State*, September 8, 2022. The Missouri Circuit Court ruled on January 19, 2023 that plaintiffs were entitled to refunds for remote work performed in 2020 during the pandemic, in that the earnings tax imposition only applied to work actually performed in the city.

In *City of Creve Couer v. DirecTV LLC*, No. 21-3090, the United States Court of Appeals for the Eighth Circuit affirmed on January 26, 2023 the federal district court's remand to state court plaintiff municipality's class action claim for declaratory, injunctive relief and damages against defendant streaming service providers for failing to pay fees owed under that the Missouri Video Services Providers Act ("VSPA"). The plaintiff originally filed suit in state court and the defendants removed the action to federal court, which has subsequently remanded the matter back to state court on comity grounds, where it is now pending.

Nevada

In *City of Reno v. Netflix, et. al*, No. 21-16560, the 9th 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.

In *Clark Cnty. v. Orbitz Worldwide, LLC*, No. 2:21-CV-1328 JCM (VCF), 2023 BL 109742, 2023 Us Dist Lexis 56246 (D. Nev. Mar. 31, 2023), Clark County filed suit in state court against various online travel companies (OTCs) seeking recovery of local transient lodging tax on their charges. The OTCs removed the action to federal district court, which granted their motion for summary judgment dismissing the suit, determining that the OTCs were not “operators” of transient lodging facilities under the tax imposition at issue.

New Jersey

In *Borough of Longport, et al. v. Netflix, Inc., et al.*, Civil Appeal No. 22-2139, two municipalities filed suit against Netflix and Hulu in federal district court seeking declaratory relief and damages under the New Jersey Cable Television Act (CTA) for failure to obtain franchises and pay franchise fees. The federal district court granted the defendants' motion to dismiss, determining that the municipalities had no right to sue the defendants under the CTA. The plaintiff municipalities have appealed to the Third Circuit, where the matter is pending.

North Carolina

In a 6-1 decision, the North Carolina Supreme Court ruled on December 16, 2022 for the Department, reversing the business court's dismissal as unconstitutional for lack of nexus the Department's 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 relied on *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), arguing 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. The Court determined that *Dilworth* did not apply. The taxpayer has petitioned the U.S. Supreme Court for certiorari and the North Carolina Chamber Legal Institute (NCCLI) has filed an amicus brief in support of the petition, which is pending.

Ohio

In *NASCAR Holdings, Inc. v. McClain*, Slip Opinion No. 2022-Ohio-4131, the Ohio Supreme Court on November 22, 2022 held unlawful the Department's commercial activities tax (CAT) assessment against NASCAR Holdings, Inc., an out-of-state company, primarily on its apportioned receipts from licensing NASCAR race

broadcast rights to Fox, which in turn sub-licensed those rights to local television stations in Ohio. The Department argument that under the CAT sourcing rules, those receipts should be apportioned based on the Ohio television audience share. The applicable sourcing law for receipts from use of intellectual property provided that such receipts “shall be situated to [Ohio] to the extent that the receipts are based on the right to use the property in [Ohio].” R.C. 5751.033(F). The Court agreed with the taxpayer’s argument that because the licensing agreements with Fox permitted broadcasting the races to a large area that included Ohio, but was not specific to Ohio, those receipts should not be sourced to Ohio and should instead be sourced to the taxpayer’s domicile, Florida.

City of Maple Heights v. Netflix et al, No. 2021-864, is a lawsuit by Ohio municipalities in federal district court with certified questions submitted to the Ohio Supreme Court seeking to hold Netflix and Hulu 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 its opinion dated November 30, 2022, No. 2022-Ohio-4174, the Ohio Supreme Court answered the certified questions as follows: (1) Netflix and Hulu are not video-service providers under the Ohio Fair Competition in Cable Operations Act and (2) the Act does not expressly or impliedly give Maple Heights the authority to bring a cause of action such as the one at issue here.

In *Curcio v. Hufford*, the Ohio Court of Appeals affirmed on December 29, 2022 a trial court finding that the taxpayers were properly subject to the income tax in the municipalities where their employers were located despite working from their homes in different Ohio localities during Governor Wine’s pandemic stay-at-home order. Audrey E.P. Fick, “Ohio Appellate Court OKs Municipalities’ Tax on Remote Workers,” *Tax Analysts Tax Notes State*, Vol. 107, p. 203, January 9, 2023.

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.

South Carolina

Oral argument before the South Carolina Court of Appeals in *Amazon Services v. SCDOR* Appellate Case No. 2019-001706 was held on February 14, 2023. In this case, Amazon Services has appealed the administrative law judge's ruling upholding the Department's position that Amazon Services is liable for uncollected sales tax on facilitated sales for certain time periods prior to enactment of South Carolina's marketplace facilitator tax collection law.

Tennessee

In *CITY OF KNOXVILLE, TENNESSEE v. NETFLIX, INC. ET AL.*, No. M2021-01107-SC-R23-CV, the Supreme Court of Tennessee answered on November 22, 2022 certified questions from the United States District Court for the Eastern District of Tennessee, No. 3-20-CV-00544-DCLC-DCP, that Netflix and Hulu were not considered to be video service providers under the Tennessee Competitive Cable and Video Services Act and were not required to obtain franchises and pay franchise fees to localities. The federal district court thereafter dismissed the lawsuit on December 5, 2022.

Texas

In *City of Dallas, et al. v. Disney DTC LLC et al.*, United States District Court for the Northern District of Texas, No. 3:22-cv-2071-L, several Texas municipalities brought suit in state court against the video streaming platforms, seeking to require them to obtain franchises as video service providers and pay franchise taxes to the municipalities. The video streaming platforms removed the case to the federal district court. On December 14, 2022, a federal magistrate judge recommended that the matter be remanded back to state court on comity grounds.

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. The Comptroller recently re-adopted those local sales tax sourcing rules. Paul Jones, "Texas Comptroller Readopts Contested Local Sales Tax Sourcing Rule," *Tax Analysts Tax Notes State*, February 2, 2023.

Wisconsin

In *Stubhub, Inc. v. Wisconsin Department of Revenue*, Docket No. 16-S-268, the Wisconsin Tax Appeals Commission on February 28, 2023 upheld the Department's sales tax assessment of \$8.5 million plus interest against Stubhub for uncollected tax on secondary sales of tickets to sporting and entertainment events in Wisconsin during tax years 2008 through 2013. Ticketholders entered into contracts with Stubhub to advertise their tickets for sale on Stubhub's marketplace platform. The ticketholder set the purchase price, but Stubhub added its own service fees on top of that, and Stubhub collected full payment from the purchaser. After deducting its fees, Stubhub remitted the payment balance to the ticketholder. Stubhub had a wholly owned subsidiary, LMT, that it contracted with to deliver the tickets to the purchaser. Stubhub provided ticket purchasers a guarantee that if the ticket was unusable, Stubhub would either replace it or refund the purchase amount. LMT had an employee in Wisconsin. Stubhub, an out-of-state entity, also periodically sent employees into Wisconsin to build relationships with various sports organizations. Stubhub had not registered with Wisconsin to collect sales tax. The Department contended, and the Commission agreed, that Stubhub was a "retailer" making taxable "retail sales" of admissions to sporting and entertainment events in Wisconsin. Stubhub unsuccessfully contended that it was not a retailer, but was merely facilitating the secondary ticket sales on behalf of the ticketholder, who owned the ticket. Stubhub did not hold the secondary tickets as inventory. Although Stubhub did not contest nexus, this case provides an example of representational nexus through the LMT's actions on behalf of Stubhub in Wisconsin.

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