



MULTISTATE TAX COMMISSION

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## **Nexus Program Director's July 24, 2023 Update on Nexus Law Developments Since April 26, 2023**

### **Rulings or Administrative Actions**

#### California

The California Department of Tax and Fee Administration (CDTFA) published on June 1, 2023 a guide on application of sales and use tax to internet sales, including marketplace facilitator sales.

#### Colorado

The Department conducted a workgroup meeting on June 13, 2023 to gain feedback and consider simplification of its sales tax exemption forms in accordance with H.B. 22-1034.

#### Illinois

The Department has published ST-23-0006-GIL dated 03/30/2023 to provide guidance on its sales/use tax treatment of drop shipments and its marketplace facilitator tax collection law.

#### Kansas

The Department published Notice 23-02 concerning 2022 HB 2136, which excluded “delivery charges” from the definition of “sales price” in K.S.A. 79-3602(II), indicating that delivery charges will be exempt from sales tax if the retailer separately states it on the invoice. Otherwise, if not separately stated, delivery charges will be included in the sales price.

#### Louisiana

The Department has amended regulation LAC 62:III.2103 to provide that employer withholding taxes can be included in a voluntary disclosure agreement.

#### Maryland

The Comptroller on May 10, 2023 published the Maryland Form 600 Digital Advertising Gross Revenues Tax Return, the day after the Maryland Supreme Court ordered dismissal of *Comcast v. Maryland Comptroller*, the state court legal challenge to that tax, for failure to exhaust administrative remedies.

#### Massachusetts

The Department has proposed amendments to the regulation 830 CMR 64H.1.9 "Remote Retailers and Marketplace Facilitators" dated 04/24/2023 to provide updated sales/use tax guidance for marketplace facilitators and remote sellers.

#### Michigan

The Treasury has published in May 2023 an FAQ providing sales/use tax guidance to remote sellers.

#### Minnesota

The Department circulated for public comment on April 25, 2023 draft Revenue Notice # 23-XX adopting the interpretations and examples contained in the Commission's 2021 revised Statement of Information concerning Public Law 86-272 and internet activities.

#### Missouri

The Department published LR 8232 dated March 30, 2023 providing sale/use tax guidance on drop shipments to Missouri customers, indicating that the out-of-state retailer should be collecting Missouri sales tax on drop shipment sales because when the drop shipper delivers the item to the Missouri customer, title passes from the drop shipper to the out-of-state retailer to the Missouri customer, and since title passed from within Missouri, it is a taxable Missouri sale.

The Department has adopted 12 CSR 10-114.400 to explain who qualifies as a marketplace facilitator and how a seller should report use tax transactions. "Missouri DOR adopts marketplace facilitator rule," *Checkpoint State Tax Update*, Thomson Reuters (June 2, 2023).

#### South Carolina

The Department has published "Tax Tips for Remote Workers and Their Employers," dated June 27, 2023, clarifying South Carolina's income and employer withholding tax treatment of remote work (taxable if performed in the state).

#### Tennessee

The Department has published an extensive guide entitled "Taxation of Short-term Rental Units" dated May 2023.

#### West Virginia

The Tax Division has published TSD 445 dated May 2023 stating that streaming services are subject to West Virginia and local sales and use tax.

#### Wisconsin

The Department has published Wisconsin Dept. Rev. Tax Bulletin No. 221 dated 04/01/2023 to provide sales/use tax guidance to marketplace facilitators.

### **Legislation**

#### Colorado

The Colorado Legislature enacted S.B. 23-143 on May 4, 2023, creating an exemption from its \$.28 delivery fee for businesses with sales in the prior year of \$500,000 or less and allows retailers the option to pay the fee on behalf of their customers. Emily Hollingsworth, "Colorado Exempts Small Businesses from Delivery Fee," *Tax Analysts Tax Notes State* (May 15, 2023).

L. 2023, H1017 (c. 365) requires the Department to make certain improvements to its Sales and Use Tax Simplification System (SUTS) by January 1, 2025, including a simplified user interface for filing returns, a bulk address testing system, and features to improve its usability for retailers and local jurisdictions. State Tax Update, *Checkpoint Thomson Reuters* (June 12, 2023).

#### Louisiana

The Legislature enacted HB 171 to delete the "200 transactions" economic nexus threshold from its sales tax economic nexus law.

The Legislature enacted HB 558 to provide for the Louisiana Uniform Local Sales Tax Board and to require the board to manage and maintain a uniform electronic local return and remittance system, design and implement a single remittance system for state and local sales and use taxes, provide for the operation of the single remittance system, provide for requirements and limitations, and provide for the funding of certain technology and programs.

#### Minnesota

The Legislature enacted HF 2887 providing for a \$.50 fee on retail deliveries to consumers, similar to Colorado's, with an exemption for retailers with annual sales below \$1 million, effective July 1, 2024, to fund major transportation infrastructure. Michael J. Bologna, "New Taxes on Tap for Minnesota Corporations, Millionaires," *Bloomberg Law News* (May 22, 2023).

## New Jersey

The New Jersey Legislature enacted A6494, which establishes a “convenience of the employer test” for residents of states that impose a similar test. This means that for an individual who is a nonresident of this State and who has income from employee compensation from a New Jersey employer for the performance of personal services performed outside of New Jersey that were not required to be performed outside of New Jersey, and whose state of residence imposes an income or wage tax that requires employee compensation to be sourced to an employer’s location if the nonresident renders the personal services from an out-of-state location for the convenience of the nonresident employee and not due to the necessity of the employer, that same sourcing rule will apply to that income of the nonresident. The bill also provides a refundable gross income tax credit available to New Jersey resident taxpayers who obtain a final judgment from another state’s or jurisdiction’s tax court or tribunal in the resident taxpayer’s favor resulting in the resident taxpayer being refunded taxes paid to that state or jurisdiction on the basis that the income was derived from services rendered while the resident taxpayer was within New Jersey.

## Cases

### California

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. The California Supreme Court denied review on April 26, 2023.

In *Online Merchants Guild v. Maduros*, the U.S. District Court for the Eastern District of California dismissed the lawsuit challenging as unconstitutional and unlawful for other reasons the California Department of Tax and Fee Administration assessments for back sales/use taxes on marketplace sellers with inventory nexus in the state, based on the Tax Injunction Act. The Ninth Circuit affirmed the dismissal on November 9, 2022, determining that “the requested relief would ‘to some degree stop’ the

assessment or collection of a state tax, and federal courts lack jurisdiction under the TIA.” Perry Cooper, “Amazon Sellers California Tax Challenge Properly Dismissed,” *Bloomberg Tax Daily Tax Report: State*, November 9, 2022. The Online Merchants Guild filed a petition for certiorari with the U.S. Supreme Court, but it was denied on June 20, 2023. Paul Jones, “Supreme Court Rejects Amazon Sellers’ California Sales Tax Suit,” *Tax Analysts Tax Notes State*, June 21, 2023.

#### 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 and the respective parties have recently filed their briefs.

#### Indiana

In *Netflix, et. al v. City of Fishers, Indiana, et. al*, No. 22A-PL-1630 (June 13, 2023), the Indiana Court of Appeals determined in an interlocutory appeal from a lower court decision denying Netflix, et. al motion to dismiss several municipality lawsuits seeking franchise fees from Netflix and other streaming companies under the Indiana Video Services Franchise Act that the Indiana Legislature had recently enacted a law H.B. 1454 retroactive to July 1, 2006 providing that streaming companies such as Netflix are not included in the provisions of that Act, and therefore, remanded the case back to the lower court for a redetermination on the motion to dismiss consistent with this new legislation.

#### Louisiana

In *City of Kenner v. Netflix Inc.*, No. 22-CA-466, the Louisiana Fifth Circuit Court of Appeal affirmed the trial court’s dismissal of a suit for franchise fees from Netflix and Hulu, brought on behalf of a putative class of all Louisiana political subdivisions. Audrey E.P. Fick “Netflix, Hulu Win Again in Louisiana Franchise Fee Fight,” *Tax Analysts Tax Notes State* (May 15, 2023).

In *Apple v. Samuel*, DOCKET NO. L01283 (January 12, 2023), the Louisiana Board of Tax Appeals granted Apple’s motion for partial summary judgment that Apple's

iCloud personal electronic storage capacity services were not subject to certain local sales taxes. The local parishes had agreed not to oppose the motion.

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. The parties and several amici have filed briefs and oral arguments were held. However, following passage of HB 171 eliminating the "200 transactions" threshold from Louisiana's sales/use tax economic nexus law and the enactment of HB 558 including reforms to the local sales tax system, the taxpayer advised the Fifth Circuit that it was no longer pursuing the case and considered it "moot." Michael Bologna, "Small Seller Retreats From One Battle Against Sales Tax Complexity," *Bloomberg Law News* (June 20, 2023).

#### Maryland

On May 9, 2023, on the grounds that plaintiffs had not exhausted their administrative remedies, the Maryland Supreme Court remanded for dismissal *Comcast v. Maryland Comptroller* and vacated the order dated October 20, 2022 of Judge Asti of the Circuit Court of Anne Arundel County that had 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 had 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.

#### Minnesota

In *Uline, Inc. v. Commissioner*, No. 9435-R (June 23, 2023), the Minnesota Tax Court affirmed the Commissioner's corporate franchise tax assessment against the out-of-state taxpayer, a distributor of industrial packaging and products, finding loss of protection under P.L. 86-272 due to its sales representatives gathering market research information and regularly filing reports on competitor's activity, products and pricing while they made sales calls on wholesale customers. Such activity was beyond the scope of solicitation.

#### New York

In *Matter of Zelinsky*, DTA # 830517 and 830681, New York Tax Appeals Tribunal, Professor Zelinsky, a Connecticut resident and faculty member of a New York City law school, is challenging the constitutionally New York's "convenience of the employer" rule based on the facts during the pandemic, arguing that his income from remotely taught classes during COVID-19 should not be taxable by New York because those remote classes were not for his convenience but were a necessity. Christopher Jardine, "Connecticut Taxpayer Claims New York Illegally Taxed Nonresident Remote Work," *Tax Analysts Tax Notes State* (June 10, 2023).

#### North Carolina

In *Quad Graphics, Inc. v. North Carolina Department of Revenue*, No. 22-890, the U.S. Supreme Court denied on June 20, 2023 the petition for certiorari filed by Quad Graphics of the North Carolina Supreme Court's order. 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 had petitioned the U.S. Supreme Court for certiorari and the North Carolina Chamber Legal Institute (NCCLI), COST and Professor Richard Pomp, American College of Tax Counsel, National Manufacturers Association, and National Federation of Independent Businesses filed amicus briefs in support of the petition.

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