



MULTISTATE TAX COMMISSION

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Nexus Program Director's November 15, 2023 Update on Nexus Law Developments Since July 24, 2023

Rulings or Administrative Actions

California

The California Taxpayers Association filed its August 8, 2023 letter objecting to the California Department of Tax and Fee Administration's proposed modified regulation 1684.5 concerning the marketplace facilitator tax collection law AB 147 as issued in violation of the Administrative Procedure Act and objecting to several provisions in the proposed regulation concerning definitions. Paul Jones, "CalTax Urges Do-Over of California Proposed Marketplace Reg," *Tax Analysts Tax Notes State*, August 15, 2023. However, the Office of Administrative Law approved the proposed regulation on August 28, 2023.

Colorado

The Colorado Energy Office has adopted permanent regulations (8 CCR 1501-10, effective 11/14/2023) relating to the community access enterprise retail delivery fee. Colo. Code Regs. § 8 CCR 1501-10:1. *Checkpoint State Tax Update*, October 26, 2023.

Illinois

The Illinois Department of Revenue has published Informational Bulletin FY 2024-08 dated October 2023 entitled "Retailers' Occupation Tax and Updated Threshold Guidance for Remote Retailers and Marketplace Facilitators as set forth by the Leveling the Playing Field for Illinois Retail Act" to provide sales/use guidance on sourcing and economic nexus thresholds to remote sellers and marketplace facilitators making sales to Illinois purchasers.

Indiana

The Department published Income Tax Information Bulletin #28 dated November 2023 to provide guidance on Indiana source income, states with which Indiana does or does not have reciprocity agreements concerning wages earned by residents working in those states, how credits for taxes paid to other states should be claimed, and withholding tax guidance for employers with Indiana residents working out-of-state.

Louisiana

The Louisiana Sales and Use Tax Commission published Remote Sellers Information Bulletin No. 23-001 dated September 8, 2023 providing guidance to merchants making sales through marketplace facilitators and direct sales to consumers.

The Department published on September 21, 2023 proposed regulation LAC 61:I.1357 to implement the digital nomad income tax exemption provisions recently enacted.

Missouri

The Department published LR 8264 dated July 31, 2023 providing sale/use tax guidance concerning a Florida company that leased ground support equipment to an air cargo company with offices at the St. Louis airport. The ruling determined that the leased equipment established physical presence nexus for the Florida company, which was obligated to collect Missouri use tax on the lease payments.

The Department published LR 8271 dated October 30, 2023 providing that for a Montana resident purchasing tangible personal property from a Missouri manufacturer, with delivery by UPS to the purchaser in Montana, Missouri regulations provide that if the parties have not agreed that title transfers earlier, title would transfer upon delivery to the purchaser in Montana, and the transaction would not be subject to Missouri sales tax.

New Jersey

The Division of Taxation has published TB-108, issued September 5, 2023 to provide nexus guidance for the New Jersey corporation business tax, implementing P.L. 2023, c.96, which was signed into law on July 3, 2023, imposing a bright-line economic nexus standard of \$100,000 in New Jersey gross sales or 200 transactions in the taxpayer's fiscal or calendar year. This document includes a list of activities that are protected or not protected by P.L. 86-272, largely adopted from the MTC Statement of Information Concerning P.L. 86-272 revised in 2021. The document also states that offering, soliciting, selling, accepting, or buying of digital assets such as virtual currency or non-fungible tokens (NFTs) and/or offering of services pertaining to them is the offering and selling of financial products, financial instruments, and financial services and is not protected by P.L. 86-272.

The Division of Taxation has published TB-112 issued October 11, 2023 to provide new income apportionment and sourcing guidance to taxpayers: single sales factor apportionment of business income and market-based sourcing of services income for

tax years beginning on January 1, 2023. Emily Hollingsworth, "New York Tax Department Formally Proposes Corporate Tax Reform Regs," *Tax Analysts Tax Notes State* (August 14, 2023).

The Division of Taxation published on October 27, 2023 guidance entitled "Convenience of the Employer Sourcing Rule FAQ," which is effective January 1, 2023, stating: P.L.2023, c.125 was enacted on July 21, 2023, to provide that this State will apply another state's Convenience of the Employer Rule on nonresidents, which would be the same as the one in the nonresident's home state.

New York

The New York State Department of Taxation and Finance published on August 9, 2023 its proposed extensive corporate tax reform regulations for comment. These proposed regulations include guidance consistent with the MTC's Statement of Information Concerning P.L. 86-272, as revised in 2021 concerning internet transactions.

Pennsylvania

The Department launched in October 2023 a new online filing option available for non-profits, such as charitable and volunteer organizations, to apply for and renew a Pennsylvania sales tax exemption.

The City of Philadelphia Department of Revenue has published guidance entitled "Philadelphia Wage Tax policy guidance for non-resident employees in the era of remote work," updated October 12, 2023, stating that the compensation of non-resident employees who perform work for Philadelphia-based employers is not subject to Philadelphia Wage Tax during the time they are required to work remotely from a location outside Philadelphia, including working from home. If an employer allows an employee to work from home, at the convenience and discretion of the employee, the employee's compensation will be subject to Wage Tax. The guidance provides several hypothetical fact situations as additional explanation.

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).

In a letter dated July 26, 2023 to a legislator requesting an opinion as to whether Turo, an online peer-to-peer car sharing platform with no physical presence in Myrtle

Beach, or its hosts, were subject to the city's business license tax, the South Carolina Attorney General stated that a court would need to make that determination, although indicating that based on the information provided, it did not appear that Turo was "doing business" in the city.

South Dakota

The Department has published guidance dated August 2023 on the sales/use tax treatment of drop shipments. A supplier can accept a resale exemption certificate from a retailer outside of South Dakota that does not have nexus (physical presence or economic) with South Dakota, the resale certificate providing the retailer's sales/use tax registration number issued by another state. The supplier need not charge that retailer South Dakota sales/use tax on sales of items it ships to South Dakota customers of the retailer.

Utah

The Utah State Tax Commission has published Publication 37 dated October 2023 entitled "Business Activity and Nexus in Utah" to provide guidance to taxpayers by listing Utah sales tax and corporate tax nexus-creating activities.

Washington

The Department has published guidance entitled "Canadian residents using Washington shipping address," providing that United States sellers selling products to Canadian residents and delivering the products to business addresses in Washington where those Canadian residents accept products and take them to Canada must charge Washington sales tax. Also, those sales are subject to the Washington B&O tax. *Checkpoint State Tax Updates*, October 26, 2023.

Legislation

California

Governor Newsom signed AB 1097 on October 7, 2023, providing that California businesses must register to remit use tax if they are a qualified purchaser, defined as a person that makes more than \$10,000 in purchases per year that are subject to use tax that hasn't been collected and remitted to the state by the remote seller. Prior law provided that a business was a qualified purchaser required to register for use tax if it had annual gross receipts exceeding \$100,000.

New Jersey

The New Jersey Legislature enacted A6494 (P.L.2023, c.125) on July 21, 2023 (retroactive to January 1, 2023), which establishes a "convenience of the employer

test” for residents of states that impose a similar test, such as Alabama, Delaware, Nebraska, and New York. 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

Arkansas

In Docket No. 23-TAC-00338, the Arkansas Tax Appeals Commission affirmed the Department’s sales tax assessment, holding that a non-resident vendor and installer of automotive lifts in garages of private homes and commercial buildings in Arkansas had physical presence nexus and owed sales tax on the sale and installation charges for such lifts that it contracted with local third parties to install. The local independent contractor installers were considered agents of the non-resident vendor. The customer was provided one invoice showing the non-resident vendor’s name and logo at the time of installation for the sale and installation charges. The vendor sold lifts and other items to 167 Arkansas customers during the audit period.

California

In *American Catalog Mailers Association v. Franchise Tax Board*, in which the American Catalog Mailers Association (“ACMA”) challenged the Franchise Tax Board’s (“FTB”) Technical Advice Memorandum (“TAM”) No. 2022-01 and Publication 1050 adopting the MTC’s recently revised Statement concerning P.L. 86-272, the Superior Court of California denied ACMA’s motion for summary judgment by order dated August 24, 2023, finding that the ACMA relied upon the use of general fact patterns in the TAM and Publication 1050 to seek summary judgment without adequate supporting facts or substantive argument regarding post-sales assistance and internet cookies. The court did find that the ACMA had standing to sue and that the TAM and Publication 1050 were regulations that did not comply with the Administrative

Procedures Act, but did not address that issue, since it was not part of the summary judgment motion. Paul Jones, "California Court Denies Summary Judgment in ACMA's P.L. 86-272 Suit," *Tax Analysts Tax Notes State*, August 31, 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 (No. 22-2905) on October 31, 2022 and the respective parties have recently filed their briefs. The Seventh Circuit affirmed the dismissal on October 13, 2023.

Maryland

The parties participated in oral arguments before the Fourth Circuit on September 20, 2023 in *Chamber of Commerce of the United States v. Lierman*, a challenge to the constitutionality and legality of the Maryland digital advertising tax. Andrea Muse, "Fourth Circuit Weighs Maryland Digital Ad Tax's Constitutionality," *Tax Analysts Tax Notes State*, September 21, 2023.

Apple has filed a petition in *Apple Inc. v. Comptroller of the Treasury of Md.*, Md. T.C., No. 23-DA-00-0456, October 20, 2023, seeking refund of digital advertising tax payments, arguing the tax is illegal and unconstitutional. The Comptroller has moved for dismissal for failure to exhaust administrative remedies. Michael J. Bologna, "Apple Files in Maryland Tax Court to Protest Digital Ad Tax," *Bloomberg Daily Tax News*, October 30, 2023.

Missouri

In *Daley v. Boles*, No. ED111495, Missouri Court of Appeals Eastern Division, nonresident St. Louis teleworkers seek affirmance of the district court's ruling granting them refunds of the St. Louis 1% earnings tax that the city had denied during the pandemic because the tax only applies to work conducted within the city's boundaries. The case has been briefed and decision is pending. Richard Tzul, "St. Louis Teleworkers Say Earnings Tax Win Should Stand New York," *Bloomberg Law News* (August 31, 2023).

Ohio

In *Jones Apparel Group/Nine West Holdings v. McClain*, Nos. 2020-53 and 2020-54, the Ohio Board of Tax Appeals upheld the Department's denial of refund claims for previously paid commercial activity tax (CAT) filed by an apparel wholesaler that shipped inventory to Ohio distribution centers, which was ultimately shipped to locations outside of Ohio. Under CAT sourcing rules, sales were sourced to the location of the merchandise after all transportation was completed, but the apparel wholesaler failed to provide adequate proof that the inventory at the Ohio distribution centers actually was ultimately shipped to out-of-state locations.

In *VVF Interinvest, LLC v. Harris*, No. 2019-1233, the Ohio Board of Tax Appeals reversed the Department's denial of refund claims for previously paid CAT filed by a contract soap manufacturer that shipped product from the Kansas plant to an Ohio warehouse, for ultimate delivery outside the state. The Board held that the refund claimant had provided adequate proof that the product was ultimately delivered from the Ohio warehouse to locations outside of Ohio.

In *Total Renal Care, Inc. v. Harris*, No. 2019-848, the Ohio Board of Tax Appeals upheld the Department's denial of CAT refund claims by a provider of kidney dialysis services to patients in Ohio. The patients were required to undergo monthly blood testing, with labs in Florida performing the testing. Also, the provider performed related administrative services outside of Ohio. The Board determined that the patients received the benefit of the lab work and related administrative services in Ohio, where they underwent the dialysis treatment, so those services were properly sourced to Ohio. In addition, the Board determined that insufficient evidence was presented to show the amounts attributable to those services performed out-of-state.

Washington

In *Quinn v. Washington*, Docket No. 23-171, the taxpayer has petitioned for certiorari to the U.S. Supreme Court seeking review of the Washington Supreme Court's decision upholding the constitutionality of the new Washington capital gains tax as an excise tax. The taxpayer asserts that because the state court determined that the tax was an excise tax and not an income tax, then it violates the Commerce Clause due to lack of transactional nexus, given that the sale of stock generating capital gains likely takes place on a stock exchange outside of Washington, even though the seller is a resident of Washington. The petition raises *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944) in support of its transactional nexus argument. Several taxpayer and business organizations have filed amici briefs in support of the petitioner. Washington,

Nexus Director's Update
November 14, 2023

Edmonds School District, and Washington Education Association filed responses in opposition to the petition on November 3, 2023.

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