MULTISTATE TAX COMMISSION

444 North Capitol St., NW
Suite 425
Washington, DC 20001-1538
Telephone: 202.650.0300

www.mtc.gov

Nexus Program Director's May 1, 2024 Update on Nexus Law Developments Since November 15, 2023

Rulings or Administrative Actions

California

The California Department of Tax and Fees Administration (CDTFA) has published Tax Publication 77 revised April 2024 to provide guidance to out-of-state sellers as to when they are required to register and commence collecting and remitting California sales/use tax.

Colorado

The Department published GIL 24-002 dated March 4, 2024 advising that a remote seller not "doing business" in Colorado (i.e. no physical presence and making sales into Colorado that do not exceed its economic nexus threshold) may voluntarily register and obtain a Colorado sales/use tax permit and may voluntarily collect sales/use tax on retail sales made into Colorado. The letter requestor asked whether such a remote seller had a duty to comply with the notice and reporting requirements of section 39-21-112(3.5), C.R.S.

Florida

The Department issued TIP No. 23A01-24 dated December 15, 2023 entitled "Know Who is Responsible for Remitting Sales and Use Tax When Using Third-Party Delivery Networks" in order to provide guidance to restaurants and other businesses using delivery network companies that those companies will collect and remit sales/use tax on deliveries only if they have elected to do so and have notified the merchant. Otherwise, the merchant remains responsible for collecting and remitting the tax.

The Department published guidance on its voluntary disclosure program, GT-800053 dated March 2024.

Illinois

The Department published ST-23-0035-GIL dated November 16, 2023 to provide state and local sales/use tax general sourcing guidance for in-state and out-of-state sellers with some physical presence in Illinois.

The Department has published PIO-101 entitled the "Illinois Sales and Use Tax Matrix," effective January 1, 2024, to provide guidance on Illinois sales/use tax impositions and exemptions.

The Department has published PIO-102 entitled "Illinois Filing, Payment, and Refund Resources for Marketplace Facilitators, Marketplace Sellers, and Remote Retailers," effective January 1, 2024, to provide sales/use tax guidance to remote sellers and marketplace facilitators and sellers.

Indiana
The Department has published Income Tax Information Bulletin # 32 dated January 2024 to provide guidance on local income taxes. The Department has published Sales Tax Information Bulletins #52 and #57 dated March 2024 to indicate that the 200 transactions alternative sales/use tax economic nexus threshold was legislatively eliminated effective January 1, 2024. The Department has published Sales Tax Information Bulletin #89 dated April 2024 to provide sales tax compliance guidance to remote sellers and marketplace facilitators.

Iowa
The Department published on February 7, 2024 Regulation 701—Chapter 207 entitled "Remote Sales and Marketplace Sales" to provide sale/use tax guidance to remote sellers and marketplace facilitators and sellers, effective March 13, 2024.

Louisiana
The Department published on November 14, 2023 Revenue Ruling No. 23-001 to explain the tax collection and remittance requirements for vehicle lease or rental transactions facilitated through peer-to-peer vehicle sharing platforms.

Massachusetts
The Department has published updated final reg 830 CMR 64H.1.9 on April 12, which provides several exceptions to the marketplace facilitator definition: persons facilitating sales of marijuana or marijuana products on behalf of marijuana retailers are not considered marketplace facilitators to the extent that the retailers themselves are registered to collect tax; businesses solely provide payment processor services for marketplace sales; marketplaces that solely provide advertising services; facilitators of meal sales when the restaurants are registered to collect tax; or facilitators of vehicle rentals when the retailers are registered to collect tax. Emily Hollingsworth,

"Massachusetts Adopts Regs on Remote Sellers, Advance Tax Payments," *Tax Analysts Tax Notes State* (April 15, 2024).

Michigan

Michigan Treasury has published Michigan Revenue Administrative Bulletin 2023-26, approved December 26, 2023, to provide guidance on Michigan's SALES AND USE TAX SOURCING rules.

Minnesota

The Department has published an updated Sales Tax Factsheet 173 entitled "Direct Mail and Fulfillment Services" to provide sales tax guidance on direct mail.

The Department has published guidance concerning the retail delivery fee (similar to Colorado's) effective July 1, 2024 of 50 cents that applies to certain transactions involving retail delivery in Minnesota. An exclusion is provided for a retailer, who for the previous calendar year, had Minnesota retail sales that totaled less than $1,000,000, and a marketplace provider facilitating a sale for a retailer, who during the previous calendar year, made Minnesota retail sales through the marketplace that totaled less than $100,000.

Missouri

The Department published LR 8279 dated January 4, 2024 providing sale/use tax guidance concerning an out-of-state wholesaler making wholesale sales to Missouri businesses and obtaining exemption certificates from them. The Department advised that if the out-of-state wholesaler's taxable sales into Missouri did not annually exceed $100,000, the wholesaler did not have nexus and did not need to register with Missouri for sales/use tax and collect its sales/use tax.

New York

The New York State Department of Taxation and Finance has formally adopted in December 2023 extensive corporate tax reform regulations implementing the 2015 legislation. These regulations include guidance consistent with the MTC's Statement of Information Concerning P.L. 86-272, as revised in 2021 concerning internet transactions. Nicholas Montorio and Denisse Moderski, "New York's Retroactive Corporate Tax Regulations Can Create Exposures," Tax Analysts Tax Notes State (February 26, 2024).

The Department has adjusted for inflation the corporate franchise tax economic nexus annual "deriving receipts" threshold, increasing it from $1.138 million to $1.238

million effective January 1, 2024. Emily Hollingsworth, "New York Ups Corporate Receipts Threshold for Franchise Tax, MTA Surcharge," *Tax Analysts Tax Notes State* (January 3, 2024).

Pennsylvania
The Department has published CORPORATION TAX BULLETIN 2024-01 entitled "Sourcing Sales Other Than Tangible Personal Property and Services" issued January 5, 2024 to provide guidance on its market-based sourcing rules adopted by the legislative changes as part of Act 53 of 2022.

Tennessee
The Department has updated and published its extensive guides, the "Sales and Use Tax Manual," "Tennessee Business Tax Manual," and "Franchise and Excise Tax Manual," dated December 2023.

Virginia
In Document Number 23-112 dated October 19, 2023, the Virginia Tax Commissioner determined that a Virginia city's Business, Professional and Occupational License (BPOL) tax and returns were due from an out-of-state internet retailer affiliate of a company that operated retail stores in the city. Employees of the retail stores facilitated the internet sales of the affiliate using the computers at the retail stores. Since orders for the affiliate's products were taken at those retail stores, those sales were deemed to occur at the retail store locations for BPOL tax purposes because solicitation activity occurred there. Also, those retail stores were deemed to be places of business of the affiliate for BPOL purposes.

Washington
In Det. No. 21-0083, 42 WTD 066 (2023), the ADMINISTRATIVE REVIEW AND HEARINGS DIVISION, DEPARTMENT OF REVENUE determined that an out-of-state internet seller that was a subsidiary of an in-state business that operated retail stores in the state had substantial nexus with Washington for sales tax and B&O tax purposes as a result of the activities of the parent on behalf of the subsidiary in allowing customers to place "special orders" for the subsidiary's products using the parent's computers in those stores. Employees of the in-state business were carrying on activities that helped to build and maintain the market for the out-of-state internet seller.

Wisconsin

The Department published a document entitled "Marketplace Providers and Sellers" dated January 4, 2024, effective January 1, 2020, stating that 2019 Wis. Act 10 clarifies that a marketplace provider is required to collect and remit sales or use tax for all sales of taxable products and services in Wisconsin that the marketplace provider facilitates on behalf of a marketplace seller. The Act also reverses the effect of the decision in *Orbitz, LLC vs. Wisconsin Department of Revenue,* (Wisconsin Court of Appeals, District IV, February 11, 2016) by requiring marketplace providers that facilitate sales of all services under sec. 77.52(2), Wis. Stats., including lodging services, to collect and remit sales or use tax on the entire amount charged to a purchaser.

Legislation

National Conference of State Legislatures (NCSL)

The NCSL TASK FORCE ON STATE AND LOCAL TAXATION has published a white paper/POLICY RECOMMENDATION dated August 2023 entitled "State and Local Tax Considerations for Marketplace Facilitator Tax Collection Requirements." This document contains several recommendations for updating current tax compliance laws for remote sellers and marketplace facilitators to encourage uniformity and ease of administration for businesses, such as eliminating the 200 transactions alternative economic nexus threshold, providing remote sellers at least 60 days to register with a state after exceeding the state's economic nexus threshold, and allowing more flexibility in interpreting and applying the state's definition of "marketplace facilitator." Danielle Muoio Dunn, "States' Sales Tax Rules for Online Sellers Need Update: Report," *Tax Analysts Tax Notes State* (April 17, 2024). This document can be downloaded from the NCSL website at https://www.ncsl.org/state-legislatures-news/details/states-adapt-tax-laws-as-online-sales-surge.

Arizona

The Arizona Legislature enacted H.B. 2382, which provides that beginning on or before Jan. 1, 2026, taxpayers who use certified service providers to source transactions subject to transactions privilege tax involving tangible personal property will not be liable under certain circumstances for failing to pay the correct amount of tax due to an error in sourcing the transaction. *Bloomberg Daily Tax Report: State* (April 11, 2024).

Colorado

Colorado Legislature has enacted H.B. 24-1041 prohibiting a home rule city, town, or county that collects its own sales and use taxes — rather than use Colorado's online sales and use tax system (SUTS) portal — from collecting sales/use taxes from a retailer with no physical presence in Colorado, unless the seller elects to remit the tax

or enters into a voluntary collection agreement with the jurisdiction. Emily Hollingsworth, "Colorado Modifies Rules on Local Sales Tax Filings and Collections," *Tax Analysts Tax Notes State* (April 8, 2024).

Colorado Legislature has enacted L. 2024, S23, which provides that any vendor that uses the data contained in the GIS database to determine the tax rate and the local taxing jurisdictions to which sales or use tax is owed is held harmless in an audit by any local taxing jurisdiction for any tax, charge, or fee that otherwise would be due solely as a result of an error or omission in the GIS database data. *Thomson Reuters Checkpoint* (April 23, 2024).

Colorado Legislature has enacted SB 24-024, effective January 1, 2024, which provides that, for purposes of local tax administration of remote sales, no local taxing jurisdiction (including any home rule city, town, or city and county) that imposes a local lodging tax may apply additional reporting requirements or standards to an accommodation's intermediary that are not similarly applied to all marketplace facilitators obligated to collect and remit locally administered taxes by the local taxing jurisdiction. *Thomson Reuters Checkpoint* (April 23, 2024).

Colorado S.B. 24-025, passed by both houses and sent to the governor for signature, would amend statutes for the department of revenue to clarify that local jurisdictions would now be required to submit copies of any sales and use tax ordinance 45 days before their effective dates to the DOR, and would establish that retailers remitting sales taxes would qualify as "harmless" for errors made by the state's Geographical Information System database; the bill would be effective on July 1, 2025. "Colorado Bill Would Amend DOR Statutes for Local Sales, Use Tax Management," *Tax Analysts Tax Notes State* (April 24, 2024).

Indiana
The Indiana Legislature has enacted SB 228, eliminating the alternative 200 transactions sales/use tax economic nexus threshold, effective January 1, 2024.

Wyoming
The Wyoming Legislature has enacted HB 0197, effective July 1, 2024, eliminating Wyoming's alternative "200 or more transactions" sales/use tax economic nexus threshold, leaving in place as its sales/use tax economic nexus threshold gross sales exceeding $100,000 in the current or immediately preceding calendar year.

Cases

Arizona

In *RockAuto, LLC v. Dep't of Revenue*, Ariz. Ct. App., Div. 1, No. 1 CA-TX 23-0002, the Department appealed an adverse lower court ruling that an out-of-state auto parts internet business RockAuto did not have physical presence transaction privilege tax nexus during the audit period (prior to *Wayfair*) on remote sales to Arizona customers. The company used six Arizona suppliers to fulfill orders and provided those suppliers with branded packaging and marketing magnets to be included in the customer shipments. The Department argued on appeal that the Arizona suppliers were involved in establishing and building a market for the company in Arizona, creating representational nexus. Perry Cooper, *Bloomberg Law News*, "Arizona Judges Hit Car-Parts Seller Hard on Tax Nexus Arguments," March 21, 2024. The Arizona Court of Appeals issued its opinion on April 2, 2024, reversing the lower court and determining that the in-state distributors established representational nexus. The in-state suppliers performed all the activities of the online sales contracts between RockAuto and its online customers except the acceptance of orders, and about 11% of the orders handled by those suppliers involved products shipped intrastate to Arizona customers. Christopher Jardine, "Wisconsin Retailer Found to Have Nexus to Arizona Through Distributors," *Tax Analysts Tax Notes State*, April 3, 2024.

In *City of Tucson v. Orbitz Worldwide Inc.* (No. 1 CA-TX 23-0001) (January 11, 2024), the Arizona Court of Appeals (Division One) held that Tucson's hotel tax did not apply to Expedia and other OTCs because they did not fit within the city's definition of a hotel "operator" or "non-employee managing agent." Paul Jones, "Expedia Not Subject to Tucson's Hotel Tax, Arizona Appeals Court Holds," *Tax Analysts Tax Notes State* (January 22, 2024).

California

In *City of Lancaster v. Netflix Inc.* (Case No. B321481) the California Court of Appeal, Second Appellate District, on February 22, 2024 upheld the trial court's determination that the state's Digital Infrastructure and Video Competition Act (DIVCA) did not give the city a cause of action against nonfranchise holders for declaratory judgment and damages against Netflix and Hulu for failing to pay franchise fees on streaming. Andrea Muse, "California Court Rules for Netflix, Hulu In Local Franchise Fee Fight," *Tax Analysts Tax Note State* (March 4, 2024).

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 granted ACMA's motion for summary judgment by order dated December 13, 2023, finding that the Board failed to adopt the TAM and Publication 1050 in compliance with the Administrative Procedures Act, so those documents were void. Paul Jones, "ACMA Wins P.L. 86-272 Case Against California FTB," *Tax Analysts Tax Notes State*, December 18, 2023. The court further denied the Board's motion to vacate and modify the judgment, and the Board has not appealed the ruling. Laura Mahoney, "California Misses Deadline to Appeal Internet Activity Tax Ruling," *Bloomberg Law News* ((March 19, 2024).

In *Bahl Media, LLC. Et al v. California Franchise Tax Board*, Superior Court of California, San Francisco County (No. CGC-16-554150) the trial court granted plaintiffs' motion for class certification on February 24, 2024 in a lawsuit brought by passive owners of California LLCs whose only connection with California was small percentage ownership (but greater than .2%) and claiming not to be "doing business" in California, seeking refund of the $800 minimum franchise tax.

Colorado

Wayfair v. City of Lakewood, *et al.* Case No. 2022CV30710, District Court, Jefferson County Colorado: Wayfair filed a state court challenge to the City of Lakewood notice of deficiency for locally administered sales/use tax, alleging the City and the Colorado Department of Revenue had a Commerce Clause duty to establish a centralized administration system for local sales tax, provide access to software immunizing Wayfair from audit liability, and mitigate tax compliance complexity of state, home rule jurisdiction and other special district sales tax laws. The Department's motion to dismiss was granted on January 10, 2024, based on the Department's lack of authority to comply. The case is pending against City of Lakewood.

Illinois

In *PetMed Express, Inc. v. Illinois Department of Revenue,* Case No. 23 TT, Illinois Independent Tax Tribunal (petition filed 1/26/2024), a Florida-based remote seller contested notices of sales/use tax liability, challenging constitutionality of Illinois Level the Playing Field Act, local sales/use tax sourcing rules, discriminating against and imposing an undue burden on remote sellers vs. in-state sellers in applying destination sourcing to remote sellers but origin sourcing to in-state sellers. The complaint alleges that under the Level the Playing Field Act, remote sellers (no physical presence in Illinois) with economic nexus are required to collect state and local Retailers' Occupation Tax (Illinois sales tax) on their remote sales to Illinois customers and apply destination sourcing (delivery address) in determining the local sales tax that applies. In-state sellers also collect state and local sales tax on sales to

Illinois customers, but local rate is based on in-state seller's location. Remote seller and in-state seller making the sale of the same item to the same customer could apply different local rates, and the remote seller has to track and report its sales by delivery locations. Illinois imposes state use tax, but few local use taxes. Sellers with physical presence in Illinois but conducting sales activity outside the state and shipping the ordered item to the Illinois customer from out-of-state only need to collect state use tax (unless a local use tax is imposed). A remote seller making a sale to the same customer would need to collect both state and local ROT and source the sale to the delivery location.

Louisiana

In *Robinson v. Priceline, et al*, NO. 2023 CA 0069, the Louisiana Court of Appeals on April 17, 2024 in a 2-1 decision affirmed the lower court's dismissal of the Louisiana Department of Revenue's and local parishes' petition against online travel companies for failure to collect state and local sales/use tax on the full price paid by customers purchasing hotel rooms on the online travel companies' platforms, determining that the online travel companies were providing nontaxable services in facilitating the transactions, were not hotels furnishing sleeping rooms within the meaning of the sales/use tax imposition, and were not "dealers" under the sales tax law.

Maryland

The Fourth Circuit on January 10, 2024 in *Chamber of Commerce of the United States v. Lierman*, No. 22-2275, a challenge to the constitutionality and legality of the Maryland digital advertising tax, upheld the district court's dismissal of Counts I-III (ITFA, due process, commerce clause) under the Tax Injunction Act, determining that the digital advertising tax was a tax and not a fee, but ordered the dismissal be without prejudice, and vacated the district court's dismissal of Count IV (First Amendment) and remanded. Concerning Count IV, the 1st Amendment challenge to the tax "pass-through provision," the district court ordered the parties to file supplemental briefs on the meaning of that provision, and the parties have done so.

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. Several other large companies have since filed similar petitions. Bologna, "Amazon, Facebook, Google Seek Maryland Digital Ad Tax Refunds," November 14,

2023; Bologna, "Apple, Peacock Battle for Top Position in Maryland Ad Tax Fight," February 13, 2024.

Massachusetts
In *Welch v. Commissioner of Revenue*, Docket No. C339531, Massachusetts Appellate Tax Board (November 29, 2023), the Board held for the Commissioner, upholding an income tax assessment against a nonresident former shareholder, founder and key employee on the gain from the sale of shares in a Massachusetts-based corporation that developed and marketed derivatives and collateral management solutions for institutional investors. The Board viewed the gain as compensatory and effectively connected with the trade or business of employment carried on in Massachusetts.

Michigan
In *Apex Laboratories International, Inc. v. City of Detroit*, No. 363984, Michigan Court of Appeals (January 4, 2024), Detroit assessed Apex, a Delaware corporation listing a Detroit mailing address, for income tax on gain from its sale of shares in Labstat (a Canadian company), its only asset. Apex did not have any employees, owned no real or personal property, provided no services, and sold no goods, either in Detroit or elsewhere. Various members and employees of Huron, a Detroit-based private equity firm, were appointed to Apex's board of directors. Apex never held a board meeting. Huron employees/members conducted negotiations for Apex's sale of the Labstat shares in their Detroit offices, and the sale was closed remotely in Canada. Apex appealed the assessment to the Michigan Tax Tribunal, which held for Apex that it was not "doing business" in Detroit and therefore had no nexus. The Michigan Court of Appeals affirmed, but shortly thereafter, the *Wayfair* decision came down, and Detroit appealed to the Michigan Supreme Court, which vacated the lower court decision and remanded, in view of *Wayfair*. On remand, the Tax Tribunal again ruled for Apex, but the Michigan Court of Appeals reversed, granting Detroit's motion for partial summary judgment and determining that Apex did have nexus in Detroit by virtue of the actions of Huron members/employees conducting the Labstat sale negotiations in their Detroit offices—the only activity of Apex. However, the Court of Appeals determined that issues of fact remained on the income allocation question and remanded for that purpose.

Missouri
In *Creve Couer v. Direct TV LLC et al*, Case No. 18SL-CC02821-01, in the Circuit Court of St. Louis County, Missouri, the city and others filed a class action lawsuit against Direct TV and other video streaming service providers, seeking franchise fees under the Video Service Providers Act and a private cause of action under that act. The

court on November 28, 2023 denied Direct TV's motion for judgment on the pleadings, determining that the cities do have a private right of action under the Act and may seek declaratory relief. The court noted that Direct TV had sought authorization under the Act as a video service provider and had paid partial fees. The court also held that the cities' claim for unjust enrichment could proceed.

New Jersey

In *H&M Bay, Inc. v. Dir., Div. of Taxation*, Docket No. 012545-2021, the New Jersey Tax Court denied the parties' motions for summary judgment, but determined that H&M Bay, a Maryland corporation and federally licensed freight forwarder with national operating authority as an "LTL" (less-than-truckload) service provider, coordinating multiple LTL shipments throughout the United States, was not entitled to protection under P.L. 86-272 from New Jersey's corporate business tax. However, material issues of fact remained as to whether the taxpayer's activities in New Jersey were *de minimis* or were nexus-creating and considered "doing business" in New Jersey. The taxpayer had no physical presence in New Jersey but coordinated shipments to and from New Jersey using independent truckers. The taxpayer was not taking orders for tangible personal property but was instead involved in providing transportation services, so P.L. 86-272 did not apply. The court also held that physical presence was not necessary to establish income tax nexus. But the evidence did not show how many New Jersey customers the taxpayer had and how much revenue was derived from those customers. The court determined that the independent trucking firms contracting with the taxpayer were not agents and their activities in New Jersey in making pickups and deliveries did not establish representational nexus.

In *Burough of Longport, et al v. Netflix et al*, No. 22-2139, the 3rd Circuit on February 29, 2024 affirmed the federal district court' s determination that the New Jersey Cable Television Act did not provide municipalities a private right of action to enforce its provisions for franchise fees against video streaming companies.

New York

In *American Catalog Mailer Association v. Department of Taxation and Finance*, the ACMA has filed a complaint in New York district court alleging that the Department's recent adoption of regulations based on the Multistate Tax Commission's revised Statement of Information on P.L. 86-272 dated August 2021 are invalid. The regulations view nonsolicitation-related internet activity with customers in New York (such as internet chat assistance to customers, soliciting and obtaining employment or credit card applications, selling warranties, remotely fixing products, using cookies for product development purposes, etc.) as occurring in New York in violation of P.L. 86-272.

The regulations are also retroactive to January 2015. Christopher Jardine, "New York's P.L. 86-272 Reg Is Invalid, ACMA Says," *Tax Analysts Tax Notes State* (April 11, 2024).

In *In re Zelinsky*, DTA 830517 and 830681, New York Division of Tax Appeals, the ALJ, relying on prior precedent (*Zelinsky* and *Huckaby* decisions) on November 30, 2023 denied Cardoza Law School Professor Zelinsky's petition challenging the constitutionality of New York's "convenience of the employer" rule as applied during the pandemic. Professor Zelinsky asserted that the rule was unconstitutional in violation of due process and the commerce clause to the extent he was required to pay New York personal income tax on his teaching income earned while working from home out-of-state, due to the COVID-19 pandemic requirement to work from home. On December 27, 2023, Professor Zelinsky sought reversal of this ruling from the New York Tax Appeals Tribunal, which is pending. Cameron Browne, "Connecticut Professor Files Exception to New York's Denial of Tax Refund," *Tax Analysts Tax Notes State* (January 4, 2024).

Ohio

In *Schaad v. Alder*, Slip Opinion No. 2024-Ohio-525 (February 14, 2024), the Ohio Supreme Court affirmed the lower court, upholding the due process constitutionality of H.B. 197, enacted during the COVID-19 pandemic, designed to maintain consistency in municipal tax revenues providing that for a limited time, Ohio workers would be taxed based on their "principal place of work" rather than by the municipality where they actually performed their work. The law was unsuccessfully challenged by a worker employed by a Cincinnati business who worked from home outside of Cincinnati and was subject to withholding and income tax by Cincinnati on those earnings.

In *Price v. City of Cincinnati*, CASE NO. 2021-2679, the Ohio Board of Tax Appeals on April 22, 2024 applied the *Schaad v. Alder* holding in affirming the City's denial of a request by a person working remotely for a Cincinnati employer whose office was shut down during the pandemic for a refund of overpayment of Cincinnati municipal income taxes for tax year 2020.

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. The taxpayer has appealed to the Ohio Supreme Court. Perry Cooper, "Nine West Seeks Commercial Activity Tax Refund at Ohio Top Court," Bloomberg Law News (January 29, 2024).

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. The taxpayer has appealed to the Ohio Supreme Court. Perry Cooper, "Ohio Tax Agency Urges Top Court to Reject DaVita's Arguments," Bloomberg Law News (January 30, 2024).

In *Harris v. VVF Intervest, LLC* , Ohio, No. 2023-1296, the Ohio Tax Commissioner has appealed to the Ohio Supreme Court a Board of Tax Appeals decision granting the CAT refund claim of VVF, a Kansas soap manufacturer selling product during 2010-14 to a distributor with an Ohio distribution center where the product was temporarily located until the distributor sold the product to other retailers located outside of Ohio. The Commissioner claimed in its brief that those soap sales were sourced to the Ohio distribution center and were subject to the CAT. VVF argued lack of nexus since VVF had no physical, virtual, or economic presence in Ohio and the soap was ultimately delivered outside of Ohio. The appeal is pending. Perry Cooper, "Soap Shipped Via Ohio Isn't Taxable, Producer Tells High Court," *Bloomberg Law News* (April 4, 2024).

Philadelphia

In a November 22, 2023 decision in *Zilka v. Tax Review Board of Philadelphia*, the Pennsylvania Supreme Court found that Philadelphia did not unconstitutionally discriminate against interstate commerce when it allowed Diane Zilka, a Philadelphia resident working for a Wilmington, Delaware employer, a credit against the city's wage tax for local income tax paid to Wilmington, but denied additional credits for out-of-state income tax Zilka paid to Delaware. Christopher Jardine, "Pennsylvania Supreme Court Upholds Philadelphia Wage Tax Scheme," Tax Analysts Tax Notes

State (December 4, 2023). The taxpayer has petitioned (February 20, 2024) for certiorari to the U.S. Supreme Court.

South Carolina

In *Amazon Services LLC v. South Carolina Department of Revenue*, Appellate Case No. 2019-001706, the South Carolina Court of Appeals on January 24, 2024 affirmed the Department's sales tax assessment against Amazon for $12.5 million for uncollected sales tax on sales it facilitated on its marketplace during the first quarter of 2016, a time period prior to South Carolina's marketplace facilitator tax collection law going into effect, determining that Amazon was a "person in the business of selling tangible personal property at retail" under South Carolina's sales tax laws in effect at the time of the audit. The court viewed South Carolina's later enactment of its marketplace facilitator tax collection law as "clarifying" Amazon's obligation to collect sales tax on such marketplace sales, distinguishing *Normand v. Wal-Mart.com USA, LLC*, 2019-00263 (La. 1/29/20), 340 So. 3d 615, which held that Wal-Mart.com, a marketplace facilitator, had no obligation to collect sales tax on facilitated sales prior to Louisiana's law expressly requiring marketplace facilitators to collect. Amazon sought a rehearing, which was denied. On April 17, 2024, Amazon petitioned for certiorari to the South Carolina Supreme Court. Andrea Muse, "Amazon Asks South Carolina High Court to Hear Marketplace Suit," *Tax Analysts Tax Notes State* (April 22, 2024).

South Dakota

In *Ellingson Drainage Inc. v. South Dakota Department of Revenue*, 2024 S.D. 8 (February 7, 2024), the South Dakota Supreme Court upheld the Department's use tax assessment against an out-of-state company that performed 30-some drain tile installation projects in South Dakota during the audit period. The use tax assessment was imposed on equipment that Ellingson brought into the state to perform the projects but on which Ellingson had paid no sales or use tax. Some of the equipment had only been in the state for one day. The equipment was assessed on depreciated value (reduced 10% per year since purchase). In challenging the assessment, Ellingson argued that the assessment violated the "fair apportionment" prong of the *Complete Auto* 4-part test. The court, relying on *Jefferson Lines v. Oklahoma Tax Commission*, held the use tax was a substitute for a sales tax in this situation and did not need to be apportioned. In addition, it was the taxpayer's choice as to how long the equipment remained in the state. Had the taxpayer paid any sales or use tax on the equipment, a credit would have been allowed.

Texas

In *IN RE DISNEY DTC, LLC N/K/A DISNEY PLATFORM DISTRIBUTION, INC., HULU, LLC AND NETFLIX, INC.*, Relators, No. 05-23-00485-CV, the Texas Court of Appeals, Fifth District, held on January 31, 2024 that under Chapter 66 of the Texas Public Utility Regulatory Act (PURA), municipalities lacked a private right of action to seek franchise fees from video streaming companies. Instead, the Public Utilities Commission had exclusive authority to issue a state-wide franchise authorizing the construction and operation of a cable or video services network in public rights-of-way. The appellate court issued a writ of mandamus compelling the trial court to grant the relators' Rule 91a motion to dismiss the municipalities' lawsuit against them.

Washington

In *Quinn v. Washington*, Docket No. 23-171, the taxpayer 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 asserted that because the state court determined that the tax was an excise tax and not an income tax, then it violated 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 raised *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, Edmonds School District, and Washington Education Association filed responses in opposition to the petition on November 3, 2023. The petition was denied on January 2024.

In *Orthotic Shop Inc. v. Washington State Department of Revenue*, No. 39321-6-III (January 23, 2024), Washington Court of Appeals upheld sales tax and B&O tax assessments following Department audits of two FBA Sellers with inventory at Amazon facilities in the state who failed to collect sales tax on their marketplace sales during time periods before Washington's marketplace facilitator tax collection law went into effect (10/1/2018). FBA sellers argued that Amazon should have been required to collect sales tax on their marketplace sales. Court considered the FBA seller-Amazon contract and Washington sales tax law as placing the tax compliance obligation on the FBA seller and viewed Washington Legislature's later enactment of marketplace facilitator tax collection requirements (SB 5581) as indicating no marketplace facilitator tax collection obligation prior to that: "If the legislature thought that the law before SB 5581 required marketplace facilitators such as Amazon to collect taxes, it would have faced no need to enact the new provisions."

In *Citibank (S.D.) Nat'l Ass'n v. Dep't of Revenue*, No. 57127-7-II, 2023 BL 411309 (Wash. App. Div. 2 Nov. 14, 2023), the Washington Court of Appeals determined that Citibank had nexus with Washington, upholding the Department's B&O tax assessment. Citibank is a commercial bank with its headquarters in South Dakota. Citibank does not have a place of business or any employees or property within Washington. However, during the assessment period Citibank generated over $1.7 billion in interest and fee income from issuing credit cards to Washington residents. Some of these credit cards were private label, store branded cards that could only be used at certain retailers. Pursuant to agreements with Citibank, these retailers were obligated to market the credit cards and distribute marketing materials to customers in their Washington stores in order to solicit new accounts for Citibank. In addition, Citibank used Washington attorneys to file over 3,000 lawsuits in Washington courts to collect unpaid debts owed by Washington residents during the relevant period. Citibank argued that Washington law required physical presence before a taxpayer could be subject to B&O tax prior to 2010. However, the court determined that physical presence was satisfied based on representational nexus.

Wisconsin

In *ASAP Cruises, Inc. v. Wisconsin Department of Revenue*, Case No. 2023AP1251, Wisconsin Court of Appeals, District I, the Department has appealed the lower court's remand order. ASAP Cruises, Inc., a Florida corporation, had agreements with travel agents in Wisconsin. The agents sold cruises, tours, and vacation packages, from which ASAP retained a percentage of the sales as income and provided the remainder to the agent as a commission. The agents accessed the travel packages they sell through an online platform provided by ASAP. The Department assessed ASAP for income tax, and ASAP contended protection under P.L. 86-272. The Tax Appeals Commission held that P.L. 86-272 did not protect ASAP because it does not sell tangible personal property but instead sold travel services. ASAP argued to the circuit court that it sold "software as a service," not travel services. The circuit court remanded to the Commission because it thought the Commission disregarded evidence that ASAP sells software rather than travel services, and software is arguably tangible personal property. The parties have filed their briefs, and the case awaits decision.

Richard Cram
Director, National Nexus Program