



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 July 29, 2024 Update on Nexus Law Developments Since May 1, 2024

Rulings or Administrative Actions

Illinois

The Department has published Information Bulletin FY 2024-29 dated June 2024 entitled "Hotel Operators' Occupation Tax Updates for Operators and Re-Renters of Hotel Rooms," providing that as a result of Public Act 103-592, starting July 1, 2024, "re-renters of hotel rooms" are defined as persons who are not employed by a hotel operator but who, either directly or indirectly, through agreements or arrangements with third parties collect or process the payment of rent from a guest of a hotel for a hotel room located in Illinois and either

- obtain the right or authority to grant control of, access to, or occupancy of a hotel room in Illinois to a guest of the hotel; or
- facilitate the booking of a hotel room located in Illinois.

They are subject to Hotel Operators' Occupation Tax on the receipts from those rentals. Hotel re-renters owe tax on the entire charge to a guest for the rental of a hotel room, including any fee, charge, or commission received from a guest specifically in connection with the re-rental of hotel rooms.

Louisiana

The Department has issued Ruling 23-001 dated May 20, 2024 providing that pursuant to La. Rev. Stat. Ann. 47:301(4)(n) a company that operates, maintains, and facilitates an online platform that connects third-party vehicle owners with drivers/renters who want to lease or rent vehicles on a short-term basis for use in Louisiana is a dealer under the law and is responsible for collecting and remitting the state and local sales tax on vehicles rented or leased pursuant to the company's platform. *Thomson Reuters Checkpoint*, "Peer-to-peer vehicle sharing platforms" (May 21, 2024).

Minnesota

The Department has published "Hotels and Other Lodging Establishments Guide" dated May 15, 2024, describing sales and use tax topics related to hotels and other lodging establishments, including clarification that accommodations intermediaries

must register as a retailers to collect, report, and remit taxes on the full sales price of lodging and related services.

The Department has published guidance on the retail delivery fee, which became effective July 1, 2024.

Nevada

The Tax Commission published proposed regulation LCB FILE NO. R099-24I on May 6, 2024, which provides information about how and when remote sellers, marketplace sellers and marketplace facilitators are required to register, collect, remit and report sales tax.

New Jersey

The Division of Taxation has published Technical Bulletin 112(R) dated May 3, 2024 to explain changes to New Jersey's income sourcing rules resulting from enactment of P.L. 2023, c. 96. Gross Income Tax taxpayers (i.e., sole proprietors, partners, and S corporation shareholders) will now follow the same sourcing rules required for Corporation Business Tax purposes for the receipts of business income.

North Carolina

The Department has published North Carolina Sales and Use Tax Directive SD-24-1 to explain legislation Session Law 2024-28, eliminating the 200 or more transactions sales/use tax economic nexus threshold, effective July 1, 2024.

Tennessee

The Department has published Sales and Use Tax Notice #24-08 to advise that as a result of Tennessee Works Tax Act ("TWTA"), Public Chapter 377 (2023), effective July 1, 2024, destination sourcing applies for sales of services performed on tangible personal property and computer software, and sales, including services, made through the marketplace facilitator's marketplace. The TWTA adopts destination sourcing for leased property, including licensed computer software or specified digital products, where the *primary property location* moves out of Tennessee during the lease period. The TWTA adopts destination sourcing for sales of direct mail distributed by mail or other service to recipients outside Tennessee.

The Department has published its comprehensive Sales and Use Tax Manual dated May 2024.

Texas

The Comptroller has readopted Rule 34 TAC section 3.334, a rule for allocating local sales taxes, adding a provision to simplify compliance for small businesses, published in the June 28 edition of the Texas Register. Paul Jones, "Texas Adopts Latest Change to Controversial Sales Tax Sourcing Rule," *Tax Analysts Tax Notes State* (July 3, 2024).

Vermont

The Department has published guidance that effective July 1, 2024, all sales of prewritten computer software are subject to sales and use tax, including software purchased on storage media, downloaded to a computer system, or accessed remotely via the internet. Act 183 (H.887) of 2024 specifically applies the sales and use tax to all prewritten computer software, regardless of the method in which the software is delivered or accessed, effective July 1, 2024.

The Department has published guidance that effective August 1, 2024, Act 183 of 2024 requires that operators of short-term rentals collect a new 3% surcharge on rents from short-term rentals, which is effective for rents collected on or after August 1, 2024. This surcharge is in addition to the 9% Rooms Tax and any 1% Local Option Tax already collected by the operator. If a short-term rental is listed on an internet rental platform, that platform is responsible under Vermont law to register with the Department of Taxes and collect the rooms tax, local option tax (if applicable), and short-term rental surcharge and remit these taxes to the Department of Taxes.

Virginia

The Department of Taxation has published guidance entitled "Virginia Peer-to-Peer Vehicle Sharing Tax" providing that the peer-to-peer vehicle sharing tax applies on the use of a shared vehicle arranged through a peer-to-peer vehicle sharing platform. The platform collects the tax from the person booking the vehicle, then sends the funds to Virginia Tax.

Washington

The Department has adopted May 15, 2024 amendments to Wash. Admin. Code section 458-20-19402 — referred to as Rule 19402 —intended to clarify sourcing of receipts linked to services for business & occupation tax purposes, effective June 15, 2024. Paul Jones, "Washington's Amended Sourcing Rule Could Draw Litigation, Tax Pros Say," *Tax Analysts Tax Notes State* (May 30, 2024).

West Virginia

The West Virginia Tax Division has published West Virginia Publication TSD-434 entitled "Sales and Use Tax Collection for Florists." An out-of-state florist may contact a West Virginia florist to make a floral delivery in West Virginia. The out-of-state florist may directly contact the West Virginia florist by telephone or the Internet. The out-of-state florist may be a member of a floral association network, and the request of the out-of-state florist for delivery of a floral arrangement in West Virginia may come through the network. While the out-of-state florist should be collecting and remitting West Virginia State and local sales taxes applicable to the transaction, the out-of-state florist will not have direct taxable nexus with West Virginia unless the out-of-state florist has a physical location in West Virginia. The out-of-state florist does have indirect taxable nexus with West Virginia because its agent for delivery of the floral arrangement is physically located in West Virginia. As the out-of-state florist and in-state floral delivery service have an agency relationship, the out-of-state florist should be collecting and remitting West Virginia state sales taxes and any applicable municipal sales taxes.

When the out-of-state florist selling flowers for delivery in West Virginia belongs to a floral association network, the floral association network should be responsible for collecting and remitting the West Virginia State sales tax and any applicable municipal sales taxes collected by the originating florist.

Legislation

Alabama

The Alabama Legislature enacted SB 150, effective October 1, 2024, which requires accommodations intermediaries to collect transient occupancy tax on facilitated hotel accommodations based on the full price paid to the accommodations intermediary, including any service fees. Accommodations intermediaries and providers must also submit a report to the Department annually of the locations where accommodations were rented for more than 14 days in the prior year.

Arizona

The Arizona Legislature has enacted L. 2024, H 2909, which requires the Arizona Department of Revenue (DOR), by January 1, 2028, to establish a certification process for a third-party provider that offers sourcing services to taxpayers for transactions involving tangible personal property. The legislation allows a person to apply to be a certified third-party service provider on a form prescribed by DOR and allows a taxpayer to use a certified third-party service provider to assist in sourcing transactions. A taxpayer that uses a certified third-party service provider for sourcing of transactions is not liable for incorrectly reporting the correct amount of tax due to an error in sourcing the transaction. A certified third-party service provider is liable

for the correct amount of tax that the taxpayer failed to pay if the failure was due to a sourcing issue unless the error was due to incorrect information received from DOR. *Thomson-Reuters Checkpoint*, “Third-party provider of TPT sourcing services,” June 28, 2024.

Colorado

The Colorado Legislature has enacted S.B. 24-025, amending 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 to establish that retailers remitting sales taxes would qualify as "harmless" for errors made by the state's Geographical Information System database; the bill also includes a dispute resolution provision and is effective on July 1, 2025. “Colorado Governor Signs Law Relating to Local Sales and Use Taxes,” *Bloomberg Law News* (May 7, 2024).

Illinois

The Illinois Legislature enacted SB 3362 to amend the retailers occupation tax sourcing rules to provide that for retailers doing business in Illinois (i.e. with physical presence in Illinois but no selling activity in the state) but selling items to Illinois customers from outside the state, starting January 1, 2025, those retailers will need to collect state and local retailers' occupation taxes based on the destination location where the customer receives the item, instead of merely collecting state use tax under prior law. Michael J. Bologna, “Illinois Poised to Tweak Part of Remote-Seller Sales Tax Rules,” *Bloomberg Law News* (May 29, 2024).

North Carolina

The North Carolina Legislature has enacted Session Law 2024-28, HB 228, eliminating North Carolina's alternative 200 or more transactions sales/use tax economic nexus threshold, effective July 1, 2024.

Federal

Congressman Scott Fitzgerald (WI) introduced H.R. 8021 in Congress in April 2024, the *Interstate Commerce Simplification Act*, proposing to amend P.L. 86-272. The bill would define the term “solicitation of orders” as “business activity that facilitates the solicitation of orders even if that activity may also serve some independently valuable business function apart from solicitation.” This would legislatively overrule the holding in *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) that activities “ancillary to solicitation” would also be protected, distinguishing between:

. . . those activities that are *entirely ancillary* to requests for purchases--those that serve no independent business function apart from their connection to the soliciting of orders--and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force.

505 U.S. at 228-29. H.R. 8021 would do away with the “independent business function” test for determining whether an activity is considered “ancillary to solicitation” (and therefore protected under P.L. 86-272) or not. The bill was apparently triggered by a Minnesota Department of Revenue income tax assessment against Uline Inc., a Wisconsin-based seller of industrial and packaging materials that sold its products to Minnesota customers. The Department determined that the company’s actions in Wisconsin went beyond protected solicitation activities. The matter is pending before the Minnesota Supreme Court. See Michael J. Bologna, “House Bill Seeks to Raise Limits on States Taxing Remote Sellers,” *Bloomberg Law News* (May 28, 2024).

Cases

Arkansas

In *Hotels.com LP v. Pine Bluff Advertising and Promotion Commission*, 2024 Ark. 86, the Arkansas Supreme Court held on March 16, 2024 that online travel companies were not subject to Arkansas sales tax, tourism tax, and local gross receipts tax on their facilitation fees prior to the adoption of legislation in April 2019 expressly requiring them to collect such taxes. Christopher Jardine, “Arkansas Supreme Court Finds OTCs Not Liable for Pre-2019 Hotel Taxes,” *Tax Notes State* (May 20, 2024).

Maryland

The U.S. District Court for the District of Maryland in *Chamber of Commerce of the United States v. Lierman*, Civil Action No. 21-cv-00410-LKG, by Memorandum Opinion dated July 3, 2024, granted the Comptroller’s motion to dismiss, denied the plaintiffs’ motion for summary judgment, and dismissed Count IV, the 1st Amendment challenge to the tax “pass-through provision.” Previously, 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.

Apple 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 filed a motion for summary judgment on March 14, 2024, arguing that ITFA violates the anticommandeering doctrine of the Tenth Amendment, and Maryland's Digital Advertising Tax does not violate the dormant Commerce Clause or the Due Process Clause of the United States and Maryland Constitutions. Oral arguments in *Apple Inc.* were heard on May 9, 2024. Andrea Muse, "Maryland Tax Court Hears Apple's Digital Ad Tax Challenge," *Tax Analysts Tax Notes State* (May 10, 2024). Several other large companies have since filed petitions to Apple's. Michael 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. The taxpayer filed an appeal and brief on May 13, 2024 with the Appeals Court, Commonwealth of Massachusetts, No. 2024-P-0109. Cameron Browne, "Taxpayer Disputes Income Tax Bill On Stock Sale in Massachusetts," *Tax Analysts Tax Notes State* (May 20, 2024).

In *Sakowski v. Commissioner of Revenue*, Docket No. C347594, Massachusetts Appellate Tax Board (July 8, 2024), the Board upheld (one dissent) the Commissioner's income tax refund denial, determining that a New Hampshire resident working remotely from home for a Massachusetts employer (a federal agency) during the governor's pandemic stay-home order that was in effect in 2020 owed Massachusetts income tax on such wages, pursuant to emergency regulation 830 CMR 62.5A.3, which allowed Massachusetts employers to withhold employment tax on wages of telecommuting employees during the 2020 pandemic period based on how much employees worked in Massachusetts in 2019. The Board upheld the regulation against due process and commerce clause challenges.

Michigan

In *AAA LIFE INSURANCE COMPANY v. DEPARTMENT OF TREASURY*, No. 365613, the Michigan Court of Appeals in its June 20, 2024 order affirmed the trial court's grant of summary judgment in favor of the Department in disposing a Michigan-based insurance company's claim for use tax paid under protest on advertising packages mailed via USPS by a Missouri marketing company to Michigan addresses. The court determined that the insurance company exercised sufficient control of the advertising packages to be responsible for use tax by approving of the design of the package, selecting the target audience to receive the advertisements, and retaining the right to edit or change the package up to final mailing. Cameron Browne, "Michigan Court: AAA Owes Use Tax on Mail Advertisements," *Tax Analysts Tax Notes State* (July 1, 2024).

Missouri

In *Boles v. City of St. Louis*, No. ED111495, in a lawsuit filed by remote workers against St. Louis, the Missouri Court of Appeals on May 28, 2024 affirmed the lower court's determination that the St. Louis 1% earnings tax, under the terms of the tax imposition ordinance, did not apply to wages of employees of St. Louis employers working remotely. Subsequent to the decision, St. Louis agreed to disburse refunds for all teleworkers who submit their lawful claims between July and October. Richard Tzul, "St. Louis Settles With Teleworkers in Earnings Tax Refund Suit," *Bloomberg Law News* (June 14, 2024).

In *Troyer v. Director, Missouri Department of Revenue et al*, U. S. District Court for the Western District of Missouri, No. 4:24-CV-0160-DGK, the court dismissed under the Tax Injunction Act a lawsuit by a Missouri taxpayer alleging that the Kansas City earnings tax was unconstitutional in violation of the Commerce Clause because it did not allow him to claim a credit for the full amount of income taxes he paid to the State of Kansas in 2019 and 2020. The taxpayer had previously challenged the tax in Missouri state court and lost, but argued unsuccessfully that Missouri lacked a "plain, speedy, efficient" remedy. Cameron Browne, "Federal Court Rejects Missouri Local Earnings Tax Challenge," *Tax Analysts Tax Notes State* (June 13, 2024).

Ohio

The City of Cleveland has voluntarily dismissed its appeal in *Morsy v. Gentile*, Ohio Court of Appeals, No. 112061, from the lower court order finding that application of the City's earnings tax to a telecommuting Pennsylvania resident worker was unconstitutional. Christopher Jardine, "Cleveland Refunds Remote Worker's Taxes After City's Appeal Dismissed," *Tax Analysts Tax Notes State* (May 10, 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). Oral argument was held on July 9, 2024. Perry Cooper, "Out-of-State Lab Case Leads Ohio Justices' Business Tax Quartet," *Bloomberg Law News* (July 8, 2024).

Oregon

The Oregon Supreme Court affirmed the lower court, upholding the Department of Revenue's income tax assessment in *SANTA FE NATURAL TOBACCO COMPANY v. Department of Revenue*, (TC 5372) (SC S069820) 372 Or 509 (2024). The taxpayer, an out-of-state tobacco manufacturer, argued that P.L. 86-272 applied to protect it against Oregon's income tax. The court applied the *Wrigley* "independent business function" test in determining whether the taxpayer's in-state activities were limited to those "ancillary to solicitation," finding that conduct of employees soliciting Oregon tobacco product retailers to place orders with Oregon wholesalers went beyond "solicitation," in that those employees at times took "prebook orders" from retailers, filling out an order form for tobacco products. The prebook order form would be signed by the retailer, would include the product amounts and delivery dates, and the employee would send that prebook order to the wholesaler. The incentive agreements between the tobacco manufacturer and the wholesalers required the wholesalers to accept these prebook orders and otherwise imposed penalties them. The tobacco manufacturer also established "specific prebook goals" for its employee trade representatives. The court characterized this activity as "facilitation" of a sale, not solicitation of an order, which went beyond the scope of protected activities under P.L. 86-272. The court found that these "prebook orders" were not *de minimis*, and analogized them to the "agency stock checks" at issue in *Wrigley*.

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, which remains pending. The Court has requested the Solicitor General to file a brief. Christopher Jardine, "SCOTUS Seeks Solicitor General's View on Philadelphia Wage Tax Case," *Tax Analysts Tax Notes State* (Jun. 11, 2024).

South Carolina

The South Carolina Administrative Law Court held on June 3, 2024 in *Mastercard International Inc. v. Department of Revenue*, No. 20-ALJ-17-0008-CC, that gross receipts from the revenue produced by Mastercard's in-state transactions should have been sourced to the state, although Mastercard had no physical presence in the state. The decision affirmed the Department of Revenue's income tax assessment against Mastercard for tax years 2007 through 2016. The court determined that Mastercard's income-producing activity is a result of charging fees based on the number and gross dollar volume of credit and debit transactions using the company's branded cards, and Mastercard's income producing activity is the provision of a payment systems network facilitating cashless transactions. The actual source of Mastercard's income are transactions between merchants and cardholders. Mastercard argued that its income should be sourced outside South Carolina because the messages to interstate processors are delivered outside the state. Christopher Jardine, "SOUTH CAROLINA AFFIRMS \$7.7 MILLION TAX JUDGMENT AGAINST MASTERCARD," *Tax Analysts Tax Notes State* (June 6, 2024).

Several amicus briefs (COST, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, NETCHOICE, THE SOUTH CAROLINA CHAMBER OF COMMERCE, AND THE GREATER COLUMBIA CHAMBER OF COMMERCE, Professor Hayes Holderness) have been filed with the South Carolina Supreme Court in its pending review of *Amazon Services, LLC v. South Carolina Department of Revenue*, Supreme Court Appellate Case No. 2024-000625, the lower court order affirming the sales tax assessment on facilitated sales.

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. The taxpayer has petitioned for certiorari to the U.S. Supreme Court, which remains pending. The taxpayer argues that the use tax assessment violates the "external consistency" test. Providing a credit for taxes paid to other states isn't a "silver bullet" to ensure states only tax a fair proportion of a multistate business's activity, the National Taxpayers Union Foundation told the US Supreme Court in an amicus brief. Perry Cooper, "Taxpayer Group Asks Justices to Review South Dakota Use Tax Case," *Bloomberg Law News* (June 10, 2024).

Richard Cram
Director, National Nexus Program