NEXUS LITIGATION UPDATE

PRESENTED BY: RICHARD CRAM
DIRECTOR, NATIONAL NEXUS PROGRAM
APRIL 22, 2026
NEXUS COMMITTEE MEETING

P.L. 86-272

STATES ADOPTING PORTIONS OF MTC REVISED STATEMENT

Following adopted or proposed examples from the revised Statement:

- **California Franchise Tax Board** TAM 2022-01 and Pub 1050 (held void as regulations in violation of the California Administrative Procedure Act in *American Catalog Mailers Association v. Franchise Tax Board,* Case No. CGC-22-601363, Superior Court of California)
- **New Jersey Division of Taxation** adopted amendment to N.J.A.C. 18:7-1.9A effective 5/19/2025 (being challenged in *American Catalog Mailers Association v. Director, Division of Taxation*, complaint filed September 12, 2025, Tax Court of New Jersey).
- **New York State Department of Taxation and Finance** adopted regulations including portions of the MTC's revised Statement on P.L. 86-272. Challenge in *American Catalog Mailers Association v. Department of Taxation and Finance*, NY district court dismissed 4/28/2025, appeal pending at S. Ct. of N.Y. (oral argument 2/11/2026)
- **Massachusetts Department of Revenue** adopted amendment to 830 CMR 63.39.1 (effective 10/10/2025): using cookies for market research may be nonsolicitation activity.
- **New York City Department of Finance** has proposed for public comment rules based on MTC's updated 2021 Statement Concerning P.L. 86-272. November 2025.

SALE OF SAAS A SERVICE OR TANGIBLE PERSONAL PROPERTY?

ASAP Cruises, Inc. v. Wisconsin Department of Revenue, Case No. 2023AP1251, Wisconsin Court of Appeals, District I (6/3/2025): ASAP Cruises, Inc., Florida corporation, had agreements with travel agents in Wisconsin. Agents sold cruises, tours, and travel packages, from which ASAP retained 15% 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 argued protection under P.L. 86-272 because it was selling SaaS, considered TPT. Department contended unprotected sales of services: travel packages, not TPT, so no protection. Court of Appeals agreed. Petition for review denied by Wisconsin Supreme Court February 12, 2026.

STATE TAX ASSESSOR V. FIFTH GENERATION, INC.

- Maine Supreme Judicial Court upheld income tax assessment against out-of-state liquor supplier, Fifth Generation. Maine's three-tiered liquor regulatory scheme required supplier to store spirits at bailment warehouse in Maine. Title transfer of spirits did not occur until spirits left warehouse within the state. Fifth Generation owned inventory at bailment warehouse, sold products to the Bureau of Alcoholic Beverage and Lottery Operations, had Maine nexus. Fifth Generation claimed P.L. 86-272 protection. Court relied on *Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275, 282-83 (1972) in determining that Maine could regulate solicitation in a manner that might cause an out-of-state company to forfeit its tax immunity. Maine had legitimate purpose in regulating the sale and distribution of alcohol. No Commerce Clause violation because both in-state and out-of-state suppliers are subject to the three-tiered system and income tax.

SALES TAX NEXUS UPDATE

ALABAMA SSUT ISSUES

Tuscaloosa, et al. v. Barnett: Certain municipalities sued Alabama Department of Revenue for alleged unlawful implementation of the SSUT (flat combined 8% state and local use tax rate paid by remote sellers—but Tuscaloosa combined rate is 10%) by allowing certain large sellers with physical presence (Amazon, Doordash, etc.) to improperly be treated as remote sellers, unfairly depriving those municipalities of revenues. Sixty-seven counties and 140 municipalities intervened in the lawsuit as co-defendants with the Department of Revenue.

Senate bills had been introduced to prohibit municipalities from collecting use tax from nonresidents.

On February 11, 2026, plaintiffs voluntarily withdrew complaint to work out legislative solution.

MARKETPLACE FACILITATOR TAX COLLECTION LIABILITY

STUBHUB A "SELLER" OF TICKETS SOLD ON ITS ONLINE PLATFORM

Wisconsin DOR assessed StubHub as "seller" of tickets over its platform during 2009-2013 for $8.6 million in uncollected sales tax plus $8.6 million interest/penalties. Wisconsin Tax Commission affirmed assessment but dismissed penalties. Wisconsin Court of Appeals affirmed both assessment and penalties. StubHub argued it was not a "seller" until Wisconsin's adoption of marketplace facilitator tax collection law in 2019. Court agreed with DOR's argument that the 2019 legislation was merely clarification.

AMAZON SERVICES, LLC V. SOUTH CAROLINA DEPARTMENT OF REVENUE

South Carolina Supreme Court (3-2) upheld Department's $12.5 million sales tax assessment against Amazon Services on facilitated sales made by third-party sellers to South Carolina customers during first quarter of 2016. Amazon Services was "engaged . . . in the business of selling tangible personal property at retail" under the statute and was required to collect the tax on such sales. It tightly controlled and was integrally involved in third-party merchant transactions pursuant to its Business Solutions Agreement. Amazon argued that it was not the "seller," but court observed that the word "seller" is not contained in statute. Amazon Services also argued that given South Carolina's 2019 adoption of a law requiring marketplace facilitators to collect sales tax, due process was violated by requiring it collect sales tax on 2016 facilitated sales. The court found no due process violation, in that the Department had assessed sales tax based on 2016 law.

MARKETPLACE SELLER NEXUS--CA

- In *Matter of the Appeal of Diet Standards LLC,* the California Office of Tax Appeals (OTA) held that a marketplace seller LLC in Florida using Amazon fulfillment services in California was considered "doing business" in California under the general definition of "doing business" "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit" under R&TC section 23101(a) and therefore subject to the $800 annual minimum franchise tax, even though sales and inventory in the state were slight and below the thresholds set forth in R&TC section 23101(b), which was held inapplicable.
- See also *In the Matter of the Appeal of: FISHBONE APPAREL, INC.*, OTA Case No. 230212546 (12/29/2025) for a similar ruling involving a marketplace seller located in Pennsylvania, with small amounts of inventory and sales fulfilled by Amazon in California.

DOES TPP INCLUDE STREAMING SERVICES?--CO

In *Netflix, Inc. v. Department of Revenue of the State of Colorado,* No. 24CA1019 (July 3, 2025), Colorado Court of Appeals reversed the district court and held that Netflix's sales of subscriptions were sales of tangible personal property (defined as "corporeal personal property") and subject to sales tax, agreeing with Department's interpretation that corporeal property included things that can be perceived by any of the senses-not exclusively by touch. The Colorado Supreme Court granted the taxpayer's petition for review on March 30, 2026 (Case No. 2025SC629).

NY: NONTAXABLE SERVICE VS. TAXABLE LICENSE OF PREWRITTEN SOFTWARE?

Beeline.com v. N.Y. Tax Appeals Tribunal, CV-24-1494, N.Y. S. Ct. (1/15/26), affirmed NYDTF sales tax assessment and Tribunal's determination that petitioner made retail sales of tangible personal property by providing license to use its vendor management system software in matching clients with temporary labor suppliers and providing services associated with management, retention and invoicing of such labor. Court applied "primary function test" and focused on contract language.

RI: NONTAXABLE SERVICE OR TAXABLE VENDOR-HOSTED PREWRITTEN SOFTWARE?

RI Division of Taxation decision (Case No. 22-T-050, 1/21/26) upheld sales tax assessment on sales of subscriptions for remotely accessed legal research software and databases held taxable as vendor-hosted prewritten software. Seller argued: nontaxable sale of information services—customer's software use merely incidental to accessing content (relevant statutes, regs, cases), which was the "real object" of the transaction, not the software use. Division held that software access provides the search capability to identify relevant content.

ITFA CHALLENGES

DISNEY PLATFORM DISTRIBUTION INC. V. CITY OF SANTA BARBARA

- Court of Appeal of CA, 2d App. Dist., Div. 6 upheld City's video users' tax assessment against video streaming provider.
- Tax applied to "video programming . . . *regardless of the technology used to . . . provide such services.*"
- No ITFA violation because video streaming subscription and purchase or rental of a DVD are not similar.

NETCHOICE V. CHICAGO

- Chicago's recently enacted Social Media Amusement Tax, Chi. Mun. Code, §§ 4-156-1000 on streaming is being challenged in Circuit Court of Cook County, Illinois as violating ITFA, the Illinois Constitution, and First Amendment and Commerce Clause of the U.S. Constitution.

UBER TECHNOLOGIES, INC. V. O'CONNELL

Georgia Court of Appeals upheld the Department's $9 million sales tax assessment against Uber as the headquarters operator under Department's taxicab regulations for failing to collect sales tax on providing taxable transportation services through its app during 2012-2015 audit period. Uber collected payment from the rider and distributed the driver's share to the driver. Uber also argued that the tax violated the Internet Tax Freedom Act, but the court determined that the Georgia sales tax was not discriminatory in that other taxicab services were subject to the tax. Uber petitioned the Georgia Supreme Court for review, granted (March 26, 2026).

INCOME TAX APPORTIONMENT ISSUES

FLORIDA V. CALIFORNIA MOTION TO FILE COMPLAINT IN SCOTUS

Florida seeks to enjoin California's "special rule" excluding from its single-sales factor apportionment formula occasional substantial sales of fixed assets or other property used in the regular course of business (but including such sales in business income), claiming it amounts to extra-territorial taxation violating due process, import-export and commerce clauses and deprives Florida of tax and investment revenues.

Briefs in support of Florida have been filed by amici U.S. Chamber of Commerce, American College of Tax Counsel, and National Taxpayers Union.

INTERNAL CONSISTENCY TEST: *JETBLUE AIRWAYS V. FLORIDA* (2025)

JetBlue unsuccessful in challenging Florida's corporate income tax apportionment formula as not fairly apportioned: gross income times fraction of revenue miles traveled in Florida/revenue miles traveled everywhere; Florida revenue miles included ocean area contiguous to coastal areas. Trial court interpreted internal consistency test as requiring other states to enact formula identical to Florida's (although not possible) to identify inherent discrimination against interstate commerce and found none. Appeal pending.

SOURCING DISPUTES

OHIO CAT CASES

Jones Apparel Group v. Harris, 2023-Ohio-1288 (1/14/26): taxpayer sold inventory to retailer's Ohio distribution center and retailer later shipped most of it to retailer's stores outside of Ohio. Taxpayer's CAT refund claim denied, failing to provide documentation as to what inventory was later shipped outside of Ohio.

VVF Intervest, L.L.C. v. Harris, 2025-Ohio-5680 (12/24/25): taxpayer shipped goods to a distribution center in Ohio. After the taxpayer's goods arrived in this State, the purchaser of the goods sold them to third-party retailers and then the goods were transported to those retailers outside Ohio. Sales sitused in Ohio; goods initially received in Ohio, and subsequent sales to third-party retailers broke chain of transportation between the taxpayer and retailers.

CHICAGO TITLE V. WA DEPARTMENT OF REVENUE

- WA Court of Appeals reversed the lower court's ruling granting B&O and use tax refunds to Chicago Title, determining that the company's title insurance services involving WA real property are sourced to WA because the customers made first use of those services in WA. The company provided its services remotely through affiliated agencies that were located outside the state and had claimed the income from those services should be sourced to the affiliated agencies' locations.

BETTS PATTERSON & MINES V. WA DEPARTMENT OF REVENUE

- WA Court of Appeals denied insurance defense law firm's Washington B&O tax refund claim. Gross receipts for legal services rendered to out-of-state insurance companies in policy defense litigation are sourced to the litigation location in Washington, determined to be where the "benefits of the services were received," not the insurance companies' out-of-state billing addresses.

NUSTAR ENERGY, LP V. HANCOCK

- Texas Supreme Court affirmed lower court's determination that section 171.103(a)(1) of the Texas Tax Code sourced receipts from sales of TPP to TX if taxpayer yields possession and control of the goods to buyer at location in TX even if buyer subsequently transports those goods to another jurisdiction for consumption. NuStar sold high-sulfur bunker fuel for use in large, ocean-going ships and delivered it to foreign-registered vessels at Texas ports. NuStar had sourced such sales to Texas, later sought $2.4 million franchise tax refund, claiming sales were not sourced to Texas when buyer consumed fuel elsewhere. Court noted that NuStar's interpretation would require complex administrative, practical, and recordkeeping burdens to document a buyer's post-acquisition journey to the place of consumption.

CMS ENERGY CORP. V. MI DEPT OF TREASURY

- Michigan Court of Appeals upheld denial of CMS's corporate income tax refund claim based on sourcing of wholesale electricity sales. CMS generated electricity in MI, made wholesale sales to the Midcontinent Independent System Operator (MISO) in MI, a regional transmission organization that controls transmission of electricity for several states. CMS claimed sales should have been sourced to states where the electricity was consumed. The court upheld MI Treasury's determination that title to the electricity transferred to MISO in MI and sales were sourced to MI. CMS also claimed that the refund denial violated the Commerce Clause proportionality requirement, but the court determined that the tax was both internally and externally consistent, so no violation.

CHECKFREE SERVICES CORP. V. FLORIDA

- Circuit court granted Checkfree summary judgment that none of its sales income was sourced to FL, dismissing $3.4 million corporate income tax assessment. Checkfree, HQ in Wisconsin, derived revenue from facilitating clients' (financial institutions in FL and other states) online bill payment services through payment processing networks such as ACH. None of Checkfree's business operation hubs were in Florida. Department applied cost-of-performance sourcing rule, contending that Checkfree's income was sourced to Florida, in that Checkfree provided Florida clients access to database (ACH). Court disagreed, finding no evidentiary support.

APPEAL OF MGG ENTERPRISE, INC.

- California Office of Tax Appeals (OTA) found appellant Nevada corporation had one employee in California, paid salary of $12,000 during tax year, sufficient to be "engaged in business in the state" for the purposes of R&TC section 23101(a) and subject to the $800 minimum franchise tax. Hiring an employee is a profit-motivated transaction, contributing to appellant's business.

CHALLENGES TO NEW TAXES

HAWAII'S LODGING TAX ON CRUISE SHIPS PREMPTED BY FEDERAL LAW?

Cruise Lines Int'l Assoc., Inc. v. Suganuma , 9th Cir., No. 25-8058, order 12/31/25: Hawaii extended transient accom. tax to cruise ship rooms, effective 1/1/26. Cruise Lines sued in federal court to enjoin tax as violation of Tonnage Clause of Constitution and Rivers and Harbors Appropriation Act. Department of Justice intervened as co-plaintiff. Hawaii raised Tax Injunction Act as barring suit. District Court allowed intervention but partially dismissed suit. Ninth Circuit granted temporary injunctive relief on tax 12/31/25 and imposed accelerated briefing schedule. Oral argument held April 13, 2026.

WA MILLIONAIRE'S TAX

- In *Petter v. State*, Wash. Super. Ct. (complaint filed 4/9/26), plaintiffs argue that the new millionaire's tax is illegal under state constitution.
- In *Brian Heywood et al. v. Steve Hobbs*, Supreme Court No. 1052201, Washington Supreme Court granted emergency motion for accelerated review of challenge seeking to require the secretary of state to allow a referendum to overturn millionaire's tax.