

State Tax Alert October 2023

State Sales and Use Tax Quarterly Update - October 2023

Ernst & Young LLP's Sales and Use Tax Quarterly Update provides a summary of recent major legislative, administrative and judicial sales and use tax developments.

An important reminder: Gross receipts-based sales taxes apply to more than just sales of goods

Sales and use taxes are generally understood to apply to sales of tangible goods and specifically enumerated services, depending on the scope relevant state's law. However, a handful of states take a different approach by employing a gross receipts-based tax in lieu of or in addition to a traditional sales tax regime; most notably, Arizona's Transaction Privilege Tax, Hawaii's General Excise Tax, New Mexico's Gross Receipts and Compensating Tax, and Washington's Business and Occupation Tax. Although this concept is nothing new and may seem remedial for those that deal with sales and use taxes on a daily basis, multistate businesses - especially those in service-based industries - need to pay particular attention to these taxes because the assumption that they do not apply because you are not selling goods can be a costly one.

Recently, Hawaii's Department of Taxation began emphasizing General Excise Tax (GET) compliance for taxpayers that have filed state corporate income tax returns. The GET, which operates as the state's sales tax, applies to all business activity (including the provision of services) within the state with few exceptions, exclusions, or deductions. Essentially, if a taxpayer has registered and filed for income tax purposes, and the Department does not find a corresponding GET return (or information on the GET return does not match apportionment data contained on the corporate income tax return), auditors are issuing assessments based on the data provided on the corporate income tax return apportionment schedule. While this type of activity can result in significant assessments under typical scenarios, Hawaii can and does treat any year in which a GET return should have been filed and was not as an open year, and assessment periods have gone back as many as 20 years. Accordingly, it is essential for companies with business in Hawaii - and in other gross-receipts tax states - that do not have regular sales and use tax compliance obligations to carefully review whether they may have risk or exposure related to these taxes.

Our Observation: As part of the ongoing indirect tax compliance "check-up" process, multistate businesses should ask whether they are meeting all of their registration and filing requirements with respect to all tax types. For companies that have no obligations under traditional sales and

use taxes - either because they solely provide nontaxable services or have a limited nexus profile - nontraditional transaction taxes, such as the GET, may apply based on the derivation of income sourced to the state. By closely tracking the sourcing of business income with these taxes in mind, costly traps may be avoided.

Other Recent Sales and Use Tax Developments

Nexus and Marketplace

California: The California Office of Administrative Law has [approved](#) the California Department of Tax and Fee Administration's (CDTFA) amendments to Cal. Code Regs. tit. 18, §1684.5 that modify and clarify provisions for marketplace facilitators and marketplace sellers. Revisions to the regulation amend and add definitions under Section 1684.5(a). These changes:

- Modify the definition of "facilitate" to expand facilitation activities to include "listing products for sales", delete an exception from the definition of facilitate (this exception has moved to a new subsection on "advertising", which is discussed below), and delete the examples that had been under this definition.
- Amend the definition of "listing products for sale" to mean "creating or posting or authorizing or providing the means for another person to create or post a written, verbal, pictorial, graphic, or similar means or announcement of tangible personal property [TPP] for sale in a marketplace, including ... an advertisement that contains an announcement of [TPP] for sale."
- Add a definition of "order taking" to mean "the process of getting or obtaining a buyer's order for a marketplace seller's [TPP] by telephone, fax, email or any other physical or electronic means, including ... the customer including the items in a physical or virtual shopping cart at checkout."
- Modify the definition of "payment processing services" to mean "any services related to charging a buyer the price to purchase a marketplace seller's [TPP], collecting, handling, or processing the payment, and transmitting any portion of the payment to the marketplace seller. Such services include ... providing a physical or virtual credit or debit card terminal, integrating payment processing with an online shopping cart at checkout, or otherwise directly or indirectly authorizing or providing the means for payment processing in any manner."
- Add a definition of "providing customer service or accepting or assisting with returns or exchanges" to mean providing any service related to a marketplace seller's TPP to a potential buyer or providing any service to a buyer related to their purchases of the marketplace place seller's TPP. Such services include answering questions about the property, the property's use or the terms of sale; assisting buyers with a refund, credit or exchange request; and accepting returns or exchanges.

In addition, amendments modify the definitions of “branding sales as those of the marketplace facilitator” and “marketplace facilitator”, add a definition of “fulfillment or storage services”, and add examples to the definition of “marketplace.” The revision adds new Section 1684.5(d) “Advertising”, which pulls exception language that, prior to this revision, had been included in the definition of “facilitate”. A person, including those who operate a newspaper or internet website, that advertises TPP for sale, refers purchasers to the seller, and does not participate further in the sale, is not facilitating the sale. Such a person is not considered the seller and retailer for the sale for purposes of determining whether the person has to register with the CDTFA as a marketplace facilitator and the person is not the retailer selling or making the sale of TPP under Section 1684.5(c), regardless of whether the person is a marketplace facilitator, the seller is a marketplace seller, the TPP is advertised in a marketplace or the advertisement includes an offer to sell TPP. The revision adds examples of “advertising.” Section 1684.5(b) “Registration Requirement for Marketplace Facilitators and Marketplace Sellers” is amended to clarify that marketplace facilitators and marketplace sellers calculates the \$500,000 threshold by including all sales of TPP for delivery in the state regardless of whether the sales are taxable. The regulatory action took effect August 28, 2023.

Louisiana: The Louisiana Sales and Use Tax Commission for Remote Sellers (Commission) issued a bulletin to provide guidance on tax collection and remittance requirements for Louisiana merchants that make sales through marketplace facilitators or directly to consumers. Marketplace facilitators are the dealer responsible for collecting and remitting sales tax for all remote sales occurring on its marketplace; remote sales include those made by a Louisiana merchant through a marketplace facilitator. A marketplace seller’s physical presence in Louisiana does not preclude it from being considered a remote seller. For these sales, the Louisiana merchant/marketplace seller can rely on the marketplace facilitator to collect and remit sales tax to the Commission on their behalf. In addition, the marketplace facilitator is required to maintain documentation from the marketplace seller used to determine the taxability of the facilitated sale, such as exemption certificates. The Commission noted that this guidance applies to marketplace facilitators that have a physical presence in Louisiana. A Louisiana merchant that makes sales on a marketplace as well as directly to consumers, is responsible for collecting and remitting state and local sales tax on the direct sales that do not occur on a marketplace. La. SUT Comm. for Remote Sellers, [Remote Seller Information Bulletin No. 23-001](#) (September 8, 2023).

Missouri: In response to a ruling request, the Missouri Department of Revenue (MO DOR) said that an out-of-state company that does not have physical locations in Missouri is liable for collecting state use tax as a vendor on leases of ground support equipment to an air cargo company with offices at an in-state airport. Under regulation 12 CSR 10-114.100(1), an out-of-state vendor must register with the MO DOR and collect and remit use tax when the vendor has sufficient nexus with the state. Sufficient nexus is established by having a physical presence in the state, and 12 CR 10-114.100(2) defines a physical presence as “owning or leasing real or tangible personal property within this state; or having ... independent contractors ... in ... this

state on behalf of the vendor.” Because the company meets the definition of vendor and maintains a physical presence in the state through its leases of tangible personal property and its use of independent contractors for future maintenance and parts for such property, it is liable for use tax as a vendor. Mo. Dept. of Rev., [LR 8264](#) (July 31, 2023).

Tax Base and Taxability

Colorado: In response to a ruling request, the Colorado Department of Revenue (CO DOR) determined that food products sold by a remote seller that has no physical presence or retail locations in the state, are food for home consumption and, as such, it is exempt from the state’s sales and use tax. The remote seller purchased food products from independent third parties and resells the products to customers through its website. An out-of-state third-party cooks, packages, attaches a nutrition label and ships the food products to the remote seller’s customers; the food products are delivered through the postal service and not by an on-demand delivery service. The food products are not for immediate consumption and require further preparation. The CO DOR explained that the state relies on the USDA’s definition of food for purposes of the sales and use tax exemption. The exemption generally applies to food sold for home consumption but does not apply to prepared food or food for immediate consumption (i.e., hot food, food kept above room temperature). In addition, Colorado specifically excludes prepared salads, cold sandwiches and deli trays from the definition of food. The CO DOR found the exemption applies to the food products at issue - meat and plant-based protein, vegetables and whole grains that require further preparation to be consumed as intended - as these items are food for home consumption. Colo. Dept. of Rev., [PLR 23-003](#) (June 14, 2023).

Illinois: New law ([HB 1497](#)) amends the Automobile Renting Occupation and Use Tax (rental tax) to provide that if tax due on an automobile under the Retailers’ Occupation Tax Act (ROTA) or Use Tax Act (UTA) was paid at the time it was purchased or when it was brought into Illinois, then: (1) “renting” does not include peer-to-peer car sharing, and (2) “rental price” does not include consideration paid for peer-to-peer car sharing to a shared-vehicle owner or a car-sharing program. The rental tax does not apply to any amounts paid or received for peer-to-peer car sharing or the privilege of sharing a shared vehicle via a car-sharing program if the shared vehicle owner paid the applicable taxes when the automobile was purchased. A car-sharing program must ask a shared vehicle owner if they paid applicable tax at the time the automobile was purchased; the car-sharing program has a right to rely on the owner’s response and to be held legally harmless for such reliance. HB 1497 took effect upon becoming law. Ill. Laws 2023, Pub. Act 103-0520 (HB 1497), signed by the governor on August 11, 2023.

Michigan: The Michigan Department of Treasury has updated guidance on the application of sales and use tax to delivery and installation charges to reflect changes to the law enacted in 2023. Generally, delivery and installation charges are excluded from the tax base if such charges are separately listed on documents given to the purchaser and the seller’s books and records show separately the transactions used to determine the amount of sales/use tax that

will be imposed. The guidance (1) defines delivery and installation charges, (2) explains which of these charges are/are not subject to sales/use tax, (3) explains when a utility's charges for transmission and distribution are subject to sales/use tax, (4) describes the tax treatment of a delivery charge for a shipment of taxable items and exempt items, and (5) explains tax relief the 2023 law change provides to taxpayers - i.e., the cancellation of outstanding balances for delivery and installation charges on notices of intent to assess or on final assessments issued before the effective date (April 26, 2023) of the law change. The guidance includes examples. Mich. Dept. of Taxn., [RAB 2023-16](#) "Sales Tax and Use Tax - Taxability of Delivery and Installation Charges" (September 11, 2023) (replaces RAB 2015-17).

Missouri: In response to a ruling request, the Missouri Department of Revenue (MO DOR) said digital music and signature subscription services are not subject to sales and use tax. Under Missouri law, charges for access to interactive computer services are specifically excluded from the sales tax on telecommunication services. The MO DOR determined that the interactive digital subscription, in this instance, also are excluded from tax on telecommunications services. Mo. Dept. of Rev., [LR 8248](#) (June 28, 2023).

Rhode Island: In response to a ruling request, the Rhode Island Division of Taxation (RI DOT) determined that a company's charges for its online educational courses, which are stored on cloud servers, are subject to Rhode Island sales tax. The RI DOT said that tax applies to the extent the company charges Rhode Island customers for access to these online courses and software services.¹ R.I. Div. of Taxn., [Ruling Request No. 2023-02](#) (September 5, 2023).

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) determined the applicability of the state's sales and use to an online school's sales of online licensing courses, course textbooks that can be downloaded as a PDF and exam guide courses. The TN DOR found both the online licensing course and exam guide course are subject to sales and use tax as remotely accessed computer software. The TN DOR noted that the addition of a live chat feature would not alter the taxability of these transactions. The course textbooks are not subject to tax, regardless of whether they are in digital or physical form. Lastly, the TN DOR said that a proposed mortgage loan originating course, which includes self-paced state-module course in the transaction, would be subject to sales and use tax. Tenn. Dept. of Rev., [Letter Ruling #23-07](#) (August 21, 2023).

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) determined that a technology company's fees for staff augmentation services and payment processing services accessed through a digital platform are not subject to the state's sales and use tax because these services are not specifically enumerated as taxable. While these services are not taxable, the TN DOR found that since the company's "platform is accessed through an

¹ Under Rhode Island law, "[i]nfrastructure as a service ("IaaS"), platform as a service ("PaaS"), and software as a service ("SaaS") are taxable as long as there is a charge to a Rhode Island customer for the use of the virtual infrastructure, platform, or for software that is accessed through the internet or on a vendor-hosted server." See, R.I. Gen. Laws §§44-18-7(15), 44-18-8, 44-18-18 and 44-18-12(a).

app, which is arguably subject to Tennessee sales and use tax as the use of computer software”, the company’s fees are for taxable and non-taxable items. The TN DOR applied the true object test and found that the provision of staff augmentation service was the true object of the transaction, and the app was merely incidental to the non-taxable service as the app “would be worthless without the non-taxable services.” Tenn. Dept. of Rev., [Letter Ruling # 23-05](#) (June 30, 2023).

Sales and Use Tax Exemptions, Exclusions and Refunds

Colorado: On August 15, 2023, the Colorado Department of Revenue (CO DOR) hosted a [workgroup meeting](#) to solicit input for sales tax rules to implement law enacted in 2022 (HB 22-1118), that impose significant new penalties on refund claims for sales and use taxes paid by a purchaser to a vendor (Buyer's Claims). (See Tax Alert [2022-0746](#).) Draft Rule 39-26-703-1 “Protective Claims for Sales or Use Tax Refunds” would provide guidance on protective claims for sales and use tax refunds. Under the general rule, the CO DOR would have the discretion to decide how to process protective refund claims, noting that it would be in the CO DOR and taxpayers “interest ... to delay action on protective claims until the pending litigation or other contingency is resolved.” The draft rule would define a “protective claim” and would require a protective claim satisfy all of the following: (1) be in writing and signed by the claimant; (2) include the claimant’s name, address, social security number (for individuals) or federal employer identification number or Colorado account number (for corporations, partnerships and other entities); (3) identify and describe the contingencies upon which it depends; (4) clearly alert the CO DOR to the nature of the claim; and (5) identify the specific months for which the refund is sought. The draft rule would make clear that “[a] refund claim is not a protective claim merely because the claimant labels it as such.” A claimant that timely submits a valid protective refund claim would be able to supplement their claim with additional data, information and documentation upon resolution of the contingency the claim is based on. Draft Rule 39-26-703-2 “Buyer’s Claims for Refund of Sales Tax Paid” would prescribe the form for making a refund application for sales or use taxes and the data, information and documentation an applicant must provide, and it would provide guidance on the penalty imposed for incomplete refund claims. An “applicant” filing the protective refund claim would include both the purchaser who paid the sales tax and any person who prepares the refund claim, in whole or in part, on behalf of the purchaser. The draft rule lists the information an applicant would have to include with their refund claim including a complete itemization of all purchases included in the claim, proof of purchase and proof of payment. Certain claims may require the provision of additional data, information and documentation, such as refund claims for machinery used in an enterprise zone or for computer software that is excluded from the definition of tangible personal property. Additional information on the workgroup meeting as well as links to the latest version of the draft rules are available [here](#).

Louisiana: New law ([HB 629](#)) expands the local sales and use tax exemption for certain prescription drugs to include drugs administered by topical system in medical clinics (in addition

to being administered by infusion or injection in medical clinics). The law also expands the lists of conditions for which drugs must be prescribed in order to qualify for the exemption to include neuropathic pain and wet and dry age-related macular degeneration. These changes took effect on July 1, 2023. La. Laws 2023, Act 382 (HB 629), signed by the governor on June 14, 2023.

Louisiana: New law ([HB 127](#)) exempts from state excise and sales and use tax the furnishing of alcoholic beverages, products subject to the state tobacco tax and other items at no charge as samples in a business-to-business exchange at, or in conjunction with, conferences, conventions, expositions, trade shows, professional or trade association events, business or professional meetings, corporate events, or exhibitions of any kind held in Louisiana. For purposes of this exemption, a “business-to-business exchange” is defined as “the distribution by a business of free samples in a limited quantity with nominal value to another business as part of a genuine effort to sell or market the product being sampled to that business.” This exemption ends on August 1, 2033. La. Laws 2023, Act 297 (HB 127), signed by the governor on June 13, 2023.

Michigan: The Michigan Department Treasury issued an updated revenue administrative bulletin (RAB) on the state’s sales and use tax exemption for rolling stock (i.e., property used by interstate motor carriers engaged in interstate commerce). To qualify for the rolling stock exemption, the property must meet the following requirements: (1) it must be rolling stock; (2) the rolling stock must be purchased by, or for rental or lease to, an interstate motor carrier (for sales tax purposes) or purchased, rented or leased by an interstate fleet motor carrier (for use tax purposes); and (3) the rolling stock must be used in interstate commerce. The RAB describes each of these requirements in greater detail and includes examples. Mich. Dept. of Treas., [RAB 2023-12](#) “Sales and Use Tax Treatment of Interstate Motor Carriers” (August 10, 2023) (replaces RAB 2016-2).

Missouri: In response to a ruling request, the Missouri Department of Revenue (MO DOR) discussed which purchases of the taxpayer related to the development of an in-state utility scale solar farm are exempt from sales and use tax. The MO DOR found the following purchases exempt from sales and use tax: (1) solar panels, solar panel racking and supports, combiner boxes, inverters, solar collection transformers, project substation and interconnection transformers – these are part of the solar energy system and are exempt under RSMo §§ 144.030.2(46) and 144.615.3; (2) tracking systems and Supervisory Control and Data Acquisition (SCADA) system control center – while not part of the basic components of a photovoltaic system, these monitor the status of the system and contribute to improve efficiency and are exempt under RSMo §144.030.2(46); and (3) electrical DC wiring, AC electrical wiring and data cabling – these are exempt when they are moving the energy through the actual system because they are a part of the photovoltaic energy system. The taxpayer’s purchases of site fencing and gravel access and service roads do not qualify for a sales and use tax exemption because these items are not part of the photovoltaic energy system. Mo. Dept. of Rev., [LR 8258](#) (July 31, 2023).

Ohio: The Supreme Court of Ohio took a new approach to construing tax statutes, particularly exemptions, and allowed most of a taxpayer's claimed Ohio sales/ use tax exemptions for oil and gas production for certain equipment it purchased for fracking activities. Instead of following court precedents, which construed exemption statutes narrowly against the taxpayer, the Court announced that it would read tax statutes through a "clear lens, not one favoring tax collection" to "provide a fair reading of what the legislature has enacted" and that "henceforth we will apply the same rules of construction to tax statutes that we apply to all other statutes." *Stingray Pressure Pumping, LLC v. Harris*, Slip Opinion No. 2023-Ohio-2598 (Ohio S.Ct. August 2, 2023). For more on this development, see EY Tax Alert [2023-1400](#).

Ohio: On July 3, 2023, Governor Mike DeWine signed [HB 33](#), Ohio's biennial budget legislation for the fiscal period July 1, 2023 through June 30, 2025. HB 33 makes several changes to Ohio's tax laws. Effective October 1, 2023, sales of baby products, including child diapers, creams and wipes, car seats, cribs, and strollers will be exempt. Further, the bill modifies the exemption contained in Ohio Rev. Code § 5739.02(B), which applies to sales made to the State of Ohio or any of its political subdivisions by adding a reference to construction materials and services sold or rented to government entities for the purposes of temporary traffic control or drainage. HB 33, signed by the governor on July 3, 2023. For additional information on these developments, see Tax Alert [2023-1218](#).

Texas: New law ([SB 1122](#)) provides a sales and use tax exclusion for medical services, examinations or tests required or authorized for purposes of determining an appropriate level of workers' compensation benefits. SB 1122 took effect immediately. Tex. Laws 2023, SB 1122, signed by the governor on June 18, 2023.

Texas: New law ([SB 379](#)) expands the sales and use tax exemption for certain family care items to include wound care dressing, diapers (children or adult), and baby wipes. Items that qualify as "wound care dressing" include individual sterile adhesive bandages, sterile rolls or pads of gauze and surgical and medical tape used to secure wound care dressing; it does not include general purpose absorption items such as cotton balls or swabs, tissues, or appliances/devices used to drain bodily fluids or irrigate body cavities (e.g., drains, suction catheters or irrigation systems.) SB 379 takes effect on September 1, 2023. Tex. Laws 2023, SB 379, signed by the governor on June 18, 2023.

Virginia: New law ([HB 6001](#)) reestablishes the sales and use tax exemption holidays for certain energy and water efficient qualified products, school supplies, clothing and footwear and certain hurricane preparedness equipment. These holidays will run during specific periods through July 1, 2025; however, the holiday authorized for 2023 only will apply to sales occurring during the three-day period beginning on Friday, October 20 and ending at 11:59 p.m. on Sunday, October 22. Va. Laws 2023 (Special Sess. 1), ch. 1 (HB 6001), signed by the

governor on September 14, 2023. For a list of eligible products, see Va. Dept. of Taxn., [Release “Virginia Sales Tax Holiday Runs October 20-22, 2023”](#) (September 2023).

Washington: In a recently issued notice, the Washington Department of Revenue explained that the sales and use tax exemption for the construction of new airplane repair stations has been extended to January 1, 2031. In addition, effective July 23, 2023 the definition of eligible maintenance repair operator (eligible operator) means an operator “classified by the Federal Aviation Administration ... as a federal aviation regulation part 145 certificated repair station and ... located in a commercial services airport that is either of the following: (1) [o]wned by a county with a population less than [1 million, or] (2) [j]ointly owned by a county and city.” The exemption can be claimed by (1) an eligible operator engaged in the maintenance of airplanes and (2) a port district, political subdivision or municipal corporation that entered into an agreement with an eligible operator to build the facility for lease to the operator. The exemption applies to items such as labor and services used to construct new buildings, materials used as ingredient or part during construction, and labor and services to install certain fixtures that do not qualify for the manufacturing machinery and equipment sales and use tax exemption. The notice also provides guidance on when and how to claim the exemption, including information that must be included in the refund request. Wash. Dept. of Rev., [Special Notice “Sales and use tax exemption for construction of new airplane repair stations modified”](#) (July 26, 2023).

Washington: The Washington Department of Revenue issued guidance on when an item qualifies as an exempt export sale when a customs broker is involved. Among other responsibilities, a customs broker calculates and pays taxes, duties and excises. To qualify for an exempt export sale when a customs broker is involved, the seller must meet one of the following requirements it must deliver the goods: (1) to the buyer, to a place in another country, (2) to a for-hire carrier who transports the goods to a place in another country, or (3) to the buyer at shipside or aboard the buyer’s vessel or other transportation vehicle for export (the export process should obviously be started). The guidance includes examples. Wash. Dept. of Rev., [Tax Topic “Customs brokers”](#) (August 21, 2023).

Wisconsin: New law ([SB 70](#)) creates a sales and use tax exemption for tangible personal property or property (as defined in Wis. Stat. §77.52(1)(c)) used exclusively for the development, construction, renovation, expansion, replacement, repair or operation of a qualified data center (as defined in Wis. Stat. §238.40(1)(b)) and used solely at the qualified data center. Such property includes computer server equipment, networking equipment, various cabling, substations, fuel piping and storage, among other property. The law also creates a sales and use tax exemption for tangible personal property or property used in the development, construction, renovation, expansion, replacement, or repair of a water cooling or conservation system used exclusively to cool or conserve water for one or more qualified data centers. Such property includes chillers, mechanical equipment, refrigerant piping, cooling towers, water softeners, fans. Lastly, a sales and use tax exemption is created for tangible personal property or property sold to a construction contractor that, in fulfillment of a real

property construction activity, transfers such property to a qualified data center, if that property becomes a component of the qualified data center. The Wisconsin Economic Development Corporation must certify a qualified data center for purposes of the exemption. The exemption takes effect October 1, 2023. Wis. Laws 2023, Act 19 (SB 70), approved by the governor with partial veto on July 5, 2023. See also, Wis. Dept. of Rev., [Wis. Tax Bulletin 222](#) (July 2023).

Transactions and Services

Michigan: The Michigan Department of Treasury issued updated guidance on when lessees and lessors are liable for use tax on lease transactions and explains the application of sales and use tax to tangible personal property acquired for lease or rental. The guidance describes: (1) what constitutes a lease of tangible personal property; (2) the availability of the lessor election for a single mixed transaction if the property is incidental to the service provided; (3) the tax base of rental receipts; (4) how leases are sourced; (5) who the “lessor” is under the Use Tax Act; (6) the consequences of making a lessor election to pay use tax and using the property for non-leasing purposes; (7) when a lessee is liable for use tax and when use tax is owed on a sublease; and (8) when a lessor owes use tax on property that is exempt from use tax or that is leased to a lessee is exempt from use tax. The guidance includes examples. Mich. Dept. of Treas., [RAB 2023-13](#) (August 15, 2023) (replaces RAB 2020-16).

Washington: The Washington Department of Revenue issued guidance explaining when retail sales tax applies to charges for the repair of goods damaged in transit to in-state customers. The guidance also clarifies the sales and use tax and business and occupation (B&O) tax consequences when the sale of repair work is performed for the shipper, carrier or owner of the damaged goods. The repair work is a “sale at retail” when it is performed for a shipper, carrier or owner that is not in the business of selling the goods being repaired at retail to consumers. If retail sales tax is not collected by the seller (repairer), then use tax applies to the purchaser’s use of the repair work. Charges for repair services on goods damaged in transit are not subject to retail sales tax if the owner of the goods is in the business of selling such goods at retail to consumers and provides the seller (repairer) with a reseller permit, certifying that the goods are for resale in the regular course of the owner’s business. Repair services provided to the owner of damaged goods by a seller (repairer) that is in the business of selling the damaged goods at retail to consumers, are subject to the B&O tax under the wholesaling classification. Wash. Dept. of Rev., Excise Tax Advisory [ETA 3128.2023](#) (June 13, 2023).

Washington: New law ([HB 1431](#)) clarifies that sales and use tax does not apply to food, drink or meals furnished to tenants of senior living communities as part of their rental or residency agreement for which no separate charge is made. The law takes effect on July 23, 2023. Wash. Laws 2023, ch. 416 (HB 1431), signed by the governor on May 11, 2023. Note: the value of such food, drink and meals remains subject to the business and occupation tax under the

Service and Other Activities classification. See, Wash. Dept. of Rev., "[Special Notice - Intended guidance: Senior living communities](#)" (July 13, 2023).

Technology and Digital Taxes

Louisiana: New law ([SB 227](#)) provides a sales and use tax exemption for digital art, which is defined as "digitally created content including ... video, or song to which ownership can be proven through use of blockchain or another similar mechanism." The definition of "works of art" is expanded to include "digital art". The exemption applies to tax periods beginning on or after July 1, 2023. La. Laws 2023, Act 396 (SB 227), signed by the governor on June 15, 2023.

Mississippi: The Mississippi Department of Revenue issued a sales and use tax notice regarding the taxation of purchases of computer software and computer software services following a 2023 law change (SB 2449) that took effect July 1, 2023. (See Tax Alert [2023-0693](#).) As of that date, Mississippi exempts from sales and use tax remotely accessed software hosted on servers located outside the state, and it allows reasonable allocation of fees/payments for computer software and computer software services that include taxable and nontaxable items. In addition, purchasers of computer software and computer software services can apply for a computer software direct pay permit, which can only be accepted by vendors that sell, rent or lease computer software and computer software services. The notice includes definitions of "computer software" and "computer software services" and explains how to apply for the computer software direct pay permit. Miss. Dept. of Rev., Sales and Use Tax Bureau, [Notice 72-23-12](#) (July 6, 2023).

New Mexico: The Taxation and Revenue Department has announced that it proposes amend/repeal/replace and enact certain rules and regulations pertaining to digital advertising services under the Gross Receipts and Compensating Tax Act, and further clarification for engaging in business. The proposed rules are being amended to clarify the taxation of digital advertising, the correct reporting location to use when reporting these gross receipts, and deductions that may be available. Further, the proposed changes would clarify "engaging in business" for those taxpayers that only have economic presence in New Mexico. The proposed regulations detail which receipts from the sale of digital advertising services are subject to gross receipts taxation and which are deductible, and also clarifies the sourcing rules for such receipts. A public hearing will be held on the proposed rule changes on Thursday, November 9, 2023, from 10 AM to 11 AM and will be recorded. N.M. Dept. of Taxn. And Rev., [Notice of Hearing](#) (October 5, 2023).

Controversy and Compliance

Colorado: New law ([HB 23-1017](#)) makes improvements to the electronic sales and use tax simplification system. The law provides that by or before January 1, 2025, the Colorado

Department of Revenue (CO DOR) must modify the electronic sales and use tax simplification system: (1) to populate a local account number of all returns and summary reports, if the retailer filing the return has a number and provides the number in the system; (2) by developing a simplified user interface for filing returns as an alternative to the current spreadsheet method; (3) to provide retailers with a bulk testing option for address files; and (4) to include a column for describing "other deductions", filtering options for local taxing jurisdictions to sort retailers, local account numbers on a detail tab for retailers, and a tab for retailer's filing history and payment. The CO DOR is prohibited from imposing a convenience fee or other type of charge for payment through the system (except a charge for paying by credit card). In addition, the CO DOR must solicit and consider feedback from interested parties, including local taxing jurisdictions, members of the business community and retailers, on potential enhancements to the system. Colo. Laws 2023, ch. 365 (HB 23-1017), signed by the governor on June 5, 2023.

Hawaii: The Hawaii Department of Taxation announced that, as a result of Maui County Ordinance No. 5551 authorizing imposition of a county surcharge on general excise tax, beginning January 1, 2024, and ending December 31, 2030, the general excise tax retail rate will be imposed at 4.5%, comprised of the state rate of 4% and the Maui County surcharge of .5%. The maximum rate that may be visibly passed on to customers in Maui County is 4.712%, which accounts for imposition of the tax on amounts collected as tax. Sellers may also pass on the tax at the statutory rate of 4.5%, or elect to not visibly pass on the tax. Hawaii Dept. of Taxn. Announcement 2023-05 (September 23, 2023).

Louisiana: New law ([HB 558](#)) moves the management and supervision of the uniform electronic local return and remittance system to from the Louisiana Department of Revenue (Department) to the Louisiana Uniform Local Sales Tax Board (Board). The Board is required to build a single remittance system that will allow a taxpayer to remit state and local sales and use tax through a single transaction. The Department will continue to operate its electronic local return and remittance system until the Board certifies that the new system is available for use by taxpayers; such system must be available to use by taxpayers by January 1, 2026. The law also provides that the local sales and use tax, interest or penalty rates cannot be changed unless the change has an effective date of the first of January, of April, of July or of October and the Board and the Uniform Electronic Local Return and Remittance Advisory Committee must be notified 60 days in advance. For purposes of this provision, a tax rate change includes changes: (1) due to the levy of a new tax; (2) for an existing tax; (3) due to an annexation or other boundary modification by the taxing authority; (4) due to the execution or expiration of a cooperative endeavor agreement to which the taxing authority is a party; or (5) due to implementation, amendment or repeal of an optional sales tax exemption or exclusion. HB 558 takes effect on January 1, 2024. La. Laws 2023, Act 375 (HB 558), signed by the governor on June 14, 2023.

Missouri: In response to a ruling request, the Missouri Department of Revenue (MO DOR) said that sales an out-of-state IRC §501(c)(3) nonprofit organization facilitated on its marketplace

platform on behalf of nonprofit organizations as part of their charitable activities are exempt from Missouri use tax. Further, because the sales are exempt and the out-of-state nonprofit will not be remitting tax due, it is not required to register with the MO DOR as a marketplace facilitator. Mo. Dept. of Rev., [LR 8263](#) (July 31, 2023).

Missouri: New law ([SB 398](#)) will require licensed motor vehicle dealers to collect and remit to the Missouri Department of Revenue (MO DOR) sales tax due on all motor vehicles it sells. This requirement will apply following the development and maintenance of a modernized, integrated system for the titling of vehicles, issuance and renewal of vehicle registrations, among other things. The MO DOR has the authority to promulgate rules to administer this provision. Mo. Laws 2023, SB 398, signed by the governor on July 6, 2023.

Wisconsin: New law ([AB 245](#)) allows Milwaukee to impose a 2% sales tax and also allows Milwaukee County to impose an additional 0.4% sales tax (current county rate is 0.5%). These rates could become effective as early as January 1, 2024, if approved by a two-thirds vote of the City of Milwaukee Common Council and the Milwaukee County Board of Supervisors. Wis. Laws 2023, AB 245, signed by the governor on June 20, 2023. For more on this development, see Tax Alert [2023-1149](#).

Wisconsin: New law ([SB 70](#)) increases the retailers discount for sales tax reported on a sales and use tax return. Effective October 1, 2023, the discount on the total sales tax is increased to 0.75% (from 0.5%), with the maximum that can be deducted on the sales tax return per reporting period increased to \$8,000 from \$1,000. Wis. Laws 2023, Act 19 (SB 70), approved by the governor with partial veto on July 5, 2023. See also, Wis. Dept. of Rev., [Wis. Tax Bulletin 222](#) (July 2023).

Wisconsin: The Wisconsin Department of Revenue announced that both the City of Milwaukee and Milwaukee County have certified ordinances, approving new sales and use taxes allowed under legislation enacted in 2023 (Act 12). The Act authorized the City of Milwaukee to enact a 2% sales and use tax and Milwaukee County to enact an additional 0.4% sales and use tax. Because the certifications were received by the WI DOR before the statutory deadline, these taxes can be imposed starting January 1, 2024. Wis. Dept. of Rev., Press Release "[City of Milwaukee and Milwaukee County certify new sales taxes](#)" (August 31, 2023).

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