

State Tax Alert January 2024

State Sales and Use Tax Quarterly Update - January 2024

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.

As New Mexico moves forward with new regulations, Maryland's Comptroller denies Digital Advertising Services Tax refunds

It has been more than six months since the Maryland Supreme Court [dismissed](#), on procedural grounds, a legal challenge to the state's Digital Advertising Services Tax (DAT). Because the court did not address the merits of the case, it was expected that the action would quickly be refiled in the Maryland Tax Court; however, that did not happen. Instead, in the Fall of 2023, the Maryland Comptroller began rejecting the many protective refund claims filed by taxpayers that had been reporting and paying the DAT since it took effect in 2022. In November 2023, the Maryland Tax Court agreed to hear a challenge to one of those denials - meaning that taxpayers may at last get a ruling on the merits as to whether the DAT violates federal law (the Internet Tax Freedom Act (ITFA)) and the U.S. Constitution.

Achieving certainty on this issue is important not only with respect to the millions of dollars at stake in Maryland; it also may prove to be determinative as to how other states move forward. While Maryland remains the only state to enact a specific tax targeting digital advertising services, at least five other states have introduced substantially similar or identical taxes. Should the DAT ultimately be upheld, it is expected that these states, and many more, will move quickly to implement such taxes. Alternatively, if the DAT is struck down on the merits, states may choose to enact broader taxes that affect all forms of advertising services (which would remedy the inherent discrimination against electronic commerce barred by ITFA), or wait for some consensus to emerge (e.g., via the Multistate Tax Commission's Uniformity Project on Digital Products).

In the meantime, at least one state that imposes a broad, gross-receipts style sales and use tax has sought to clarify how it taxes digital advertising. In December 2023, New Mexico adopted final rules (discussed in detail below) explaining when digital advertising services are subject to the state's Gross Receipts and Compensating Use Tax. The new rules "clarify" that the tax applies to receipts of digital platform providers if: (1) the digital platform can be accessed or viewed in New Mexico; and (2) the providers display digital advertising services from the sale

of those services to advertisers within and outside New Mexico. The new rules also discuss sourcing and what constitutes “engaging in business” in the state.

Although New Mexico’s sales and use tax structure is not traditional, in that it applies to gross receipts and is not limited to transactions involving tangible personal property, it may serve as a guide for other states looking to tax digital advertising services should the Maryland statute ultimately be struck down.

Our Observation: While the issue of taxing digital advertising services will not be completely resolved in 2024, taxpayers should receive some guidance - at least in Maryland. The state provides a four-year statute of limitations for refund claims, so taxpayers are still within that period with respect to the DAT. However, any taxpayer that did file a protective claim likely has or will receive a denial notification from the Comptroller. For those that have (or do) receive such notices, it is imperative that they file an appeal within the timeframe specified in the notice (generally thirty (30) days) or their claim may be deemed to be waived. Taxpayers in other states should continue to monitor the developments in Maryland as it will likely impact legislation in jurisdictions relevant to their operations.

Other Recent Sales and Use Tax Developments

Nexus and Marketplace

Illinois: The Illinois Department of Revenue issued updated compliance guidance for remote retailers and marketplace facilitators making sales to Illinois purchasers. Topics addressed by the guidance include the following: (1) how a remote retailer/marketplace facilitator determines whether they are subject to state and local retailers’ occupation tax (ROT); (2) sales excluded from the tax remittance threshold determination for remote retailers/marketplace facilitators; (3) the frequency in which a remote retailer/marketplace facilitator must review their sales to determine if they are subject to state and local ROT; and (4) how remote retailers/marketplace facilitators determine which ROT rate to use. The guidance also defines “remote retailer”, “marketplace”, “marketplace facilitator”, “marketplace seller”, “certified automated system” and “certified service provider”. Additional information on the Leveling the Playing Field for Illinois Retail Act is available [here](#). Ill. Dept. of Rev., [Informational Bulletin FY 2024-08](#) “Retailers’ Occupation Tax and Updated Threshold Guidance for Remote Retailers and Marketplace Facilitators as set forth by the Leveling the Playing Field for Illinois Retail Act” (October 2023) (supersedes FY 2021-02 (N-9/20), FY 2021-02-A (N-12/20), and FY 2022-04 (N-10/21)).

Massachusetts: On December 19, 2023, the Massachusetts Department of Revenue (MA DOR) held a [hearing](#) on proposed regulation [830 CMR 64H.1.9: Remote Retailers and Marketplace Facilitators](#). The proposed amendments would expand 830 CMR 64H.1.9(4), the marketplace facilitator exception provisions, to exclude a person that facilitates: (1) the sale of marijuana or marijuana products on behalf of marijuana retailers, and (2) rentals of motor vehicles. A person that facilitates rentals of motor vehicle and is subject to the marketplace facilitator rules would be required, to the extent that the person is the marketplace facilitator with respect to such sellers, to collect and remit all applicable vehicular rental transaction contract surcharge. Proposed amendments to 830 CMR 64H.1.9(7) would amend filing and

payment deadlines for tax periods ending on or after April 1, 2021. As of that period, a vendor would be required to file a return and pay tax due for each calendar month on or before the 30th day of the following calendar month (from the 20th day of the following calendar month). A vendor also may be subject to the advance payment rules under 830 CMR 62C.16B.1.

Tax Base and Taxability

South Carolina: The South Carolina Department of Revenue issued a reminder that additional items are now subject to the state's maximum sales and use tax (Max Tax). The Max Tax applies to cars, aircrafts, and boats, along with newly added items including all-terrain vehicles (ATVs), utility task vehicles (UTVs), golf carts, dirt bikes and legend race cars. The rate of the Max Tax is 5% and capped at a maximum of \$500; retailers of items subject to the Max Tax must collect and pay the tax and file the Max Tax returns. Further, starting December 1, 2023, the Max Tax return must be filing online using MyDORWAY. Also starting on that date, Max Tax sales items must be reported item-by-item, instead of one total amount. S.C. Dept. of Rev., News Release "[More Items Subject to Max Tax; Electronic Filing Requirement Starts December 1](#)" (September 27, 2023); see also S.C. Dept. of Rev., [SC Revenue Ruling #23-3](#) (September 26, 2023) (updates guidance on which vehicles are motor vehicles subject to the partial tax exemption under S.C. Code Ann. §12-36-2110).

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) said that costs incurred to provide custom functions in a new software system are subject to the state's sales and use tax as computer software, but other elements of the project are not subject to tax. Items not subject to tax include project planning and data migration services, configuration, and training and support services - the TN DOR said these are not enumerated taxable services - and function support. The TN DOR further explained that since the parties intended for the optional customization provision to be severable from the rest of the contract, the other services provided under the contract are not subject to sales and use tax. The TN DOR also rejected the taxpayer's suggestion that it could allocate a percentage of the taxable customization elements from the contract to the location of its out-of-state employees. Tenn. Dept. of Rev., [Letter Ruling #23-10](#) (Nov. 17, 2023).

Texas: The Texas Comptroller of Public Accounts (Comptroller) issued additional guidance on the taxability of electronic games and associated content, which includes downloadable content, virtual goods and currencies for use within the electronic game, additional game content, game-play enhancements and aesthetic enhancements. Purchasers of electronic games also may purchase subscriptions or membership fees for access to games or game communities (e.g., chat rooms, discussion boards). Purchases of electronic games and associated content can be made directly through the game's website or from third-party retailers. Electronic games do not include games received on physical media, stand-alone free-to-play video games or Internet access services. The Comptroller explained that under existing statutes, rules and policy decisions, electronic games and associated content, including virtual currencies, are subject to Texas sales and use tax as an amusement service, regardless of whether access is purchased directly through a game's website or a redeemable card. In addition, membership and subscription fees for access to an electronic game or associated content are charges for membership or access to special privileges and, as such, are subject to tax as amusement services. Tex. Comp. of Pub. Accts., [STAR No. 202309029L](#) (September 25, 2023) (replaces STAR No. 201405957L (May 28, 2014)).

Sales and Use Tax Exemptions, Exclusions and Refunds

California: New law ([AB 543](#)) extends through January 1, 2029 (from January 1, 2024) the sales and use tax exemption for the sale of fuel and petroleum products to a water common carrier for immediate shipment outside California for consumption in the conduct of its business as a common carrier after the first out-of-state destination. AB 543 took immediate effect. Cal. Laws 2023, ch. 442 (AB 543), signed by the governor on October 8, 2023.

California: New law ([AB 1203](#)) temporarily exempts from sales and use tax gross receipts from the sale of breast pumps, breast pump collection and storage supplies, breast pump kits, and breast pads. The law defines “breast pumps”, “breast pump collection and storage supplies”, and “breast pump kits”. This temporary exemption applies to sales made on or after April 1, 2024 and before April 1, 2029. Cal. Laws 2023, ch. 833 (AB 1203), signed by the governor on October 13, 2023.

California: New law ([AB 314](#)) extends the sales and use tax exemption for new, used or remanufactured trucks or new or remanufactured trailers or semitrailers for use in interstate or out-of-state commerce through January 1, 2029 (from January 1, 2024). In addition, the exemption is expanded to used trailers or semitrailers through the same date. The exemption applies to such trucks and trailers purchased for use without California and is delivered to the purchaser within California, and the purchaser drives or moves the vehicle to any point outside California within 30 or 75 days of the date of the delivery of the vehicle to the purchaser. The purchaser or purchaser’s agent must furnish to the manufacturer, remanufacturer or dealer written evidence of an out-of-state license and registration for the vehicle. AB 314 took immediate effect. Cal. Laws 2023, ch. 427 (AB 314), signed by the governor on October 8, 2023.

Colorado: On November 2, 2023, the Colorado Department of Revenue (CO DOR) held a [public rulemaking hearing](#) on 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. See EY Tax Alert [2022-0746](#) (May 10, 2022). Initially, the CO DOR had proposed two separate rules, but has since combined Proposed Rule 39-26-703-1 “Protective Refund Claims for Sales or Use Tax Paid to a Seller” into [Proposed Rule 39-26-703-2](#) “Buyer’s Claims for Refund of Sales or Use Tax Paid” (hereafter, proposed rule). The proposed rule 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 protective refund claims for sales and use tax paid to the seller and the penalty imposed for incomplete refund claims. Applicants would have to comply with the requirements of this rule for refund claims filed after the rule’s effective date.

Florida: New law ([HB 1C](#)) exempts from sales and use tax certain fencing and building materials used to repair/replace farm fences on land classified as agricultural and nonresidential farm buildings damaged by Hurricane Idalia. The exemption applies to purchases made from August 30, 2023 through June 30, 2024, for materials used to replace/repair fences or replace/repair nonresidential farm building located in the following counties Charlotte, Citrus, Columbia, Dixie, Gilchrist, Hamilton, Hernando, Jefferson, Lafayette, Levy, Madison, Manatee, Pasco, Pinellas, Sarasota, Suwannee and Taylor. The refund must be applied for by December 31, 2024. The law describes what information must be included in the

application. This provision is retroactively operative to August 30, 2023. Fla. Laws 2023 (Special Session 2023C), ch. 2023-349 (HB 1C), signed by the governor on November 13, 2023.

Georgia: In reversing an appellate court ruling, the Georgia Supreme Court held that payments made by an entertainment business to another entity for leases of coin-operated amusement machines (COAMs) are exempt from sales and use tax under the exempting statute, OCGA §48-8-3(43), because the exemption “applies to any revenues a COAM generates or brings into existence, which, in this case, are revenues generated by the lease of COAMs and revenues generated by the playing of the COAMs.” In so holding, the Court determined that “by its plain terms, OCGA §48-8-3(43), [which exempts revenue generated from all bona fide commercial use COAMs that vend or dispense music or are operated for skill, amusement, entertainment or pleasure and provided to the public for play,] covers revenue generated from the lease of COAMs...” The Court further found that the statutory provision included no words of limitation restricting the manner in which COAMs generate revenue and that the phrase “which vend or dispense music or operated for skill, amusement, entertainment, or pleasure” merely describes types of machines from which revenue is generated and “does not indicate that the gross revenues can only be generated by playing the COAMs.” [Funvestment Group, LLC v. Crittenden](#), No. S22G1247 (Ga. S. Ct. September 18, 2023).

Iowa: The Iowa Department of Revenue reminded taxpayers that the sales and use tax exemption for purchases of computers and computer peripherals used to process or storing data or information by an insurance company, financial institution or commercial enterprise ends on Dec. 31, 2023. Thus, starting Jan. 1, 2024, purchases of such items are subject to Iowa sales and use tax. Iowa Dept. of Rev., “[Sales and Use Tax Exemption for Purchases of Computers and Computer Peripherals by Certain Entities Ends on December 31, 2023](#)” (Dec. 14, 2023).

North Carolina: North Carolina’s budget bill, [HB 259](#), which includes business and individual tax changes, became law without the governor’s signature on October 3, 2023. The new law impacts various sales and use tax exemption and refund provisions, including:

- Exempts from retail sales and use tax sales of items by a provider of continuing care to residents, excluding alcoholic beverages; this exemption is effective on, and applicable to sales occurring on or after, November 1, 2023
 - Note, the provider of continuing care pays sales and use tax on the purchase price of an item exempt under this provision as if the provider is the user of the item and, as such, the provider is not required to pay sales or use tax if the purchase would be exempt if purchased for the provider’s use and not resale
- Extends the sunset date of the retail sales and use tax exemption and refund for professional motorsports teams through 2027; these provisions expire/are repealed on January 1, 2028 (from January 1, 2024)
- Extends the sunset date of the annual refund of sales and use tax paid by a professional motorsport racing team, a motorsport sanctioning body, or related member of such team or body, for purchases of aviation gasoline or jet fuel that is used to travel from motorsports events through 2028; the provision is repealed for purchases made on or after January 1, 2029 (from January 1, 2024)

- Extends the sunset date for the sales and use tax exemption for aviation gasoline and jet fuel to an interstate air business for use in commercial aircraft through January 1, 2029 (from January 1, 2024)
- Expands the sales and use tax exemption for sales of fuel and other tangible personal property for use or consumption by boats transporting freight in intrastate, interstate or foreign commerce as well as the transport of passengers for hire exclusively on the high seas; this exemption is effective on, and applicable to sales occurring on or after, November 1, 2023
- Exempts from sales and use tax breast pumps (including repair and replacement parts), breast pump collection and storage supplies, and breast pump kits; this exemption is effective on, and applicable to sales occurring on or after, November 1, 2023

The new law also prohibits regional transportation authorities from levying a short-term car rental tax in a county that has withdrawn from the authority. N.C. Laws 2023, SL 2023-134 (HB 259), enacted October 3, 2023.

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) said that a wholly owned single member limited liability company (SMLLC) that elects to be treated as a corporation for federal income tax purposes would qualify for the sales and use tax industrial machinery exemption and the reduced rates for water and energy fuel, because the SMLLC will be treated as a separate entity from its parent. If the SMLLC does not elect to be treated as a corporation and remains a disregarded entity for federal income tax purposes, the SMLLC would not qualify for the exemption or reduced rates as it would be treated as a division of parent and parent's eligibility for the exemption may fluctuate based on where most of its revenue is derived. The TN DOR also determined that the if the SMLLC elects to be treated as a corporation for federal income tax purposes, it would qualify as a manufacturer for business tax purposes if, among other requirements,¹ it is primarily engaged in the fabrication of goods for resale and off premise consumption at its new fabrication location. Tenn. Dept. of Rev., [Letter Ruling #23-08](#) (August 24, 2023).

Transactions and Services

Colorado: In response to a ruling request, the Colorado Department of Revenue (CO DOR) said that sales of basic travel experience packages – which bundle taxable and nontaxable tangible personal property and services (such as transportation, tour guide service, food and drink, and hotel accommodations) – are not subject to Colorado's sales tax because the true object of the travel package is the travel experience by train. The CO DOR found the travel package transaction is inseparably mixed because the basic travel package is sold as an all-inclusive package and elements of the package are not marketed or sold separately and nontaxable items cannot be purchased later. Since the transaction is inseparably mixed, whether the transaction is taxable depends on its true object. In this instance, the CO DOR concluded that the true object of the basic travel package is the train travel experience. The CO DOR noted that the taxable elements of the package (e.g., hotel accommodations) meet the customer's basic needs during the travel experience and, thus, are not the true object of the transactions. Colo. Dept. of Rev., [PLR 23-004](#) (August 21, 2023).

¹ To qualify for the manufacturer's business tax exemption, the taxpayer also must: (1) qualify for the exemption on a per location basis, (2) derive more than 50% of its gross receipts from manufacturing, and (3) make its sales from the manufacturing location or from a storage or warehouse facility located within 10 miles of the manufacturing location.

Louisiana: In response to a ruling request, the Louisiana Department of Revenue (LA DOR) issued guidance on the tax collection and remittance requirements for peer-to-peer vehicle sharing platforms. Peer-to-peer (P2P) vehicle sharing platforms do not own or rent vehicles; instead, they facilitate the lease or rental of vehicles between vehicle owners and drivers. Under Louisiana law, the term “dealer” includes anyone that operates, maintains or facilitates a P2P vehicle sharing program and collects a portion of the amount paid under the vehicle sharing agreement. Regarding the platform company’s collection and remittance obligations for vehicles leased or rented through its platform, the LA DOR determined that the company, through its operation, maintenance and facilitation of a P2P vehicle sharing program, is a “dealer”. As a “dealer”, the company must collect and remit sales tax on transactions facilitated on its vehicle sharing platform and it also must collect and remit automobile rental taxes that are due on taxable rentals (i.e., rentals for 29 days or less) made through its P2P vehicle sharing program. Both the sales tax and the automobile rental tax must be electronically remitted and paid. The LA DOR noted that local sales tax collected on these transactions must be remitted to the appropriate local sales tax collector. P2P vehicle sharing platforms are specifically excluded from the definition of marketplace facilitator and, therefore, are not eligible to file or remit tax to the Louisiana Sales and Use Tax Commission for Remote Sellers. La. Dept. of Rev., [Revenue Ruling 23-001](#) “Peer-to-Peer Vehicle Sharing Platforms: Tax Collection and Remittance Requirements” (November 14, 2023).

Nevada: In the October 2023 issue of Nevada Tax Notes, the Nevada Department of Taxation said that Nevada sales tax applies to credit card or charge card processing fees included on a sales receipts or invoice of a taxable sale. The fee, however, is not taxable when the sale is not otherwise subject to sales tax. Nev. Dept. of Taxn., [Nevada Tax Notes](#) (Issue No. 197, October 2023).

Texas: In response to a ruling request, the Texas Comptroller of Public Accounts (Comptroller) determined that the operations of a foreign headquartered company providing facility management and property consulting services to commercial customers across different industries in various countries do not fall under the definition of “property management company” under Tex. Tax Code §151.354(f). For Texas sales and use tax purposes, in order be a property management company the company would have to operate and manage all the activities at a property held by the owner for purposes of rental, including securing tenants, hiring and supervising employees for property operation or upkeep, receiving and applying revenues, and incurring and paying expenses for the operation of the property. Because the foreign company does not secure tenants or receive and apply revenue for its clients, it does not operate and manage all the activities at its clients’ properties. As for securing tenants, the Comptroller said that a property management company can secure tenants for landlords on their own or they can hire a third party to do so. The Comptroller also determined that the foreign company was selling various taxable items, such as real property services (e.g., landscaping, building and grounds cleaning, janitorial), real property repair and remodeling, security services, catering and food services, and printed materials and graphic art. Tex. Comp. of Pub. Accts., [Star No. 202310013L](#) (October 20, 2023).

Texas: In response to a ruling request, the Texas Comptroller of Public Accounts (Comptroller) determined that a company’s biometric identification service, which verifies a person’s identity based on biometric information such as fingerprints and iris scans, is not subject to Texas sales and use tax because it is not an enumerated taxable service. The Comptroller found that the business is not performing a taxable security service, nor is it performing taxable data processing services even though some of its activities (e.g., gathering and storing customers’ electronic information) meets the definition of data processing services. These activities, the Comptroller found, are performed to facilitate the

company's service to verify a person's identity using biometric information. Tex. Comp. of Pub. Accts., [STAR No. 202309040L](#) (September 19, 2023).

Technology and Digital Taxes

New Mexico: On December 19, 2023, the New Mexico Taxation and Revenue Department (NM TRD) adopted final rules clarifying when receipts from digital advertising services are taxable.² The final rules also clarify the sourcing for those receipts and modify the definition of "engaging in business." The new and amended rules took effect December 19, 2023. Specifically, new rule, [NMAC Section 3.2.213.13](#) "Receipts of a Digital Platform that Displays Digital Advertising," clarify when receipts from digital advertising services are taxable under the Gross Receipts and Compensating Tax Act. Adopted amendments to [NMAC Section 3.1.4.13](#) "General Rules for Determining Reporting Location" and [NMAC Section 3.2.1.12](#) "Engaging in Business" (1) detail which receipts from those services are taxable and which are deductible, (2) clarify the sourcing rules for receipts from digital advertising services and (3) clarify what "engaging in business" means for taxpayers that only have an economic nexus with the state. For more information on this development, see EY Tax Alert [2023-2121](#) (December 22, 2023).

Practice, Procedure, Controversy and Compliance

California: New law ([AB 1097](#)) temporarily amends the definition of "qualified purchaser" by removing the condition that the person receives at least \$100,000 in gross receipts from business operations per calendar year and replaces it with the condition that the person makes more than \$10,000 in purchases subject to use tax per calendar year if the use tax imposed on those purchases has not otherwise been paid to a retailer engaged in business in California or to a retailer authorized to collect the tax. This change is effective until January 1, 2029, when it repealed. On January 1, 2029, the definition of "qualified purchaser" reverts back to the definition before the temporary change. AB 1097 takes effect January 1, 2024. Cal. Laws 2023, ch. 355 (AB 1097), signed by the governor on October 7, 2023.

Illinois: The Illinois Department of Revenue is soliciting feedback on proposed changes to the Retailers' Occupation Tax (ROT) bad debt regulation, [86 Ill. Adm. Code 130](#). Proposed changes to the regulation would: (1) add a definition of "bad debt"; (2) clarify when a bad debt deduction could be claimed by a cash basis retailer that has prepaid tax and a retailer that uses the gross sales method for filing their sales tax return but a cash basis for filing their income tax return; (3) describe how to calculate the bad debt deduction; (4) explain the bad debt procedural and record keeping requirements; and (5) and add illustrative examples. Comments on the proposed regulation are due December 4, 2023. (Ill. Register, Vol. 47, Issue 42, October 20, 2023).

Massachusetts: On Jan. 18, 2024, the Massachusetts Department of Revenue (MA DOR) will hold a public hearing on proposed regulation 830 CMR 62C.16B.1 "Advance Payments of Sales and Use Tax and Room Occupancy Excise". Advanced payments for sales and use tax liabilities under M.G.L. c. 64H and M.G.L. c. 64I, including marijuana retail taxes, the room occupancy excise tax under M.G.L. c. 64G, and the local sales tax on meals under M.G.L. c. 64L are required for tax periods ending after April 1, 2021. The proposed regulation defines key terms, provides a general rule and addresses the following

² N.M. Register, [Vol. XXXIV, Issue 24](#) (Dec. 19, 2023).

topics: (1) advance payment requirement, (2) taxpayers not subject to advance payment requirements, (3) penalties, (4) examples, and (5) recordkeeping requirements. Interested parties may email written comments to the MA DOR at RulesandRegs@dor.state.ma.us. Mass. Dept. of Rev., [830 CMR 62C.16B.1: Advance Payments of Sales and Use Tax and Room Occupancy Excise \(Proposed Regulation\)](#) (proposed Dec. 19, 2023).

Michigan: New law ([HB 4377](#) and [HB 4378](#)) revises the state's sales and use tax provisions related to food. The law defines the following terms: "bottled water", "candy", "food sold in an unheated state by weight or volume as a single item", "food sold with eating utensils provided by the seller", "prepared food sales percentage", "soft drinks", "volume", "weight"; and modifies the definition of "prepared food". The term "food sold with eating utensils provided by the seller" means food sold by a seller that meets either of the following requirements: (i) for sellers with a prepared food sales percentage of greater than 75%, the seller makes eating utensils available to purchasers or, for bottled water, candy or soft drinks, the seller gives/hands the utensils to the purchaser or makes available plates, bowls, glasses or cups that are need in order for the purchaser to receive the food (note: if a food item that has four or more servings is packaged as one food item and sold at a single price, the seller must give/hand the eating utensil to the purchaser); or (ii) for sellers with a prepared food sales percentage of 75% or less, the seller's business practice is to give/hand eating utensils to the purchaser (note: the seller need only make available to purchasers eating utensils necessary for purchasers to receive the food, e.g., cups and bowls). Food is not sold with eating utensils provided by the seller if a person other than the seller places the eating utensils in a package with the food items and that person's NAICS classification is a manufacturer. If, however, the person has any other NAICS classification, the seller is considered to have provided the eating utensil. According to legislative [analysis](#), the statutory update was needed to maintain the state's compliance with the Streamlined Sales and Use Tax Agreement following an appellate court's decision that a rule which had defined the term "food sold with eating utensils provided by the seller" was found to conflict with statutory language. This change is effective on the 91st day after final adjournment of the 2023 regular legislative session. Mich. Laws 2023, Pub. Act 141 (HB 4377) and Pub. Act 142 (HB 4378), both bills were signed by the governor on October 3, 2023.

Rhode Island: The Rhode Island Division of Taxation (RI DOT) issued a notice to Sales Tax permit holders, informing them that starting with Tax Year 2023 and thereafter the Rhode Island Annual Sales and Use Tax Reconciliation Return - Form T-204R - Annual (for general retailers) will no longer be required. The RI DOT noted, however, that annual reconciliation returns covering the 2023 calendar year will still need to be filed by filers of T-204A (liquor stores) and T-204W (writers, composers, and artists). Delinquent prior-year annual reconciliation returns also are still required to be filed. R.I. Div. of Taxn., [ADV 2023-17 "Discontinuation of Annual Sales Tax T-204R Reconciliations Forms"](#) (November 10, 2023).

Texas: The Texas Comptroller of Public Accounts determined that for purposes of the optional single local use tax rate for remote sellers, the estimated average rate of local sales and use taxes imposed in Texas during the preceding state fiscal year ending August 2023 is 1.75%. This rate will be in effect for the period from January 1, 2024 to December 31, 2024. Tex. Comp. of Pub. Accts., [Texas Register "In Addition"](#) (48 TexReg 6927 November 24, 2023).

Texas: In response to a ruling request regarding qualifying jobs for a certified large data center project, the Texas Comptroller of Public Accounts said that jobs assigned to the new data center but physically located at the existing data center while the new data center was under development and construction

will be qualifying jobs if they are hired on or after the date the new data center is certified. Tex. Comp. of Pub. Accts., [Star No. 202310014L](#) (October 27, 2023).

Texas: The Texas Comptroller of Public Accounts (Comptroller) has proposed amendments to local sales and use tax regulation, [34 TAC §3.334](#), to add a new “general standard” provision regarding the location where an order is received. Under the proposal, the location an order is received by or on behalf of a seller (collectively “by the seller”) would be the physical location of a seller or third party such as an established outlet, office location or automated order receipt system operated by the seller where an order is initially received by the seller and not where the order may be subsequently accepted, completed or fulfilled. An order would be received when the seller receives all of the information from the purchaser necessary to determine whether the order can be accepted. The location of the where the product is shipped would not be used to determine the location where the seller receives the order. In the preamble, the Comptroller said that the proposed language was pulled from the Streamlined Sales and Use Tax Agreement (Section 3.10.1C5). The Comptroller also explained that instead of adopting a definition of “receive” as part of January 2023 rulemaking, it addressed two situations that were “most prominently debated - automated website orders and fulfillment warehouses.” Since the adoption of that change, the Comptroller said it “has become apparent that other circumstances also require a clear articulation of [its] interpretation of the term ‘received’.” Hence, the Comptroller is proposing the addition of above general standard that can apply to all situations. Comments on the proposed rule must be received by the Comptroller no later than 30 days from the date the proposal was published in the Texas Register - i.e., November 26, 2023. The earliest this proposal could be adopted is November 26, 2023. (48 TexReg 6340, October 27, 2023).

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