State Tax Alert
October 2024

State Sales and Use Tax Quarterly Update – October 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.

Texas Comptroller proposes significant changes to data processing regulation

On September 13, 2024, the Texas Comptroller of Public Accounts (Comptroller) proposed changes to 34 Tex. Admin. Code §3.330, which relates to the application of sales and use tax to data processing services. The proposed changes are intended to clarify existing definitions, add new definitions, provide examples of both taxable and nontaxable services, explain the incidence of the tax, and update provisions related to the collection of local sales and use taxes on data processing services. If adopted, the revised regulation could take effect as early as October 13, 2024.

The Comptroller has stated that the proposed changes are intended to "help online marketplaces understand their responsibilities," particularly with respect to provision of data processing services by a marketplace facilitator to a marketplace seller. The Comptroller explained that such arrangements between a marketplace facilitator and a marketplace seller typically constitute two transactions: 1) the purchase of goods and services by the consumer through the marketplace, wherein the consumer pays sales tax; and 2) the purchase of data processing services by the marketplace seller, wherein the marketplace seller pays sales tax.

If adopted, the new regulation would retain the current definition of "data processing," but would specifically exclude a number of services, including: the display of a classified advertisement, banner advertisement, vertical advertisement, or link on an Internet website owned by another person; services exclusively to encrypt electronic payment information for acceptance onto a payment card network; and settling of an electronic payment transaction by certain payment processors. Notably, however, the proposed changes would classify search engine optimization ("SEO") services, social media marketing, and lead generation as taxable data processing. This change would formalize the Comptroller's opinion that online advertising is taxable data processing. Cloud computing would also be treated as taxable under the proposed regulation.

The proposed regulation provides a number of examples of what does and does not constitute a taxable "data processing" transaction, including: payroll services (taxable); certain

marketplace services (taxable); Internet hosting (taxable); streaming services (taxable as cable television services, not data processing); and website design services (taxable).

Our Observation: The proposed regulation represents a significant change in how the Comptroller will determine what it considers taxable data processing. The Comptroller traditionally has relied on the "essence of the transaction" test to determine if a service qualified as taxable data processing. The Comptroller now proposes to use an "ancillary test" focusing on what the seller is doing and not on what the buyer is intending to purchase. This policy shift in determining if a service is taxable data processing has the potential to vastly expand the scope of what is taxable; however, such expansion could lead to possible a violation of the Internet Tax Freedom Act's ban on discriminatory taxes. Interested parties may submit comments to the Comptroller by October 13, 2024.

Other Recent Sales and Use Tax Developments

Nexus and Marketplace

North Carolina: New law (HB 228) modifies sales and use tax nexus provisions for remote sales by removing the 200 or more separate transactions thresholds. Under the revised provisions a retailer/marketplace facilitator will have nexus with North Carolina if they make gross sales in excess of $100,000 from remote sales/marketplace-facilitated sales sourced to North Carolina. A person that holds a certificate of registration with the North Carolina Department of Revenue and is solely engaged in business in the state due to the 200 or more separate transactions threshold may close their registration certificate. Such taxpayers must file returns and remit tax for periods ending before the later of July 1, 2024 or the date they cancel their registration certificate. The law also updates the reference date to the Streamlined Sakes and Use Tax Agreement as of November 7, 2023 (from December 22, 2022). This change is effective July 1, 2024. N.C. Laws 2024, SL 2024-28 (HB 228), signed by the governor on July 1, 2024. See also, N.C. Dept. of Rev., Directive SD-24-1 (July 1, 2024).

Tax Base and Taxability

Alaska: New law (SB 179) prohibits the state and cities from levying sales or use tax on the transfer of real property. This provision applies to home rule and general law municipalities. This prohibition does not apply to a municipal sales and use tax on transfers of real property adopted before the prohibition took effect. Ak. Laws 2024, ch. 28 (SB 179), signed by the governor on August 13, 2024.

Colorado: In response to a ruling request, the Colorado of Department of Revenue (CO DOR) determined that an online company's sale of ancestral and health reports and saliva kits are not subject to Colorado's sales tax, but its use of saliva kits to collect a customer's DNA is subject to Colorado's use tax. The CO DOR explained that while the DNA analysis for ancestral and

health reports is not among the list of services explicitly subject to tax, the saliva kits are tangible personal property used in the DNA analysis and, as such, are "inseparable from the service." Since the service and kits are inseparable, the CO DOR looked to the true object of the transaction and conclude that the "true object" of the customer is the DNA analysis (i.e., the service) that results in the report, and not the saliva kit. Thus, neither the service nor the kits are subject to Colorado's sales tax. The kits, however, are subject to Colorado's use tax, which as the user of the property, the company pays. Colo. Dept. of Rev., PLR 24-007 (July 2, 2024).

Colorado: In response to a ruling request, the Colorado of Department of Revenue (CO DOR) explained the applicability of the state's sales and use tax to sales of non-alcoholic beer, kombucha, bottled coffee with sweetener and insulin sold without a prescription. The CO DOR said that because non-alcoholic beer and kombucha contain trace amounts of alcohol, they are excluded from the federal definition of "food." For purposes of Colorado's sales and use tax exemption for food, the state references the federal definition of "food" used for the federal food stamp program. Since non-alcoholic beer and kombucha are excluded from the federal definition of "food," they are likewise excluded from the Colorado sales and use tax exemption and, therefore, subject to sales and use tax. Coffee-based sweetened beverages that meet the definition of soft drinks (i.e., contain sweeteners, but not milk or milk products, soy, rice or similar milk substitutes) are subject to Colorado sales and use tax. Lastly, the CO DOR explained that "insulin does not necessarily require a prescription to qualify for the exemption because it only needs to be dispensed pursuant to the direction of a practitioner" (i.e., a person authorized to prescribe drugs or devices). Accordingly, when there is not a prescription, the seller must obtain and retain sufficient information and documentation from the purchaser to verify that the insulin is being "dispensed pursuant to the direction of a practitioner." Otherwise, the seller will have to collect sales tax at the time of sale. (The CO DOR noted that '[w]hile the statute sets forth that prescription drugs are exempt if dispensed in accordance with a prescription by a practitioner, it does not use such explicit language with the insulin exemption." (citations omitted)) Colo. Dept. of Rev., GIL 24-003 (June 24, 2024).

Louisiana: New law (SB 500) prohibits local governing authority from imposing local fees and taxes on nongaming incentives or inducements awarded by gaming licenses to patrons on a complimentary basis or through the redemption of loyalty program rewards (e.g., room stays), unless otherwise expressly provided or agreed to by the authority and licensee. If the incentive or inducement is provided by the licensee on a discounted basis or partially through the redemption of rewards, the tax or fee imposed is limited to the actual cash portion paid by the patron; no tax or fee applies to the extent of the discount or reward. "Local governing authority" includes local political subdivisions and local school boards. This prohibition does not apply to: (1) sales and use tax on a licensee's purchase of tangible personal property, including meals and beverages, used as a complimentary incentive or inducement; and (2) sales or use tax on parking, admissions or entertainment provided on a complimentary or discounted basis

if the tax is otherwise due. SB 500 took effect upon the governor's signature. La. Laws 2024, Act 592 (SB 500), signed by the governor on June 11, 2024.

Michigan: The Michigan Department of Treasury issued updated guidance on the sales and use tax treatment of food and prepared food to incorporate law changes enacted under Acts 141 and 142, Laws 2023. Generally, the Michigan Constitution prohibits tax on the sale or use of food for human consumption. This prohibition does not, "by its own terms … reach 'prepared food intended for immediate consumption'"; thus, such food may be subject to tax. Acts 141 and 142 modify the tax treatment of prepared food via changes to definitions. The guidance: (1) defines "foods" and "prepared food"; (2) describes when "food sold in a heated state or that is heated by the seller" and when "two or more food ingredients mixed or combined by the seller for sale as a single item" are prepared food; and (3) describes for periods after February 13, 2024, the controlling standard for determining whether food is "sold with eating utensils provided by the seller." Relevant to "food sold with eating utensils provided by the seller" are focused discussions on (a) the "prepared food sales percentage," which is used to determine what constitutes an eating utensil provided by the seller, (b) the definition of "eating utensils," (c) the three ways in which a seller may provide a utensil, (d) when a seller provides a utensil by packaging it with a food item, and (e) when a seller's prepared food sales percentage is "greater than 75%" or "75% or less." The guidance also describes categories of food items that are excluded from "prepared food" (e.g., food that is only cut, repackage or pasteurized by the seller, certain items that are raw or sold in an unheated state, bakery items), the tax treatment of items sold through a vending machine, and other exemptions. The guidance includes numerous examples. Mich. Dept. of Treas., RAB 2024-13 (August 20, 2024)(replaces RAB 2022-4).

Mississippi: The Mississippi Department of Revenue adopted amendments to Miss. Admin. Code Section 35.IV.6.01 "Electric Power, Light, Gas and Other Fuel Distributors" to provide that the regular retail rate of sales tax applies to receipts for the use of electric charging stations, including fees for electricity, charging time, idle time and any other fees. These fees are included in gross income related to the purchase of electricity under Miss. Code Ann. Section 27-65-19(1)(a)(i). The revised rule took effect August 1, 2024.

Nevada: The Nevada Department of Taxation (DOT) explained that when a surcharge is added to the sale of taxable tangible personal property, the surcharge is subject to tax as a service necessary to complete a sale or an expense of the seller. The DOT said examples of surcharges include, but are not limited to, credit card processing fees, fuel surcharges, regulatory recovery fees, bottle service charges, and large party charges. Nev. Dept. of Taxn., Nevada Tax Notes (Issue No. 200 July 2024).

South Carolina: In response to a ruling request, the South Carolina Department of Revenue (SC DOR) determined that sales of prepared meals and other food items to students using flex dollars are not retail sales subject to state or local sales tax. ("Flex dollars" are meal/food plan

options offered by an educational institution for board plans that may be purchased by students at the beginning of a semester or year.) The SC DOR reasoned that flex dollars are used in the same manner as meal plans but with more "flexible options" for students to purchase meals and other food items. While sales and use tax does not apply to a student's purchase of meals and other food items using meal plan flex dollars, a student's purchase of items other than meals and other food items using flex dollars will be subject to state and local sales tax. S.C. Dept. of Rev., SC Private Letter Ruling #24-3 (August 5, 2024).

Texas: In response to a ruling request, the Texas Comptroller of Public Accounts determined that a residual fee the taxpayer receives from a credit card processor for promoting the credit card processor's services to its clients is not subject to Texas sales and tax. The residual fee is compensation for promoting a service and submitting executed merchant agreements to the credit card processor; these activities, the Comptroller found, do not fall under the list of taxable services and, as such, they are not subject to tax. Tex. Comp. of Pub. Accts., Private Letter Ruling No. 202407021L (July 24, 2024).

Texas: The Texas Comptroller of Public Accounts issued guidance on the sales and use taxability of separately stated credit card processing fees billed by a retailer to customers for the purchase of taxable items. The Comptroller said that such fees "are taxable as part of the total sales price of a taxable item." The retailer, the Comptroller explained, is not extending credit to the customer for the purchase of an item, but rather is accepting the credit card as a means of payment. As such, the processing fee "is not a finance, carrying and service, or interest charge from extending credit." The Comptroller also found that separately stated credit card processing fees "do not qualify for exclusion from taxable data processing services." The Comptroller noted that legislation enacted in 2021 clarified that "data processing" does not include the processing of electronic payment transactions. The Comptroller further explained that the retailer, in passing along the cost of the credit card processing fee to its customers is passing along the cost of an expense incurred in connection with the sales of a taxable item. Tex. Comp. of Pub. Accts., Memorandum # 202406004M (June 27, 2024).

Sales and Use Tax Exemptions, Exclusions and Refunds

Alabama: The Alabama Department of Revenue issued a notice to explain that under recently enacted legislation (Act 2024-391), health care providers claiming a sales and use tax emption for durable medical equipment and medical supplies, starting September 1, 2024, will have to obtain and maintain an exemption certificate from the Alabama Department of Revenue before purchasing such equipment and supplies. The health care provider will need to provide the exemption certificate to the seller at the time of purchase. For purchases made on or after September 1, 2024, the purchase will be subject to tax if the exemption certificate is not provider to the seller at the time of purchase. Ala. Dept. of Rev., Notice "Amendments to Durable Medical Equipment Exemption" (August 1, 2024).

Illinois: New law (SB 3426) modifies the service use tax, service occupation tax, and retailers occupation tax exemption for materials, parts, equipment, components and furnishings (collectively "materials") incorporated into or upon an aircraft as part of its modification, refurbishment, completion, replacement, repair or maintenance (collectively, "repair") to clarify that the exemption only applies to sales/use of qualifying tangible personal property transferred incident to: (A) the repair of an aircraft by persons who meet certain qualifications; and (B) to the repair of aircraft engines or power plants without regard to whether the person meets the qualifications required under (A). This exemption is available through December 31, 2029. SB 3426, enacted August 9, 2024.

Illinois: New law (SB 3476) exempts from Illinois Use Tax Act, Service Use Tax Act, Service Occupation Tax, and the Retailers' Occupation Tax Act, home-delivered meals provided to Medicare or Medicaid recipients when payment is made by an intermediary (e.g., Medicare administrative contractor, managed care organization, Medicare advantage organization) under a government contract. This exemption took effect on July 1, 2024. Ill. Laws 2024, Pub. Act 103-0643 (SB 3476), signed by the governor on July 1, 2024.

Illinois: New law (HB 3144) exempts from state sales tax food sold for off-premise human consumption beginning in 2026. The law allows local jurisdictions to impose a 1% tax for such sales. Alcoholic beverages, soft drinks, candy, food prepared for immediate consumption and food infused with adult-use cannabis do not qualify for this exemption. HB 3144, enacted August 5, 2024.

Kansas: The Kansas Department of Revenue (KS DOR) issued guidance on the sales and use tax exemption for providing communication services, which as enacted earlier this year as part of HB 2098. From July 1, 2024 through July 1, 2029, the law exempts purchases of: (1) equipment, machinery, software, ancillary components, appurtenances, accessories or other infrastructure for use in the provision of communications services (i.e., internet access services, telecommunications services, and/or video services); and (2) services purchased by providers in the provision of communications services used in the repair, maintenance or installation in such communication services.[1] Purchasers claiming the exemption should complete "ST-63, Communications Service Provider Exemption Certificate" and provide it to their vendor. Kan. Dept. of Rev., Notice 24-13 "Sales Tax Exemption for Providing Communication Services" (July 1, 2024).

Mississippi: New law (HB 1855) provides a sales and use tax exemption for sales, leases or other retail transfers of fixed-wing aircraft to, or for use by, certified common carriers for the transport of persons or property in interstate, intrastate or foreign commerce. An exemption is also provided for engines, accessories and spare parts for such aircraft. HB 1855 took effect

[1] K.S.A. 79-3606(uuuu).

from and after its passage. Miss. Laws 2024, HB 1855, signed by the governor on April 25, 2024.

Missouri: New law (SB 872) creates a state and local sales tax exemption for utilities, equipment and materials used to generate and transmit electricity. Specifically, the exemption applies to "electrical energy and gas, whether natural, artificial, or propane; water, coal, and energy sources; chemicals, machinery, equipment, parts, and materials used or consumed in connection with or to facilitate the generation, transmission, distribution, sale, or furnishing of electricity for light, heat, or power; and any conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power service to consumers." Public utilities that realize savings from this exemption must provide the public service commission information on the amount of savings it realized, and they must include a statement that such savings will be passed through to its rate revenue requirement determined in its next general rate proceeding. SB 872 takes effect August 28, 2024. Mo. Laws 2024, SB 872, signed by the governor on July 9, 2024.

Missouri: New law (SB 1388) creates a state and local sales and use tax exemption for purchases of tangible personal property, building materials, equipment, fixtures, manufactured goods, machinery and parts for purposes of constructing all or a portion of a nuclear security enterprise (as defined in 50 U.S.C. Section 2501) in a city with more than 400,000 inhabitants and located in more than one county. This exemption expires on August 28, 2034. SB 1388 takes effect on August 28, 2024. Mo. Laws 2024, SB 1388, signed by the governor on July 8, 2024.

New Jersey: New law (SB 721 / AB 2812) effective October 1, 2024, exempts sales of (1) investment metal bullion (e.g., gold, silver, platinum and palladium) and (2) investment coins made of any metal valued of at least $1,000, from sales and use tax. The term "investment metal bullion" does not include "any precious metal that has been assembled, fabricated, manufactured, or processed in one or more specific and customary industrial, professional, esthetic, or artistic uses." The term "investment coin" does not include jewelry, artwork made out of coins or commemorative medallions. N.J. Laws 2024, ch. 64 (SB 721/AB 2812), signed by the governor on September 12, 2024.

New Jersey: The New Jersey Division of Taxation (NJ DOT) posted guidance on the phase-out of the sales and use tax exemption for sales of zero emission vehicles (e.g., vehicles certified under the California Air Resources Board zero emission standards for the model year) enacted on June 28, 2024. Under the legislation (P.L. 2024, ch. 19), the exemption will be phased-out over nine months, with a 3.3125% sales tax rate applying to zero emission vehicles sold on or after October 1, 2024 through June 30, 2025; and a 6.625% sales tax rate applying to such sales made on or after July 1, 2025. The exemption does not apply to partial zero emission vehicles such as hybrids, or to labor or parts for qualified vehicles. Additional information is

available on the NJ DOT's Zero Emission Vehicles FAQs webpage. N.J. Div. of Taxn., "Zero Emission Vehicles Exemptions" webpage (last updated July 12, 2024).

South Carolina: In response to a recent South Carolina Supreme Court ruling that the sales and use tax exemption for durable medical equipment [2] (DME) is unconstitutional because it discriminated against interstate commerce by exempting in-state, but not out-of-state, providers of DME from sales tax, the South Carolina Department of Revenue (SC DOR) informed sellers of DME that after June 26, 2024, they must collect and remit sales tax on instate sales of DME. The SC DOR noted that the Court's ruling "has no effect on federal law" and that any laws regarding DME paid in full or part by Medicaid or Medicare on behalf of their beneficiaries remains effective. Accordingly, sellers of DME to Medicaid or Medicare beneficiaries must remit sales tax on the portion of the transaction that may be taxed under S.C. Code Ann. Section 12-36-110(j). [3] This information letter applies to all open periods. S.C. Dept. of Rev., SC Information Letter #24-10 (July 24, 2024).

Transactions and Services

Alabama: The Alabama Department of Revenue adopted amendments to Ala. Rule 810-6-1-.196 "Withdrawals From Inventory" "to provide better clarity to taxpayers relating to taxable transactions for withdrawals from inventory." Generally, withdrawals of tangible personal property from inventory are taxable under the sales tax statute, unless specifically exempted. Tax on the withdrawn property (1) is paid by the person withdrawing the property, (2) is measured based on the price paid for the property by the person making the withdrawal, and (3) is due at the time and place the property is withdrawn from inventory. Tax is due on the withdrawal regardless of where such property is used or consumed. The rule lists exemptions and exceptions to the general rule. Exemptions include a gift from a manufacturer of property withdrawn from inventory, and property that has been previously withdrawn from inventory for which tax was paid due to the prior withdrawal. The amended rule was adopted on June 28, 2024 and takes effect on August 12, 2024.

Arizona: New law (HB 2909) changes the date by which the Arizona Department of Revenue (AZ DOR) must establish a certification process for third-party providers offering sourcing services to taxpayers for transactions involving tangible personal property to January 1, 2028 (from January 1, 2026). The law extends through December 31, 2026 (from June 30, 2024) the transaction privilege and use tax exemption for a certified healthy forest enterprise's purchase of qualifying equipment used for harvesting or processing qualifying forest products. Ariz. Laws 2024, ch. 221 (HB 2909), signed by the governor on June 18, 2024.

[2] S.C. Code Ann. Section 12-36-2120(74).
[3] S.C. Code Ann. Section 12-36-110(j) provides in part that "only the net amount reimbursed by Medicare and Medicaid is subject to the tax, if the vendor is prohibited by law from charging the purchaser the difference between the retail sale and the amount reimbursed."

Georgia: In response to a ruling request, the Georgia Department of Revenue (GA DOR) determined a bus carrier that for a flat fee provides shuttle bus services for its clients and the clients' employees, customers and tenants, is not a for-hire ground transport service provider (e.g., a limousine carrier, ride share network service, taxi service or transportation service provider) and, therefore, not subject to the transportation services tax (TST). Because the transportation services the bus carrier provides is not subject to the TST, these services are not automatically exempt from sales and use tax. Accordingly, the transportation services provided by the bus carrier will be subject to Georgia's sales and use tax unless otherwise exempted by the Georgia Code. Ga. Dept. of Rev., LR SUT-2024-01 (May 10, 2024).

Maine: Maine Revenue Services (MRS) issued guidance on changes related to the collection and remittance of sales and use tax on leased or rented tangible personal property. Starting January 1, 2025, sales tax will be imposed on each periodic lease or rental payment paid by the lessee. (Through the end of 2024, tax is paid upfront on the full value of the lessor's purchase price of the leased or rented property.) Also starting on that date, lessors will need to present their resale certificate to make a tax-free purchase. Tax applies to each individual lease or rental payment on all tangible personal property leased or rented on or after January 1, 2025, including on leases and rentals that began before 2025. The guidance also explains the new sourcing rules for leases or rentals of: (1) tangible personal property; (2) motor vehicles, trailers, semitrailers, truck campers or aircraft; and (3) transportation equipment used in interstate commerce, that take effect on January 1, 2025. The MRS noted that the sourcing of leases and rentals of (1) tangible personal property and (2) motor vehicles, trailers, semitrailers, truck campers and aircraft, depends on if the lease requires recurring periodic payments. Leases and rentals of such that do not require recurring payment, as well as leases/rentals of "transportation equipment," will be sourced in the same manner as a sale of tangible person property under 36 M.R.S. Section 1819(2). The MRS also mentioned the limited refund period for qualified lessors. The refund is available for sales and use tax previously paid on the purchase of a qualifying lease or rental property on or after January 1, 2023 and before January 1, 2025, for which the qualified lessor collected and remitted the tax on the lease or rental of the property on or after January 1, 2025. Maine Rev. Serv. Sales, Fuel & Special Tax Division, General Information Bulletin No. 114 (August 27, 2025).

Massachusetts: In response to a ruling request from an online company that provides DNA testing and analysis, the Massachusetts Department of Revenue (MA DOR) said the company's charges for processing and analysis of saliva specimens that are collected by Massachusetts customers and sent to the company's out-of-state laboratory are not taxable services. The MA DOR explained that the company is providing customers with a service (in this case DNA testing and analysis) and the transfer of tangible personal property to customers (in this case the saliva testing kit) for which no separate charge is made is an inconsequential element of the service transaction. Thus, the transaction is not subject to sales tax. The company, however, must pay sales tax on test kits purchased in Massachusetts. If the test kits are purchased or manufactured outside the state, the company must pay use tax on test kits that are transferred to its

Massachusetts customers. Ma. Dept. of Rev., Letter Ruling 24-1: Taxability of Genetic Testing and Analysis Services (June 12, 2024).

Michigan: The Michigan Department of Treasury (MI DOT) posted an article on the taxability of non-fungible tokens (NFTs) — i.e., "a digital asset that links ownership to unique physical or digital items … such as works of art, music, or videos." MI DOT said that "[c]urrently, Michigan does not tax NFTs representing digital goods nor does it generally tax digital goods" nothing that "[d]igital NFTs do not fall within the definition of 'tangible personal property'." MI DOT further explained that in determining whether an NFT transaction is taxable depends on whether the NFT represents tangible or digital property. If the NFT represents an ownership interest in tangible personal property, then the sale constitutes the sale of taxable tangible personal property. If, however, the NFT represents something that is purely digital (*e.g.*, a digital image or sound), the transaction is not subject to Michigan sales tax. Mich. Dept. of Treas., "Treasury Update" (August 2024).

New York: In response to a ruling request, the New York Department of Taxation and Finance (NY DOTF) said that a foreign company that provides information technology services to customers with New York shipping and postal addresses but invoice addresses in Florida must collect sales tax on receipts from taxable services in New York. NY DOTF explained that New York sales tax purposes, "the point of delivery or point at which possession is transferred to the purchaser controls the tax incident and the tax rate." Accordingly, sales tax is collected at combined state and local rate in effect for the jurisdiction where the delivery of the service occurs, even if the invoice address is outside the state. N.Y. Dept. of Taxn. and Fin., TSB-A-24(33)S (August 16, 2024).

Oklahoma: In response to a ruling request from a company that provides DNA testing and analysis, the Oklahoma Tax Commission (OTC) determined that DNA testing and provision of personalized ancestral and health history reports is not an enumerated taxable service. Thus, this service is not subject to Oklahoma sales or use tax. The OTC further stated that based on the true object of the transaction (in this case, the DNA testing service and subsequent results), it finds the sale of tangible personal property (in this case, the saliva collection kits) is essential to the use of the service. Thus, the OTC does not consider the non-taxable service to be taxable as part of a bundled transaction with the tangible personal property. Further, the OTC said that the company is required to remit use tax on the saliva collection kits "because they are tangible personal property brought into the state for use in providing the service;" the rate of tax will depend on whether the company has already paid sales or use tax on the kits to another state and the rate of that state's tax. The company also may take a credit against any municipal or county use tax paid for out-of-state municipal or county sales or use tax it has already paid. Okla. Tax Comm., LR 23-006 (July 5, 2024).

Pennsylvania: New law (SB 654) provides that retail sales and use of services related to the cleaning or maintenance of a storage trap used by a restaurant to collect grease waste are

excluded from sales and use tax effective for transactions occurring after September 30, 2024. SB 654, signed by the Governor, July 11, 2024.

Technology and Digital Taxes

Louisiana: New law (HB 827) provides a rebate for state and local sales and use tax paid on purchases of eligible data center equipment by an approved data center facility and for sales tax paid on expenditures for the development, acquisition, construction, lease, refurbishment, expansion and renovation of a qualified data center (e.g., construction and building material costs, site characterization and assessment, engineering, design, and labor and installation services). To be certified as an approved data center facility, the facility operator must provide a sworn attestation that the project will create at least 50 new direct, permanent jobs in Louisiana and that it intends to spend at least $200 million in new capital investment in the state on or after July 1, 2024 and before July 1, 2029. An approved data center facility must enter into an agreement with the Louisiana Department of Economic Development (Department); the agreement should provide for an initial 20-year term of rebate eligibility, with the ability of the Department to renew the agreement for an additional 10 years. For renewal purpose, the Department may include additional conditions it deems appropriate. The rebate, which will be paid annually, applies to qualified purchases made on or after July 1, 2024. The law defines what is and is not "data center equipment," among other key terms. La. Laws 2024, Act No. 730 (HB 827), signed by the governor on June 19, 2024.

Pennsylvania: New law (SB 654) limits the application of the sales and use tax exemption for data centers and amends and creates various tax credits. Effective January 1, 2026, purchases or use of computer data center equipment for installation in a certified data center will not qualify for the data center sales and use tax exemption if the equipment is used for proof of work crypto-asset mining. The law defines "proof of work crypto-asset mining" as "the process of performing computations to add a valid block of data to a blockchain, excluding computations required to validate individual transactions, typically in exchange for a reward or fee." SB 654, signed by the Governor, July 11, 2024.

Vermont: The Vermont Department of Taxes (Department) posted to its website information on the taxability of prewritten computer software. Due to a recently enacted law change, as of July 1, 2024, all sales of prewritten computer software are subject to sales and use tax, including "software purchased on storage media, downloaded to a computer system, or accessed remotely via the internet." The Department said that prewritten computer software includes "programs for office work such as spreadsheet editor, word processing, or software that creates electronic documents[;] accounting software[;] video games[; and] web browsers." Prewritten computer software does not include customized software. If prewritten software is sold with custom software, it remains taxable prewritten software; however, reasonable, separately stated charges on an invoice or other statement of price for a modification or enhancement does not constitute prewritten computer software and is exempt from tax. The

Department's webpage includes a chart, listing items and whether they are taxable or nontaxable. Vt. Dept. of Taxes, "Prewritten Computer Software" webpage (updated July 2024).

Practice, Procedure, Policy, Controversy and Compliance

Alabama: The Alabama Department of Revenue (AL DOR) issued a notice on a recent law change that requires accommodations intermediaries to collect and remit state lodging taxes as well as local levies for transactions occurring on or after January 1, 2025. Tax is imposed on the room charge. If an accommodations intermediary facilitates the lodging transaction and there is a written agreement or contract for the accommodations intermediary to remit the collected taxes to the accommodations provider, the intermediary is not liable for lodging taxes not remitted by the provider. Lodging accommodations intermediaries and providers are required to annually submit a report listing the address of each accommodation that was rented or furnished for more than 14 days during the previous year. Certain entities are exempt from filing the report, including professional property management companies, hotels and destination marketing organizations that meet certain criteria. Ala. Dept. of Rev., Notice Alabama Tourism Tax Protection (August 13, 2024).

California: The San Diego City Council passed a municipal ballot measure that if approved by voters this November would allow the city to impose a one-cent sales and use tax, which would increase the city's sales and use tax rate to 8.75% (from 7.75%). Revenue raised from the one-cent sales and use tax would go toward public infrastructure and core service needs of city residents. San Diego City Council, Ordinance No. 21840 (O-2025-2, final Council passage on July 29, 2024).

Colorado: New law (SB 24-184) starting January 1, 2025, imposes a new congestion impact fee on all short-term vehicles rentals at a maximum rate to be determined by the Transportation Enterprise Board, but not more than $3 per day for any vehicle. Subsequent renewals of a short-term vehicle rental are exempt from the fee to the extent it extends the total rental period beyond 30 days. Car-sharing programs must collect the fee on short-term rentals of 24 hours or longer. The fee must be collected and submitted to the Colorado Department of Revenue. Vehicles rented under a vehicle sharing arrangement that is exempt from the daily vehicle rental fee will also be exempt from the congestion impact fee. SB 24-184 took effect immediately. Colo. Laws 2024, ch. 186 (SB 24-184), signed by the governor on May 17, 2024.

District of Columbia: Approved bill (B25-0784) increases the District's current 6.0% sales and use tax rate to 6.5% beginning on October 1, 2025 and to 7.0% beginning on October 1, 2026. B25-0784 (A25-0550), enacted without the mayor's signature on July 26, 2024. Before becoming final law, B25-0784 will be sent to Congress for a mandatory 30 in-session day review period. These same changes were enacted via an emergency bill, B25-0875 (A25-

0506), on July 15, 2024. As an emergency bill, B25-0875 is effective for 90 days and it will expire on October 13, 2024.

Illinois: The Illinois Department of Revenue (IL DOR) adopted amendments to 86 Ill. Adm. Code Sections 195.100 through 195.150 related to booking intermediaries. The amendments explain how booking intermediaries collect and remit tax. Booking intermediaries are required to collect tax on the purchase price paid by purchasers on behalf of registered operators. Tax also is required to be collected on a booking intermediary's separate service charges included in the purchase price, even if the booking intermediary retains these service charges. Until December 31, 2023, an operator was responsible for remitting the separately stated charge to the IL DOR. Starting January 1, 2024, the booking intermediary is liable for and must remit tax to the IL DOR on any separately stated service fee that it charges to the customers. Operators are still required to remit tax on the remainder of the purchase price for the transaction. Also, effective January 1, 2024, if a booking intermediary facilitates the processing and fulfillment of a reservation for a non-registered operator, then tax must be collected on the purchase price from the purchaser by the booking intermediary on behalf of the operator and the booking intermediary must remit the tax to the IL DOR. Further, the following items added to a customer's invoice by a booking intermediary will be treated the same as a service charge: markups, services fees, convenience fees, facilitation fees, cancellations fees, overtime fees, or other such charges related or incidental to obtaining the use of a parking space. Various illustrative examples have been added to the rules. The amended rules took effect August 5, 2024. Ill. Dept. of Rev., Adopted Amendments to 86 Ill. Adm. Code Sections 195.100 through 195.150 (Ill. Register, Vol. 48, Issue 33, August 6, 2024).

Illinois: Beginning in 2025, new law (SB 3362) deems a retailer that maintains a place of business in Illinois and makes retail sales of tangible personal property from a location outside Illinois to be engaged in selling at retail in Illinois for ROT purposes. Such sales will be sourced to the Illinois location where the tangible personal property is shipped or where the purchaser takes possession (i.e., destination sourcing), similar to the sourcing of sales by remote retailers. SB 3362 enacted August 9, 2024.

Illinois: For Retailers' Occupation Tax (ROT) purposes, new law (SB 3282) requires Direct Pay Permit holders to review all purchase activity for the prior year to verify that purchases were properly sourced and the correct tax rate was applied. A $6,000 penalty applies for failure to properly verify purchase activity and correct sourcing and tax rate errors. The penalty will not apply if at least 95% of the permit holder's transactions for the applicable 12-month review period are correctly sourced and the correct taxes have been remitted, or the permit holder acted with ordinary business care and prudence. SB 3282 enacted August 9, 2024.

Massachusetts: On July 29, 2024, Massachusetts Governor Maura Healey signed the fiscal year (FY) 2025 budget bill, HB 4800 into law. HB 4800 authorizes the Massachusetts Commissioner of Revenue to establish a 60-day tax amnesty program to run in FY 25, but end

by June 30, 2025. The amnesty program will apply to tax returns due on or before December 31, 2024. In exchange for participating in the amnesty program and coming into tax compliance, the commissioner will waive most penalties, except for penalties due under Sections 35A, 35D or 35F of Chapter 62C of the General Laws.[4] Penalties will not be waived for any period for which the taxpayer does not properly file the return. Amnesty does not apply to penalties the commissioner does not have the sole authority to waive, such as the fuel taxes administered under the International Fuel Tax Agreement and the local portion of taxes or excise taxes collected for cities, towns or state government authorities. The commissioner is not authorized to waive interest but is authorized to determine the scope of the amnesty program, including the tax types, the tax periods covered and the applicable look-back periods, not to exceed four years. Penalties cannot be waived for taxpayers who are or who have been subject to a tax-related criminal investigation or prosecution, or for taxpayers that have delivered or disclosed a false or fraudulent application, return, document or other statement. Taxpayers filing false or fraudulent documentation are subject to a penalty. Taxpayers participating in this amnesty program must wait 10 years before participating in another amnesty program.

Minnesota: A new retail delivery fee took effect July 1, 2024. Starting on that date, a 50-cent fee applies to each transaction where charges for taxable tangible personal property and clothing equal or exceed $100. The Minnesota Department of Revenue (MN DOR) explained on its "Retail Delivery Fee" webpage that in calculating whether a transaction meets the threshold, the transaction includes all charges that are part of the sale, excluding the retail delivery fee. Retailers not liable for the Retail Delivery Fee include those whose prior calendar year Minnesota retail sales were less than $1 million, and marketplaces that facilitate sales for a retailer whose prior calendar year Minnesota retail sales were less than $100,000. Both taxable and nontaxable retail sales are included in the calculation of the retail sales threshold for the retailer exclusion. Charges for certain items, such as drugs, medical devices, food, select baby products, items delivered electronically, utilities delivered through wires and pipes, and items purchased for resale are not included in calculating whether the threshold has been met. The retail deliver fee does not apply to certain deliveries, including curbside pickup and deliveries made to a purchaser who is exempt from sales tax or made by a food and beverage service establishment. Retailers will need to register for the fee, and they will need to report the fee on the "Retail Delivery Fee" tax line on the Sales and Use tax return. The MN DOR also said that the retail delivery fee applies even when there is free shipping, and that taxpayers should follow the sales price definition in determining how to handle discounts and coupons when calculating the $100 threshold.

New Jersey: New law (SB 3514/AB 4702) repealed the annual 10-day back-to-school sales and use tax holiday that historically began in August and ran through the first Monday of

[4] Section 35A ("penalty for underpayment of tax required to be shown on the return"), Section 35D ("inconsistent position in reporting of income; disclosure") or Section 35F ("penalty for automated sales suppression device").

September. The holiday applied to retail sale of computers, school computer supplies, school supplies, school instructional materials, sports and recreational equipment. SB 3514/AB 4702, signed by the Governor June 28, 2024. For more on this development, including other tax-related measures, see EY Tax Alert 2024-1298 (July 3, 2024).

Contacts

For more information about any of the developments discussed in this Newsletter, please contact any of the following EY Sales and Use Tax Practice professionals:

National Resources:

Scott Norton
National Director – Sales and Use Taxes
Westlake Village, CA
805 778 7056

Karl Nicolas
Washington, DC
202 327 6585

Megan Mahony
Boston, MA
617 585 1822

Michael Wasser
Boston, MA
802 272 4969

Area and Industry Resources:

Natalie Haynes
St. Louis, MO
314 290 1782

Rachel Quintana
Denver, CO
720 931 4660

Anne Duffy
San Francisco, CA
415 894 8527

Brad Ressler
Minneapolis, MN
612 371 8558

Joe Imbarlina
Philadelphia, PA
412 644 0482

Mark Stefan
San Jose, CA
408 947 5592

Grace Kyne
Boston, MA
617 375 2359

Mike Woznyk
New York, NY
212 773 3008

Lazar Kajtazi
New York, NY – Financial Services
212 773 2016