State Tax Alert
January 2025

State Sales and Use Tax Quarterly Update – January 2025

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.

Massachusetts Department of Revenue issues draft amendments to its computer software regulation

On November 15, 2024, the Massachusetts Department of Revenue (MA DOR) issued a working draft of amendments to regulation 830 CMR 64H.1.3 "Computer Software and Related Transactions" (draft regulation), which would replace the current regulation "Computer Industry Services and Products." According to the draft regulation's summary, these changes "are intended to clarify the statutory rules …." Interested parties were asked to submit comments by December 15, 2024, but MA DOR typically will accept comments after the due date.

Massachusetts sales and use tax generally applies to sales, purchases, licenses, or other right to use or consume transfers of standardized computer software, regardless of how it is delivered, accessed, used or consumed. The taxability of a transaction would depend on whether software is transferred or otherwise made available for customer use, and not on how it is characterized by the parties. The draft regulation describes indicia that a transaction is a taxable sale of standardized software. An otherwise taxable transfer, however, may qualify for a statutory exemption, such as the manufacturing exemption or sale for resale.

Software transferred as part of or in connection with a service for a single charge is taxable. An exception to this general rule would apply when the software transferred is "an inconsequential element of a professional, insurance, or personal service transaction" and the charge for the software is not separately stated. A transfer of software would not be "an inconsequential element of the transaction" if the value of the software exceeds 10% of the total transaction charge, and it would be "presumptively not an inconsequential element of a transaction" if the software is an essential component of the transaction. Circumstances under which software would be considered an inconsequential element of a transaction include when there is not a separate charge for the transfer of software to the customer and the customer uses the software to access a distinct service not performed by the software (e.g., booking a ride-share, accessing digital information, streaming digital content).

Under Massachusetts law, the taxable sales price of software sold, or purchased for use, in the state includes the value of any service provided as part of the sale,[1] including charges for services that are a required component of the software transaction such as charges for required server and desktop maintenance. Taxable sales price would not include charges for optional services that are reasonable and separately stated.

Regarding bundled transactions, charges for services generally are not taxable when they are separately billed or itemized from a charge for taxable standardized software or other taxable item, the purchase of the service is optional, and the separate charge is reasonable and stated in good faith. A separately stated service charge, nevertheless, would be included in the taxable sales price if it relates to the functionality of purchased software or the right to use the software. Mandatory charges the purchaser must pay to acquire or use the software would be included in the taxable sales price, regardless of whether the charge is separately stated.

The draft regulation includes examples of whether standardized software is an inconsequential element of a service transaction when there is a single charge for software and services, and examples that evaluate whether separately stated charges billed to a customer as part of a transaction transferring software is taxable.

Businesses may apportion tax on sales of software for use in Massachusetts and other states, if the business is registered with, and received a Software Apportionment Certificate (certificate) from, the Commissioner and meets the requirements in 830 CMR 64H.1.3(5). As set forth in 830 CMR 64H.1.3(5), a business with a certificate can either apportion the tax at the time of the transaction based on anticipated use of the software or after the transaction based on actual use of the software. The calculation of the apportionment percentage under the actual use option would include use of the software by the purchase and any agents or affiliates that use the software. In calculating the software use on an anticipated basis, the apportionment rules in 830 CMR 64H.1.3(5)(d)(2) would be applied prospectively. Specific apportionment methods would be provided for (1) software licensed for use by purchaser's employees, (2) software licensed to run the purchaser's computer hardware of other systems, and (3) software licensed for primary use by customer.

A purchaser would have to reasonably and consistently apply the apportionment percentage to the software's sales price or license fee. If the software is sold on a per-user basis and the charges are the same for all users or if it is sold for a lump sum charge, the apportionment percentage would apply to the total charge. When software is sold on a per-user basis and varying fees apply, the purchaser must apply the appropriate apportionment percentages as determined by 830 CMR 64H.1.3(5)(d). If the purchase price is not based on the actual number of users, apportionment would be based on the expected use of the license period.

[1] M.G.L. c. 64H, Section 1.

The Commissioner would be able to require the use of an alternative apportionment method when the statutory method does not reasonable represent the use of the software in the state. Further, if the purchaser is using an alternative method that reasonably estimates its use of purchased software, they would not be allowed to subsequently use an alternative method that apportions a lower amount of use to Massachusetts.

In addition to the certificate, purchasers would also have to provide a written statement to its vendor that (1) certifies a reasonable apportionment percentage to apply to the transaction, (2) describes the anticipated in-state use of the software, and (3) other information the Commissioner deems necessary or helpful. The purchaser would have to provide both the certificate and the apportionment statement to the vendor at the time of purchase.

Vendors would be responsible for collecting and remitting sales and use tax using an apportionment percentage. If the vendor accepts a purchaser's apportionment statement and certificate, tax would be collected as provided in the statement and the vendor would be relieved of any further collection obligation and would not be held liable for any tax deficiency. If the vendor does not receive these documents at the time of sale, tax would be collected on the full sales price of the transaction. The purchaser may subsequently provide the vendor with documentation to support the apportion the tax collected and remitted.

The draft regulation includes several examples on apportioning tax.

The MA DOR's intent is that "830 CMR 64H.1.3 supersedes all prior public written statements, including letter rulings, to the extent it is inconsistent with any such prior statements or portions thereof."

Our Observation: Under these new rules, it is likely that more transactions, to the extent they involve prewritten software, are going to be considered taxable transactions. Purchasers or vendors seeking to prove that transferred software is an inconsequential element of a professional, insurance or personal service transaction that is exempt from tax should carefully review the qualification criteria. Because the design, development and sale/license of prewritten software is a qualifying manufacturing activity, the changes in the proposed regulations could affect qualification as a Massachusetts-based manufacturing corporation. Corporations that engage in qualifying manufacturing activities in the state may qualify for additional Massachusetts tax benefits, including an investment tax credit and an exemption from local property tax on personal property. Manufacturing corporations must apportion using only the sales factor; for tax years beginning on or after January 1, 2025; however, all taxpayers must apportion using only the sales factor. Finally, the draft regulation's requirement that purchasers get preapproval from the DOR to apportion sales and use tax on software transactions departs from prior procedures.

Other Recent Sales and Use Tax Developments

Nexus and Marketplace

Federal: Senator Maggie Hassan (D-NH) released draft legislative framework that would help address the burdens on small businesses resulting from the U.S. Supreme Court ruling in *Wayfair*. Senator Hassan's framework calls for an exemption for small remote sellers (i.e., those with gross annual receipts in total remote sales in the U.S. under $10 million), a prohibition on retroactive taxation (i.e., sales occurring before June 21, 2018), fee compliance services, and safe harbors for new and modified sales taxes as well as for third-party errors and those related to exemption certificates. The framework also would require simplification by prohibiting a state or locality from imposing sales tax collection obligations on remote sellers unless the state is a Member State of the Streamlined Sales and Use Tax Agreement or the state meets minimum simplification and compensation requirements for non-streamlined members. The framework lays out minimum simplification requirements for Streamlined states and non-Streamlined states, and it defines select terms. Press Release "ICYMI: Senator Hassan Leads Push for Tax Cuts for Innovative Businesses and Hard-Working Families" (October 3, 2024).

Missouri: In response to a ruling request by an online food ordering company, the Missouri Department of Revenue (MO DOR) said that the company is not required to collect and remit state sales tax as a marketplace facilitator on sales to Missouri customers from Missouri restaurants, but it is required to collect and remit Missouri use tax as a marketplace facilitator for out-of-state restaurant orders that are delivered into the state. Regarding the in-state sales, the MO DOR explained that the restaurant is the seller and has the responsibility to report and remit the tax. The company may transfer tax collected on behalf of a restaurant to that restaurant. Mo. Dept. of Rev., LR 8316 (August 30, 2024).

Tax Base and Taxability

Hawaii: The Hawaii Department of Taxation (HI DOT) issued guidance on the application of the general excise tax (GET) on discounted sales. The HI DOT said that whether a seller is subject to GET on the full price of a discounted item depends on if the seller is reimbursed by a third-party for the discount. For instance, if a third-party pays the discount to the seller, such as the manufacturer reimbursing the seller on the full face-value of a manufacturer's coupon, the GET will be assessed on the full sales price despite the discount. If the seller will not be reimbursed on the discounted sales, such as a discount from a price reduction or a store coupon, then GET is imposed on the actual proceeds received from the customer. The HI DOT further explained that passing on GET from the seller to the customer is a "contractual matter, where the customer implicitly agrees as a condition of their purchase price to also pay any GET that the seller owes to the State on the transaction." Haw. Dept. of Taxn., Tax Information Release No. 2024-03 (September 16, 2024).

Louisiana: The Louisiana Department of Revenue (LA DOR) issued a Notice on the application of sales and use tax on discounted and complimentary items (collectively, "discounted item") provided by a casino or gaming establishment (collectively, "casino"). For sales tax purposes, the sales price of discounted items provided by a casino as an incentive to its patrons is the actual cash amount paid by the patron for the discounted item at the time it is provided to them. The LA DOR said that sales and use tax is not due on complimentary items, explaining that any "theoretical win" or winnings realized by the casino will not be imputed as consideration given for the items. The LA DOR describes items that are "complimentary" and "discounted" for purposes of the Notice, such as rooms, cabanas, meeting spaces, meals, priority services, parking, admissions to entertainment venues, and other like goods and services. The LA DOR stated that this Notice does not apply to sales and use tax imposed on a casino's purchase or use of tangible personal property, including meals and beverages, used as a complimentary incentive or inducement. Nor does it apply to any other sale or use otherwise subject to the state's sales and use tax. La. Dept. of Rev., Notice to Taxpayers - Sales and Use Tax: Discounted and Complimentary Items Provided by a Casino or Gaming Establishment (September 26, 2024).

Missouri: In response to a ruling request by a rental car service company, the Missouri Department of Revenue (MO DOR) said that Collision Damage Waivers offered, but not required by the company, are not subject to the state's sales tax. The MO DOR reasoned that since the waiver is optional and may be declined it is not part of the underlying sale (i.e., not part of the rental transaction for the motor vehicle). Mo. Dept. of Rev., LR 8311 (July 31, 2024).

New York: In response to a ruling request of an out-of-state seller of durable medical equipment, the New York Department of Taxation and Finance (NY DOTF) found the seller's sales of a portable electrotherapy device used to treat and alleviate pain as well as certain muscular injuries, are exempt from sales tax. The devices are not sold to medical practitioners, rather medical practitioner's prescribe the devices to their patients. The seller receives payment for the devices directly from the patient's insurance provider. Under New York Tax Law Section 1115(a)(3) sales of medical equipment and supplies are exempt from sales and use tax unless they are purchased at retail for use in performing medical and similar services for compensation. The NY DOTF found that the devices at issue qualify for the exemption because they are (1) used for the treatment of disease or physical incapacity, (2) are not useful in the absence of illness or injury, and (3) the equipment is not sold for use in performing medical services for compensation as the devices are sold to the patients and not the medical practitioners. N.Y. Dept. of Taxn. and Fin., TSB-A-24(18)S (August 1, 2024).

New York: In response to a ruling request, the New York Department of Taxation and Finance (NY DOTF) determined that a taxpayer's receipts from sales related to its web-based, electronic trading system used to trade currencies on the foreign exchange market are subject to sales tax as sales of software. Taxable receipts include those for annual license fees, transaction

charges and other charges related to a customer's use of the taxpayer's software. The taxpayer's receipts related to obtaining Secure ID tokens are subject to tax because the tokens are tangible personal property. The NY DOTF further explained that the situs of the sale of software for purposes of determining the proper local sales tax rate and jurisdiction is the location of the customer's employees that use the software. If these employees are in New York and other states, tax is collected based on the portion of receipts attributable to these employees who are in New York. The NY DOTF found that receipts for support services are exempt from sales tax if the charges are reasonable and separately stated on the invoice. Lastly, the taxpayer's charges for providing a monthly report showing how a particular customer compares to other customers on the system is an information service and would be exempt from tax if it is "personal or individual in nature" and "is not or may not be substantially incorporated in reports furnished to other persons" and the charge for this service is separately stated on the invoice. N.Y. Dept. of Taxn. and Fin., TSB-A-24(9)S (July 30, 2024).

Tennessee: In response to a ruling request, the Tennessee Department of Revenue (TN DOR) said that a contractor's purchases of piping that will be used at a municipal freshwater treatment facility, which processes raw water into potable water for resale to customers, are exempt from sales and use tax because the piping qualifies as industrial machinery. The TN DOR found the piping met the four part test to qualify as exempt industrial machinery because: (1) the piping is used by a manufacturer, in this case the freshwater treatment facility which processes raw water into potable water for resale to customers for consumption off the premises; (2) the purchased piping constitutes "machinery, apparatus and equipment" as it conveys preliminarily treated water from one part of the manufacturing process to another part of the process; (3) the piping is necessary for the processing of raw water into potable water and it also aids in temperature stabilization during the preliminary treatment process; and (4) the piping is primarily for the processing of raw water into potable water as it is used exclusively to move raw water through the treatment system and to the facility where it is processed into potable water. Tenn. Dept. of Rev., Letter Ruling #24-07 (August 21, 2024).

Texas: In response to a ruling request by a multinational company that provides industrial automation products and services, the Texas Comptroller of Public Accounts (Comptroller) addressed various sales and use tax questions regarding a series of sales transactions occurring while imported tangible personal property was stored within a bonded warehouse. The Comptroller said that sales and use tax is not due on transactions that occur within the bonded area before it is imported into Texas because "[i]mported property retains its character as an import while in the bonded area." Use tax applies to the imported property after it is removed from the bonded area by the importer of record – i.e., the U.S. customer. The importer of record, not the company, is liable for use tax due after the items are removed from the bonded area. The Comptroller also said that entities that take ownership of goods within the bonded warehouse in Texas have physical presence in the state, reasoning that such entities are making use of the warehouse in Texas and deriving receipts from the sale of tangible personal property in the state. Further, even though the entities make sales of goods in the state, the Imports and

Exports Clause and Tex. Code Section 151.307 exempts these sales from the imposition of tax. Lastly, the Comptroller noted that these entities are engaged in business in Texas and, as such, are required to obtain a Texas sales and use tax permit. Tex. Comp. of Pub. Accts., STAR No. 202408014L (August 29, 2024).

Sales and Use Tax Exemptions, Exclusions and Refunds

Alabama: The Alabama Department of Revenue (AL DOR) adopted amendments to Rule 810-6-5-.29 "Oxygen and Durable Medical Equipment," to incorporate statutory changes that starting September 1, 2024, require health care providers claiming a sales and use tax emption for durable medical equipment and medical supplies to obtain and maintain an exemption certificate from the AL DOR before purchasing such equipment and supplies. The health care provider must 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. The amended rule, which was adopted on October 18, 2024, takes effect on December 15, 2024. Ala. Admin. Monthly, Rule 810-6-5-.29 (Vol. XLIII, Issue No. 1, October 31, 2024).

California: The California Department of Tax and Fee Administration (CDTFA) issued guidance on recently enacted changes to the state's sales and use tax bad debt deduction provisions made by SB 167 (Cal. Laws 2024). Under the law change, affiliated entities of a retailer and lenders may no longer take a bad debt deduction or file a refund claim for accounts found worthless on and after January 1, 2025. The CDTFA explained that affiliated entities and lenders may continue to take a bad debt deduction or file a refund claim for accounts found worthless and written off before January 1, 2025. Refund claims must be filed within three years from the date the account was found worthless and written off for income tax purposes. If a previously claimed bad debt is subsequently collected, the taxable percentage of the amount collected must be reported to the CDTFA. The law change did not impact a retailer's ability to take a bad debt deduction; therefore, retailers may still take this deduction for accounts found worthless and written off on and after January 1, 2025. Cal. Dept. Tax and Fee Admin., Special Notice "Bad Debt Deductions for Lenders and Affiliated Entities Will Change on January 1, 2025" (September 2024).

Illinois: The Illinois Department of Revenue adopted amendments to regulations 86 Ill. Admin. Code Sections 130.120 and 130.320 (the Retailers' Occupation Tax (ROT)), 140.101 and 140.125 (the Service Occupation Tax (SOT)) and 150.105 (Use Tax) to implement statutory changes related to aircraft and fuel taxes. Starting in 2024, the ROT and SOT exemptions for materials, parts, equipment, components and furnishings incorporated into or upon an aircraft as part of the aircraft's modification, refurbishment, completion, replacement, repair or maintenance under Sections 130.120 and 140.125 is expanded to include aircraft engines and power plants. (The exclusion of aircraft engines and power plants from the exemption applied until January 1, 2024.) The amended regulations reflect the exemption's extension through

December 31, 2029 (from December 31, 2024). The amended regulations also revise the list of who may qualify for the exemption, and they provide that no credit or refund is allowed for taxes paid because of the exemption being disallowed on or after January 1, 2015 and before February 5, 2020. ROT, SOT and Use Tax regulations related to gasohol, majority blended ethanol and mid-range ethanol blends (Sections 130.320, 140.101 and 150.105) have been amended to reflect statutory changes to the percentages of proceeds from sales of these fuels that are subject to tax and the dates to which these percentages apply. The amended regulations took effect on September 25, 2024. Ill. Dept. of Rev., 86 Ill. Admin. Code Sections 130.120, 130.320, 140.101, 140.125, 150.105 (Ill. Register, Vol. 48, Issue 41, October 11, 2024).

Massachusetts: In response to a ruling request from a pharmaceutical equipment and supplies retailer and wholesaler, the Massachusetts Department of Revenue (MA DOR) said that sales of devices used in conjunction with automated insulin delivery systems are exempt from sales tax under Ma. G.L. c. 64H, Section 6(l). The MA DOR found the device, which is not expressly designated as exempt under Section 6(l), qualifies for the exemption because it is "an essential component of an integrated system worn on the body, which operates as a substitute for the pancreas." In reaching this decision, the MA DOR distinguished the device at issue with the continuous glucose monitors at issue in Letter Ruling 22-1, which did not qualify for the exemption. Ma. Dept. of Rev., Letter Ruling 24-2: Taxability of Continuous Glucose Monitors Designed for Use in Conjunction with Automated Insulin Delivery Systems (September 17, 2024).

New York: In response to a ruling request, the New York Department of Taxation and Finance said that sales tax is imposed on receipts from sales of prescription medication originally intended for human use but dispensed by a pharmacy for use on an animal. Such sales, however, are exempt when the medication is purchased by a licensed veterinarian or a person predominantly engaged in farming, for use on livestock or poultry used in the production for sale of tangible personal property by farming (the farm production exemption). N.Y. Dept. of Taxn. and Fin., TSB-A-24(35)S (August 20, 2024).

New York: In response to a ruling request, the New York Department of Taxation and Finance (NY DOTF) determined that a company's charges for access and use of its web portal – which is used in conjunction with the purchase, lease or refinancing of residential property and allows parties to collaborate simultaneously to complete, submit and process an application and allows reviewing parties to approve, sign and upload documents related to the acceptance or rejection of applications – constitutes the sale of taxable prewritten software. The NY DOTF reasoned that customers through their access to the portal to create and review applications obtained constructive possession of the software and the right to use, control or direct the use of the software. The NY DOTF also found certain optional charges, including those for custom programming services, data entry and training services, are not subject to tax if the charges are reasonable and separately stated on the invoice. The situs of the sale for purposes of

determining the proper local sales tax rate is the location associated with the license to use the software, which is the location of the customer's employees that use or direct the use of the software. If these employees are in New York and other states, tax is collected based on the portion of receipts attributable to these employees in New York. N.Y. Dept. of Taxn. and Fin., TSB-A-24(8)S (July 16, 2024).

Transactions and Services

Michigan: The Michigan Department of Treasury issued a revenue administrative bulletin (RAB) to update guidance describing 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 RAB 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; (8) when use tax is owed on a sublease; and (9) 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 RAB includes examples. Mich. Dept. of Treas., Revenue Administrative Bulletin 2024-18 (November 13, 2024) (replaces RAB 2023-13).

New York: In response to a ruling request, the New York Department of Taxation and Finance (NY DOTF) determined that a company's receipts from providing an online directory that lists persons who can assist and represent claimants with certain disability benefits, are not subject to the state's sales and use tax as the online directory constitutes the furnishing of advertising services. Claimants can use the online directory for free, but representative are charged a fee for listing their information on the website. Representatives who pay the fee to be listed in the directory can upload their photo, logo, biography, and contact information. The NY DOTF found the type of listing on the company's online directory constitutes the placing of advertising, the charges for which are not subject to tax. N.Y. Dept. of Taxn. and Fin., TSB-A-24(31)S (August 14, 2024).

New York: In response to a ruling request, the New York Department of Taxation and Finance said a company's sales of network security monitoring services (which detects, provides alerts on and prevents cyber-attacks on network-connected assets) and professional advisory services (which includes the creation, oversight and implementation of formal cybersecurity policies and procedures) are protective services subject to state and local sales taxes. If the protective services are provided to property being protected in New York, the services are sourced to the state. If protected assets/data are located in and outside of New York, tax should be collected only with respect to the protective services that protect assets/data located in New York. N.Y. Dept. of Taxn. and Fin., TSB-A-24(12)S (July 30, 2024).

Texas: In response to a ruling request, the Texas Comptroller of Public Accounts (Comptroller) said that a company's provision of health insurance pre-authorization approval or denial services to hospitals, clinics and doctors whose patients have healthcare plans administered by the insurer, are not taxable insurance services. The Comptroller explained that even though the company performs activities that may meet the definition of data processing services, these activities are performed to facilitate the non-taxable pre-authorization services. Tex. Comp. of Pub. Accts., STAR No. 202408013L (August 30, 2024).

Technology and Digital Taxes

Georgia: The Georgia Department of Revenue (GA DOR) issued for public comment proposed new Rule 560-12-2.118 "Digital Products, and Codes," to provide guidance on the application of the state's sales and use tax on sales or uses of certain digital products, digital goods, digital codes (collectively, "digital goods") and internet access services. As of January 1, 2024, the state's sales and use tax is imposed on retail purchases/sales of specified digital goods to end users, if (1) the end user receives the right to permanently use such goods and (2) the transaction is not conditioned upon continued payment by the end user. The proposed rule would provide that a seller confers the right of permanent use to the end user if they allow the end user to download and retain the product. The proposed rule also would impose tax on an entire transaction that contains both non-fungible tokes (NFTs) and taxable specified digital products, other digital goods or digital codes. Tax applies regardless of whether possession of the digital good is maintained by the seller or a third party. The proposed rule would address the following topics: (1) how to source receipts from sales of digital products and codes; (2) exemptions and exclusions that apply to internet access services, certain sales of prewritten computer software that is transferred electronically or delivered by load and leave, software as a service, and certain subscriptions for which the end user does not receive the right of permanent use of a digital good; (3) when a sale of a digital good is a sale for resale; and (4) when tax applies to a withdrawal of digital goods from inventory. The proposed rule also defines key terms, including "specified digital products" (e.g., audio, visual, books, code), "other digital products" (e.g., artwork, magazines, newspapers, photos, video games), "end user," "prewritten computer software," "software as a service," "subscription," and "transferred electronically." The GA DOR held a hearing on the proposed regulation on December 19, 2024. Ga. Dept. of Rev., Notice Number SUT-2024-01 (issued November 1, 2024).

Washington: The Washington Department of Revenue (WA DOR) issued a draft Excise Tax Advisory (ETA) on the application of multiple points of use (MPU) sales tax exemption (MPU exemption) to sales of software maintenance agreements (SMA).[2] The draft ETA covers SMA that involve bundled transactions. Generally, a SMA is one between a software vendor and a

[2] This ETA would not apply to transactions to which RCW 82.04.050(8)(b) applies – i.e., services provided exclusively in connection with the seller's sale of digital goods, digital codes or digital automated services.

customer that requires the vendor to provide technical support and updates for an existing software product, including software upgrades and fixes and support services related to prewritten software. Per the draft ETA, retail sales tax generally would apply when a single nonitemized price is charged for the sale of an SMA that provides both retail-taxable and -nontaxable products, unless the charge for the taxable products is a de minimis part of the SMA. (This type of SMA is referred to as a mixed element SMA.) SMAs that only provide retail-nontaxable products would not be subject to retail sales tax. If the taxable and nontaxable elements are separately stated on binding sales or other sales-related documents made available to the customer within an SMA, then each activity would be "taxed according to the nature of the activity."

The draft ETA describes the application of the MPU exemption, noting that purchases of products eligible for the MPU exemption include digital goods, prewritten computer software, remotely accessed prewritten computer software, digital automated services, and digital codes. The draft ETA explains (1) when a mixed element SMA that qualifies as a bundled transaction and is otherwise subject to retail sales tax would be eligible for the MPU exemption and (2) how to apportion and pay use tax for qualified MPU transactions (with specific guidance when there is one MPU-eligible product and multiple MPU-eligible products). The WA DOR would have the authority to authorize or require the use of an alternative apportionment method that fairly reflects the proportion of in-state to out-of-state use by the taxpayer. The draft ETA includes illustrative examples and describes documentation requirements. The draft ETA specifically states that it is for discussion purposes only and that "[u]nder no circumstances is this draft ETA to be used to determine tax liability or eligibility for a tax deduction, exemption, or credit." A virtual public meeting on the draft ETA was held on December 4, 2024. Wash. Dept. of Rev., Draft ETA 3XXX.20XX (released October 2024).

Practice, Procedure, Policy, Controversy and Compliance

Multistate: A number of state and local tax-related ballot measures were decided on November 5, 2024. For results on additional state and local ballot measures, see EY Tax Alert 2024-2072 (November 11, 2024).

California: New law (AB 2854) requires local agencies by April 30 each year to report to the California Department of Tax and Fee Administration (CDTFA) specific information for each agreement that resulted in rebated sales and use tax revenue[3] in the immediately preceding fiscal year. Information that must be reported includes the following: (1) names of the parties to the agreement; (2) total dollar amount of rebated sales and use tax revenue received by each party to the agreement for various time periods; (3) the dates the agreement was originally executed and when it terminated (or will terminate); and (4) the percentage of a retailer's sales and use taxes used to calculate/determine the rebated sales and use tax revenues received by

[3] The term "rebated sales and use tax revenue" means "any direct or indirect payment, transfer, diversion, or rebate of any tax revenue resulting from the imposition of a sales and use tax … to any person pursuant to an agreement."

each party to the agreement and any other person that is not a party to the agreement. The local agency also must post this information on its website. The CDTFA may impose a penalty on a local agency that fails to report or publish this information. Cal. Laws 2024, ch. 842 (AB 2854), signed by the governor on September 28, 2024.

Delaware: The Delaware Division of Revenue (DE DOR) issued guidance on the state's short-term rental lodging tax, which was enacted earlier in the year.[4] Starting January 1, 2025, the short-term rental lodging tax is imposed at a rate of 4.5% on every occupancy of a short-term rental in the state. A "short-term rental" is defined as "a house, duplex, multi-plex, apartment, condominium, houseboat, trailer, or other residential dwelling unit where a tourist or transient guest rents sleeping or living accommodations for no more than 31 consecutive nights but excludes certain excepted rentals." The guidance list accommodations that do not fall within the definition of a "short-term rental" including hotels, motels, cabins, among other accommodations. The guidance explains the requirements, obligations and responsibilities of accommodations intermediaries. They are required to obtain an annual Delaware accommodations intermediary business license before providing accommodations intermediary services, and they are responsible for collecting and remitting the short-term rental lodging tax unless they have a contractual agreement with a hotel, motel, or other accommodations intermediary to collect and remit tax. The guidance explains when the short-term rental lodging tax must be collected, the way the tax must be reported and remitted, and when penalties and interest will be imposed for failure to file a return or pay tax due. The DE DOR also issued short term rental FAQs. Del. Div. of Rev., Technical Information Memorandum 2024-01 "Short-Term Rental Lodging Tax" (November 15, 2024).

District of Columbia: New law (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 became law on September 18, 2024.

Illinois: The Illinois Department of Revenue (IL DOR) issued an informational bulletin, explaining that the amount of the retailers' discount for certain returns is limited to $1,000 per month. Retailers and servicepersons may claim the discount on returns filed by the due and only for a percentage of taxes paid by the due date. The maximum discount of $1,000 per month may be claimed for each of the following returns: (1) Form ST-1 "Sales and Use Tax and E911 Surcharge Return" (2) Form ST-70 "Aviation Fuel Sales and Use Tax Return" (3) Form CD-1, "Cannabis Dispensary Tax return" (the sales and use tax portion); (4) Form LSE-1 "Tax Return for Vehicle Leasing Companies" (5) Form ST-201 "Rental Purchase Agreement Occupation Tax Return" (6) Form ART-1 "Automobile Renting Occupation and Use Tax return" (7) Form CMFT-1 "County Motor Fuel Tax Return" and (8) Form MMFT-1, "Municipal Motor Fuel Tax Return." The IL DOR said that retailers should continue to calculate the discount using the appropriate discount rate for the tax as provided in the return instructions. Ill. Dept. of Rev., Informational

[4] See Del. Laws 2024, ch. 474 (House Substitute 2 for HB 168 as amended by House Amendment No. 1).

Bulletin FY 2025-04, "Retailers' Discount for Certain Tax Returns Capped at $1,000 Per Month" (October 2024).

Illinois: The Illinois Department of Revenue (IL DOR) issued an informational bulletin, explaining that for certain transaction returns due on or after January 1, 2025 – i.e., for vehicles with a delivery date on or after December 12, 2024, which corresponds with returns due in January 2025 – the amount of the retailers' allowance is limited to $1,000 per month. Retailers may claim the allowance on returns filed by the due and only for a percentage of taxes paid by the due date. Returns impacted by the discount cap include Form ST-556 "Sales Tax Transaction Return" and Form ST-556-LSE "Transaction Return for Leases." If both forms are filed in a single month, the returns are subject to a combined $1,000 discount for the month. The bulletin includes an example of the amount of discount allowed per return when multiple returns are filed in the same month. The IL DOR explained that for returns filed on or after January 1, 2025 retailers will no longer be able to use the allowance to reduce their tax remittance when filing Forms ST-556 and ST-556-LSE. Instead, the IL DOR will calculate the discount on the returns through a monthly reconciliation process. This process generally will occur 60 days after the end of the monthly liability period. After the process is completed, the IL DOR will issue a check for the discount amount. Ill. Dept. of Rev., Informational Bulletin FY 2025-11, "Retailers' Allowance for Certain Transaction Returns Capped at $1,000 Per Month" (November 2024).

Illinois: The Illinois Department of Revenue (IL DOR) issued guidance to certain in-state and out-of-state retailers that before 2025 were obligated to collect and remit Illinois use tax on retail sales sourced outside the state and made to Illinois customers. Effective January 1, 2025, such sales will be subject to destination-based retailers' occupation tax (ROT)[5] – i.e., the total state and local ROT rate calculated using the local rate in effect in the Illinois location to which the items are shipped or delivered or the purchaser takes possession. The IL DOR said that "[f]or destination-based sales, retailers must register a tax site for each jurisdiction (i.e., city or county) where it has made a sale or plans to make sales." The IL DOR will change out-of-state retailers registration status from use tax to ROT; after December 23, 2024 out-of-state retailers will be responsible for registering new sites to their accounts. The IL DOR noted that in-state retailers are responsible for registering new tax sites to their account for any sales sourced outside the state. The guidance list steps that affected retailers should take for sales made on or after January 1, 2025, including registering any changing location before filing the return for the period in which the sale took place, and reporting the destination-based sales on the proper lines of the tax form. The IL DOR noted that retailers may close their sales tax account if all their sales are made through a marketplace facilitator that has met the Illinois' tax remittance threshold. Ill. Dept. of Rev., Informational Bulletin FY 2025-10, "Retailers' Occupation Tax Guidance for Out-of-State Retailers and Certain Illinois Retailers, Effective January 1, 2025" (November 2024).

[5] See Pub. Act 103-983.

Illinois: The Illinois Department of Revenue (IL DOR) issued a bulletin on the increase to Chicago's prepaid wireless E911 surcharge rate from 0% to 9%, effective November 1, 2024. (See Pub. Act 103-781.) The IL DOR explained that the E911 surcharge only applies to receipts from prepaid wireless telecommunications services, and not to other tangible personal property sold in the same transaction such as electronic games or batteries. If the services subject to the E911 surcharge are bundled with other tangible personal property and the changes for these services are not separately stated, or if the taxpayer does not document the separation in its records, the entire sale is subject to the surcharge. Retailers also are required to disclose the surcharge by separately stating the amount on the receipt or invoice. The guidance addresses how to report sales subject to different surcharge rates (e.g., prepaid wireless services subject to both the new and old rates). Chicago's 9% surcharge rate is in effect until July 1, 2029. Ill. Dept. of Rev., Informational Bulletin FY 2025-05 (September 2024) (supersedes in part FY 2025-02 (N-08/24)).

South Dakota: The U.S. Supreme Court will not review a South Dakota Supreme Court ruling upholding the imposition of use tax on an out-of-state company's movable construction equipment that the company brought into South Dakota for varying amounts of time. The Court had been asked: "Whether South Dakota's imposition of an unapportioned use tax on the fair market value of [the taxpayer's] movable construction equipment—some of which was used in South Dakota for one day—violates the fair apportionment requirement of the Commerce Clause." *Ellingson Drainage, Inc. v. South Dakota Dept. of Rev.*, *petition for cert. denied*, Dkt. No. 23-1202 (October 7, 2024).

South Dakota: On November 5, 2024, South Dakota voters overwhelmingly rejected Ballot Measure No. 28, which would have prohibited the state from collecting sales or use tax on anything sold for human consumption. According to the South Dakota Attorney General explanation, this measure would not have prohibited the state from collecting sales or use tax on alcoholic beverages or prepared food, or prohibit municipalities from taxing food sold for human consumption. Additional information on the measure remains available on the South Dakota Secretary of State website.

Utah: The Utah State Tax Commission announced that effective January 1, 2025, Salt Lake City will impose a 0.5% capital city revitalization tax on all sales except motor vehicles, aircrafts, watercrafts, modular homes, manufactured home and mobile homes. Consequently, the City's combined state and City sales and use tax rate will increase from 7.75% to 8.25%. Utah State Tax Comm., Tax Bulletin 23-24 (November 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:

Natalie Haynes
St. Louis, MO
314 290 1782

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:

Anne Duffy
San Francisco, CA
415 894 8527

Rachel Quintana
Denver, CO
720 931 4660

Joe Imbarlina
Philadelphia, PA
412 644 0482

Brad Ressler
Minneapolis, MN
612 371 8558

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

Mark Stefan
San Jose, CA
408 947 5592

Grace Kyne
Boston, MA
617 375 2359

Mike Woznyk
New York, NY
212 773 3008

Scott Norton
Sales and Use Tax Compliance Leader
Irvine, CA
805 778 7056