

E-Commerce Sales Tax Considerations

TEI Denver – State and Local Taxation Webinar

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Learning Objectives

- Learn about the states' taxation of marketplaces and online platforms
- Learn about state as well as international efforts to tax the digital economy including taxation of digital advertising
- Understand what types of digital products are being taxed and which states are taxing them

Agenda



Third Party Issues

Digital Economy

Remote
Access/Streaming/Digital
Goods

Real Time Sales Tax
Remittance

Third Party Issues



Louisiana (Jefferson Parish) – Marketplace Win!

Normand v. Wal-Mart.com USA LLC, No. 2019-C-00263 (La. Jan. 29, 2020)

- Louisiana Supreme Court issued its decision in favor of Walmart.com overturning the court of appeals and trial court decisions
- The Walmart.com marketplace was not the “dealer” in third-party sales made through the platform.
 - “There is no indication the legislature intended to tax intermediaries that are only tangentially involved in sales transaction, such as a marketplace facilitator relative to sales by third party retailers.”
 - “The fact that an intermediary transmits the funds to sellers does not relieve the sellers of their tax-collection obligation or cause the intermediary to assume the sellers’ legal obligation to collect taxes. A contrary interpretation of [the term ‘dealer’], in light of Louisiana’ general tax scheme, would authorize the imposition of liability for sales tax on any intermediary that aids or enables sellers to reach new customers although not selling anything (i.e., payment processors, credit card companies, financial institutions, common carriers, advertisers, and broadcasters). Such an interpretation produces an absurd result ...”

South Carolina – Amazon Marketplace Challenge

Amazon Services LLC v. S.C. Dep't of Revenue, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019)

- The South Carolina Administrative Law Court concluded that Amazon was required to collect and remit sales and use tax on third-party seller sales made on the Amazon marketplace.
- The ALC held that Amazon retained extensive control over every aspect of the transactions, including being the only contact for the purchaser, and prohibiting the third-party merchants from accepting payments for the products.
- South Carolina enacted a marketplace collection law in April 2019.
- The case is on appeal to the South Carolina Court of Appeals.

Florida – Online Platforms Not Responsible for Collecting Tourist Development Tax

Gannon v. Airbnb, Inc., No. 4D19-541 (Fla. Dist. Ct. App. Mar. 25, 2020)

- The Florida District Court of Appeal affirmed a trial court decision holding that certain online vacation rental platforms advertising short-term rentals are not required to collect and remit Palm Beach County’s Tourist Development Tax.
- The Court explained that the online platforms do not own, possess, or have a leasehold interest to convey in any of the properties listed on their online platforms.
 - They are simply conduits through which customers can compare properties and rates and book a reservation at the chosen property.
- The Court concluded that the Companies are not in the taxable business of renting, leasing, or letting transient accommodations as contemplated by the TDT statute.
- The Court rejected the argument that, because the Companies receive the consideration on the owners’ behalf, they are “dealers” and are required to collect and remit the TDT.

Arkansas – Uber Eats Challenges Prepared Food Tax

Little Rock Advertising & Promotion Comm'n v. Portier LLC d/b/a Uber Eats, No. 60CV-19-1865 (Ark. Cir. Ct. Pulaski Cty. July 18, 2019)

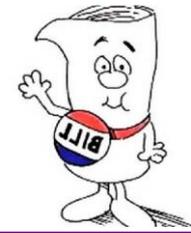
- The City of Little Rock Advertising and Promotion Commission filed a complaint against Uber Eats for failure to collect the 2% Prepared Food Tax on restaurant gross receipts.
 - The tax applies to restaurants and other similar establishments that sell food.
 - The tax was recently expanded to platforms that facilitate the sale of food.
- Uber Eats filed a motion to dismiss, claiming that imposition of the tax on the marketplace results in double-taxation and that the DFA has held that platforms such as Uber Eats are operating as couriers and therefore not responsible for collecting the tax.
- The Arkansas Circuit Court granted Uber Eats' Motion to Dismiss, finding that the Little Rock Advertising and Promotion Commission failed to state facts showing that it is entitled to relief.

Arizona – OTCs Are Hotel Operators

City of Phoenix et al. v. Orbitz Worldwide Inc. et al., No. CV-18-0275-PR (Ariz. Sept. 9, 2019)

- The Arizona Supreme Court found that online travel companies (OTCs) are “brokers” engaged in the business of operating hotels.
- Thus, the OTCs’ proceeds—their services fees and markups—are taxable gross income subject to municipal privilege taxes.
- The dissent warns that “[t]he opinion today changes the status quo and requires these agents [OTCs], credit card companies, and others to secure licenses and pay municipal taxes for the privilege of ‘operating hotels[.]’”

Recently Enacted* Marketplace Legislation



Georgia HB 276

- Requires marketplace facilitators with sales in excess of \$100,000 in the state to collect and remit sales tax on behalf of their marketplace sellers beginning on April 1, 2020.
- Bill does not contain a clear provision that excludes advertisers and payment processors.
- Bill also prohibits class actions against marketplace facilitators arising from the facilitator's overpayments of sales taxes.

Tennessee SB 2182

- Bill imposes collection and remittance duties on marketplace facilitators.
- Unlike the NCSL Model Legislation, the bill contains a threshold of \$500,000 or less during the previous 12-month period.
- Effective October 1, 2020.

Alaska – Uniform Ordinance*

- On January 6, 2020, the Alaska Remote Seller Sales Tax Commission approved a uniform ordinance addressing the sales tax obligations of remote sellers and marketplace facilitators.
- The commission was created to administer and enforce sales tax collections on remote sales made into local jurisdictions that are or that become members of the commission.
- To be a member, jurisdictions must enter into an intergovernmental agreement, and then within 120 days, adopt the uniform sales tax code.
- Under the agreement, a remote seller or a marketplace facilitator would be required to collect the local sales tax if in the previous calendar year, it has at least \$100,000 statewide gross sales from the sale of property, products, or services delivered into Alaska or has made 200 or more separate transactions with Alaska residents.

Digital Service Taxes Abroad



- Similar efforts in many other countries to tax global, highly digitalized companies
- Digital service tax (DST) enacted in France, Hungary, Italy, Austria, India, Turkey
 - Similar efforts proposed in New Zealand, Belgium, Czech Republic, Spain, United Kingdom, etc.
- France & Italy impose a 3% DST, which applies to multinational corporations with at least €750 million in global revenues with at least €25 million (France)/ €5.5 million (Italy) attributable to online advertising and intermediation activities in the country
- The US has sharply criticized the digital services tax and threatened trade war repercussions.

Maryland House Bill 732

Maryland Digital Advertising Tax - Creates a whole new tax regime that imposes an annual tax on the gross revenues derived from digital advertising services in Maryland

Effective Date – Applicable to tax years after December 31, 2020

Tax Base – Annual gross revenues derived from digital advertising services in Maryland

“Digital Advertising Services” – includes advertisement services on a digital interface, including:

- Advertisements in the form of banner advertising;
- Search engine advertising;
- Interstitial advertising; and
- Other comparable advertising services

Rate – 2.5% to 10% of the annual gross revenues derived from digital advertising services in Maryland, depending on a taxpayer’s global annual gross revenues

Global Revenue Threshold – 2.5% tax bracket kicks in at \$100,000,000 of global annual gross revenues (any source)

- Domestic Revenue Threshold – at least \$1,000,000 of annual gross revenues derived from digital advertising services in Maryland

Sourcing – Utilizes undeveloped apportionment fraction to apportion the tax to Maryland; Comptroller to adopt regulations

Bill Status – Governor Hogan recently vetoed; Legislature could override with 3/5 vote of both chambers’ members

Comparison



| Country /State | Global Revenue Threshold | Domestic Revenue Threshold | Tax Rate | Tax Base/Scope | Sourcing |
|-------------------|--------------------------|----------------------------|------------|---|---|
| Maryland (HB 732) | \$100 million + | \$1 million + | 2.5% - 10% | Advertisement services on a digital interface | Utilizes undeveloped apportionment fraction to apportion the tax to Maryland; Comptroller to adopt regulations |
| France | €750 million | €25 million | 3% | <ul style="list-style-type: none"> Targeted advertising Provision of a digital interface Transmission of data collected about users for advertising purposes | User located in France <ul style="list-style-type: none"> IP address When user has an account that has been opened from France But all methods of proof are open according to the law |

Other Digital Advertising Tax Bills

NY S 8056 – Digital Advertising Tax

- Would establish a tax on a digital advertiser's annual gross revenues derived from digital advertisements in the state
- Unlike the proposed Maryland tax, this New York bill would only impose the digital advertising tax on targeted advertisements

NY S 8166 – Sales Tax on Digital Ad Services

- Would expand the sales tax base to digital advertising services
- Unlike S 8056, the sales tax expansion would not be limited to advertisements "that use personal information about the people the ads are being served to."
- Rather, the tax base is advertisements that "market" or "promote" a particular good, service, or political candidate or message" (similar to NE)

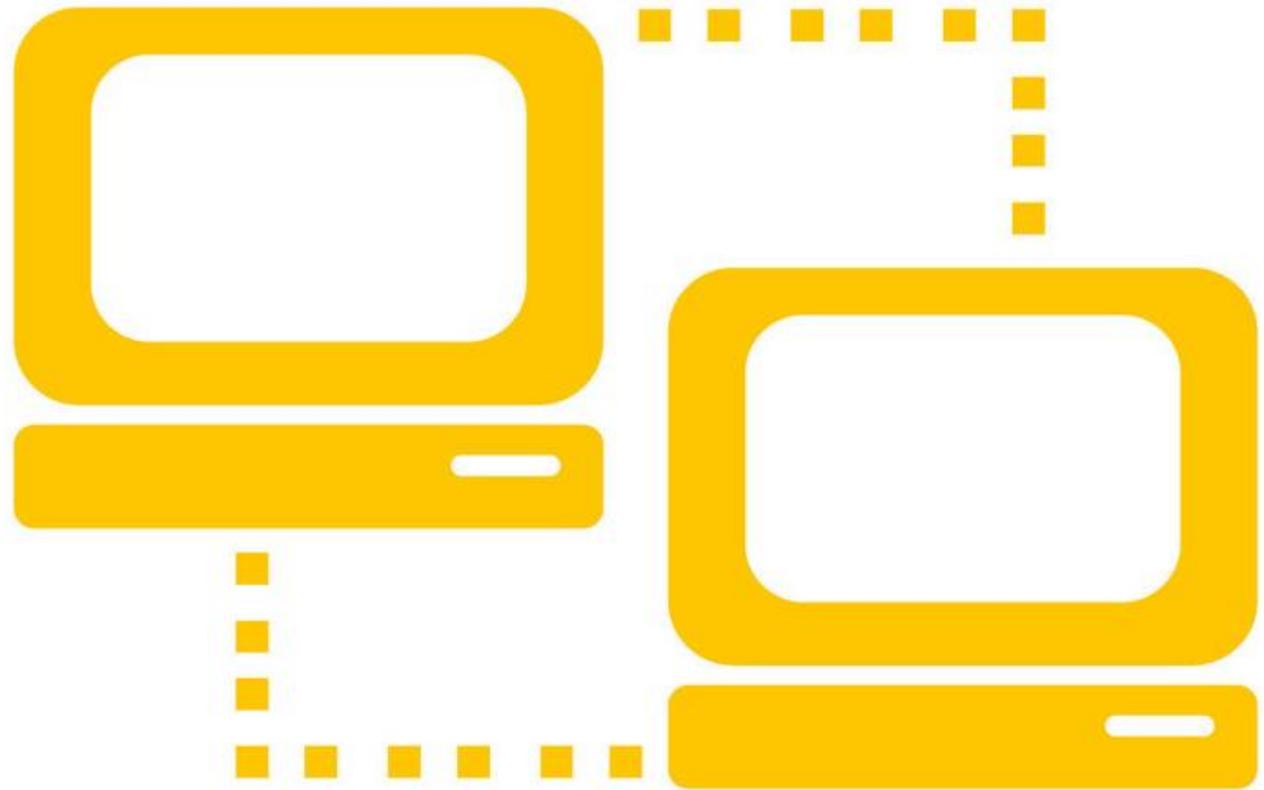
NY A 9112 – GRT on "Individual Data" Income

- Imposes a 5% tax on gross income upon every corporation which derives income from the data individuals of this state share with such corporations
- A similar bill was introduced in the Senate in May 2019 (SB 6102)

NE LB 989 – Sales Tax on Digital Advertisements

- Expands the Nebraska sales and use tax to tax digital advertisements
- "Digital advertisement" means an "advertising message delivered over the Internet that markets or promotes a particular good, service, or political candidate or message"

Remote Access/ Streaming/ Digital Goods



Digital Goods and Services – Expanding the Tax Base

Maryland

- HB 932 would subject certain digital products to Maryland sales and use tax
- Vetoed by Governor Hogan; could be overridden by a 3/5 vote of both House and Senate

Utah

- Bill passed in January 2020 which repeals a bill passed during December 2019's special session on tax reform
- The 2019 bill would have expanded the sales tax base to include certain services including streaming media

Massachusetts – Remotely Accessed Software Products

Citrix Sys. Inc. v. Comm’r of Revenue, 139 N.E.3d 293 (Mass. 2020)

- The Massachusetts Supreme Judicial Court held that receipts from subscriptions to remote access software were subject to sales tax as taxable transfers of prewritten software rather than a non-taxable service.
- Following a change in the law to tax sales of prewritten software regardless of delivery medium, the Massachusetts Department of Revenue promulgated a regulation stating that taxable sales include “transfers of rights to use software installed on a remote server.”
- The court deferred to the Department’s interpretation of law, as reflected in its regulation.

Washington – Online Research Taxable as Retailing

Gartner, Inc. v. Washington Department of Revenue, No. 51637-3-II (Wash. Ct. App. Jan. 13, 2020)

- The Washington Court of Appeals determined that a taxpayer's provision of online access to information in a digital research library constituted a digital automated service subject to sales tax and the business and occupation tax's retail classification.
- The court found that although the library's information constituted a digital good, the product was a digital automated service because software facilitated the subscriber's access to or use of the digital good.
- The court rejected the taxpayer's argument that subjecting its products to B&O tax under the retail classification violated the Internet Tax Freedom Act.
- While the reports would be subject to a lower B&O tax rate if sent via mail or CD, the court found that reports sent via a tangible format were significantly different from the taxpayer's online research portal.

Chicago, Illinois – Amusement Tax Upheld

Labell v. City of Chicago, 2019 IL App (1st) 181379 (Ill. App. Ct. Sept. 30, 2019)

- The Illinois Appellate Court upheld the City of Chicago’s imposition of its amusement tax on streaming video, streaming audio and online gaming services, finding that the tax did not:
 1. Exceed Chicago’s home rule authority by taxing services occurring outside of Chicago;
 2. Violate the Uniformity Clause of the Illinois Constitution; or
 3. Violate the federal Internet Tax Freedom Act.
- The court declined, on procedural grounds, to determine whether the exemption for certain live cultural performances violates the Uniformity Clause because the plaintiffs’ brief violated Illinois Supreme Court Rule 341(h)(7).
- The Illinois Supreme Court has declined to hear the case.

Cook County – Paid Television No Longer Subject to Amusement Tax

- Effective April 1, 2020, the Cook County Department of Revenue no longer applies its amusement tax to sales of paid television to non-residential customers, such as bars and hotels.
- The amusement tax ordinance never expressly applied to paid television.
 - Rather, in 2007, the Department issued Amusement Ruling #1, which purported to include paid television within the definition of an “amusement.”
- In a letter recently issued to taxpayers, the Department stated that it will no longer collect the tax.
 - The Department attributes its policy change to the “result of rulings recently issued by the Department of Administrative Hearings.”
 - This position change is only prospective.

Florida – Video Game Streaming Site Subscriptions Subject to CST

Florida Technical Assistance Advisement No. 19A19-001 (Aug. 7, 2019)

- The Florida Department of Revenue issued a Technical Assistance Advisement concluding that an internet-based streaming video subscription service is subject to Florida’s communication services tax.
- The Taxpayer maintains a website where viewers can watch live or on-demand video of individuals (or, “Broadcasters”) playing video games, music or e-sports events.
- The Taxpayer argued that their services are distinguishable from other streaming subscription services because subscribers purchase subscriptions primarily to support Broadcasters, rather than to receive access to streaming video content.
- The Department concluded that the Taxpayer provides a video service subject to the communications services tax.
 - Separately, the Department concluded that the Taxpayer’s services were not subject to sales tax.

Virginia Court Dismisses Massachusetts “Cookie Nexus” Challenge

Crutchfield v. Commonwealth of Massachusetts, No. CL17001145-00 (Va. Commw. Ct. Oct. 9, 2019)

- A Virginia statute gives circuit courts original jurisdiction to hear declaratory judgment actions brought by businesses to challenge another state’s assertion of sales or use tax nexus. Va. Code Ann. § 8.01-184.1.
- In a case of first impression, a Virginia circuit court granted the Massachusetts Department of Revenue’s motion to dismiss such a suit challenging the Department’s “cookie nexus” standard for sales tax collection.
- The Department notified the plaintiff, a Virginia-based company, of the cookie nexus standard in three separate letters. The plaintiff did not allege that the Department had any other contacts with the plaintiff in Virginia.
- The court dismissed the litigation, finding that the Department’s three letters sent to plaintiff were insufficient to establish jurisdiction under the Due Process Clause of the 14th Amendment of the United States Constitution.

Real Time Sales Tax Remittance



Payment Processors – “Real Time” Proposals

- In 2017, 2018, and 2020, Massachusetts considered implementation of a real-time sales tax collection system by payment processors, but ultimately it was decided after public comment that significant systems and technology changes would be required and this would take significant time and investment.
 - The State Tax Research Institute (COST) estimated in 2017 that implementation would have costs businesses \$1.2B in one-time costs and \$28M in annual costs, not including costs to Issuing Banks for systems integration.
- Similar proposals considered, but rejected, in Arizona, Connecticut, Nebraska, and Puerto Rico.
- What is the benefit?

Payment Processors – “Real” Time Proposals

- In 2019, Missouri considered legislation that would have required all remote internet sellers subject to Missouri sales tax to use a payment processor to collect and remit tax.
 - But, where a seller directly extended credit to its customers or accepts direct payment from customers, the bill provides that the seller would be treated as a “payment processor” for the purposes of the proposed sales tax collection obligation.
- In 2019, New York considered legislation that would have required certain issuers of credit cards and debit cards to participate in the collection and remittance of sales and use taxes through an escrow account mechanism.





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Welcome to this week's edition of the Digital Tax Bytes. Our team of tax lawyers is actively monitoring for developments in the taxation of the digital economy. Each week we pull together the items we deem most important, broken down by jurisdiction, to provide you with the digital tax information you need to know for your business. Subscribe to our [Tax – Digital Tax mailing list](#) to receive these updates on a weekly basis.

International news

OECD

- OECD to Release Proposed Unified Approach on October 9th

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**Marketplace Monday - Hawaii Issues
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By Michele Borens & Samantha Trencs on October 21, 2019
POSTED IN MARKETPLACE MONDAYS

On October 17, 2019, the Hawaii Department of Taxation released Tax Information

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