# SALT Shaker Podcast

**Quick Update: New York, Illinois and California**

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| Today on our show we are discussing a New York Letter Ruling concerning sales tax treatment of a database service, a New York Tax Appeals Tribunal decision concerning residency for individual income tax, an Illinois Letter Ruling addressing sourcing of sales for sales tax, and the California Office of Tax Appeals Decision concerning the sales tax treatment of ultrasound services. | |
| **Chris Lee:** | Hello and welcome to the SALT Shaker Podcast with Eversheds Sutherland (US) LLP. I’m Chris Lee and today on our show we’re discussing a New York Letter Ruling concerning sales tax treatment of a database service, a New York Tax Appeals Tribunal Decision concerning residency for individual income tax, an Illinois Letter Ruling addressing sourcing of sales for sales tax, and the California Office of Tax Appeals Decision concerning the sales tax treatment of ultrasound services. First, in a recent Advisory Opinion TSBA 2038s New York explained that the taxpayer’s database service was not subject to sales tax. It determined that the taxpayer’s information service was personal and individual in nature and not subject to sales tax. The taxpayer entered into agreements with customers to maintain their fleet vehicles and the taxpayer also maintained data on maintenance performed on customer vehicles. The taxpayer charged a separate monthly charge to allow customers access to this data through a website. The customers could access data and run reports only for the customers’ own vehicles maintained by the taxpayer and the taxpayer did not sell its data to third parties. The Advisory Opinion discussed that the sales tax statute provided that tax applies to the service of furnishing information, except it does not apply to the furnishing of information which is personal or individual in nature and which is or may not be substantially incorporated into reports furnished to other persons. While the taxpayer’s database service was an information service, because the customers could access information only concerning that customers’ own vehicles, and because the information concerning the customers’ vehicles was provided only to that customer, the information service was personal or individual in nature and was not subject to sales tax. This case highlights that the taxability of information services, software and software as a service can be complex. Taxability will depend on specific facts of the transaction and there are often exceptions from the general rule that may exclude certain activities from tax.  Next, in the Matter of the Petition of *Colson*, the New York Tax Appeals Tribunal recently held that a vacation home constituted a permanent place of abode to make the taxpayers statutory residents of New York for income tax purposes. The taxpayers were a married couple domiciled in New Jersey. The husband was a hedge fund manager who primarily worked out of the New York City office and was in the state for more than 183 days per year. The couple also maintained a vacation home in New York where they spent no more than two or three weeks each year. For those individuals not domiciled in New York, New York imposes income tax if the individual maintains a permanent place of abode in the state and if the individual is present in New York for more than 183 days during the year. The Tribunal held that the husband’s presence in the state combined with the taxpayer’s ownership of the vacation home was sufficient to establish statutory residency in New York. While there is no dispute that the taxpayer was present in New York at least 183 days during the year, the taxpayers argued that their New York home was not a permanent place of abode under the statute because their primary residence was in New Jersey for the tax years at issue, and the vacation home was more than 200 miles away from the husband’s office. The Tribunal disagreed holding that a vacation home qualified as a permanent place of abode because it was suitable for year-round habitation. The relevant question was whether the dwelling exhibits the physical characteristics ordinarily found in a dwelling suitable for year-round habitation. The taxpayer’s actual use of the residence only for vacation purposes was not determinative. Rather, because the five bedroom, three bathroom house had year-round climate control and could be used as a primary residence, it was sufficient to render the taxpayers statutory New York residents for income tax purposes. We will likely continue to see issues similar to this case. In addition to an increase in remote working, in 2020 states that saw the highest percentage of people move out of the state were New Jersey, New York, Illinois, Connecticut and California. As more people leave these states or purchase residences in other states, Departments of Revenue may continue to challenge whether individuals remain subject to income tax in these states. |
|  | In Illinois Private Letter Ruling No. ST 20-0009, the Illinois Department of Revenue considered sales sourcing to determine the local rate that applied to Retailers Occupation Tax and Services Occupation Tax. The taxpayer procured marketing materials for its clients. Its headquarters was in Illinois and it also had product managers at other locations in Illinois. These product managers were responsible for procuring materials for customers. On audit, the auditor determined that the taxpayer was required to source the sales to the taxpayer’s headquarters. However the Letter Ruling determined that the sales were properly sourced to the location of the product manager who was responsible for procuring the materials. The Department disagreed with the auditor’s conclusion and determined that for purposes of the Retailer Occupation Tax most of the primary sale and activities occurred at the location of the product manager’s and not necessarily at the taxpayer’s headquarters. These product managers solicited client work, they worked with suppliers to ensure that marketing materials met client specifications. They had discretion to select suppliers, and the product managers had authority to execute the purchase from suppliers and to issue invoices to taxpayer customers. Therefore, the Department determined that for sales of tangible personal property made by product managers located in Illinois, the company must remit Retailers Occupation Tax and Local Occupation Tax based on the Illinois location of the product manager making the sale, and not based on the location of the Illinois headquarters. For purposes of the Service Occupation Tax, the taxpayer was unable to determine the location of its subcontractors so the sales of its services were properly sourced to the location of the product manager.  And finally, in Opinion Presidential Decision, the California Office of Tax Appeals in Case No. 18063254, held that the true object of the taxpayer’s prenatal imaging services involving elective 3D and 4D ultrasound services is the sale of images captured on tangible media including photos, CDs and DVDs. Therefore, receipts from such sales were subject to sales tax as tangible personal property. California imposes sales tax on retail sales of tangible personal property but does not generally impose sales tax on the provision of the service that is not part of the sale of tangible personal property. When a transaction involves both the provision of a service and transfer of tangible personal property, the taxability is determined based on whether the true optic of the transaction is a tangible personal property or whether the transfer of tangible personal property is merely incidental to the performance of a service. In this matter the taxpayer provided a service of conducting an ultrasound to allow customers to see their baby on the ultrasound screen. The taxpayer sold various bundled packages that at a minimum included an ultrasound session and photos of the images taken during the ultrasound session. For additional charges, customers could have a longer session or could have additional images including color photos or digital photo albums. The taxpayer argued that the sale of photos, CDs and DVDs were incidental to the primary objective of the clinical service of elective diagnostic imaging. The taxpayer stated that only a small percentage of its patients purchased additional CDs and DVDs separate from the ultrasound services. The OTA disagreed and determined that the true object of the sales was the tangible personal property. I noted that the packaging and marketing of the services focused on the photos, CDs and DVDs containing the images. Therefore, the tangible personal property was more than incidental to the service provided. Further, the OT determined that the taxpayer services were not a medical necessity because the customers were required to have already obtained diagnostic ultrasounds from their healthcare providers.  That is all for today. Please check the show notes for additional information. I’m Chris Lee and this has been the SALT Shaker Podcast with Eversheds Sutherland (US) LLP. |
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