

State & Local Tax Advisor

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Connecticut

Connecticut Will Implement “App” and “Cookie” Nexus

Commissioner Kevin B. Sullivan stated that the Connecticut Department of Revenue Services will issue revised guidance early in 2018 that will update e-commerce sales tax liability for greater than \$300,000 Connecticut-destined sales based on existing state nexus law and including software physical presence indicia implemented by Massachusetts.

According to the Commissioner, the Department currently requires all top 500 national online retailers not registered and collecting tax in Connecticut to report their total past two years of annual in-state destined sales and those retailers are then billed for past sales tax liability unless there is a voluntary disclosure agreement for purposes of prospective compliance.

Massachusetts Model

In Massachusetts, an Internet vendor with a principal place of business located outside the state that is not otherwise subject to tax:

- that had in excess of \$500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions during the preceding calendar year; and

- that had property interests in and/or the use of instate software (e.g., "apps") and ancillary data (e.g., "cookies") that are distributed to or stored on the computers or other physical communications devices of a vendor's instate customers, and may enable the vendor's use of such physical devices (among other types of Internet vendors), is required to register, collect, and remit Massachusetts sales or use tax with respect to its Massachusetts sales.

An Internet vendor with this type of contact with Massachusetts is considered to have instate physical presence sufficient to create nexus and impose registration, reporting, and remitting obligations on the vendor.

E-mail, Connecticut Department of Revenue Services, November 17, 2017

Pennsylvania

NOL Deduction Cap Increased, Other Changes Enacted

Pennsylvania Governor Tom Wolf has signed legislation amending the corporate income tax net operating loss deduction, creating a Manufacturing Innovation and Reinvestment Deduction, amends the film production tax credit districts, and requires that before a tax credit can be awarded the Department of Revenue can make a finding that the taxpayer has filed all tax returns and paid all balances due. Finally, the legislation makes changes regarding personal income tax withholding, deductions and refund checkoffs. Sales and use tax changes are reported separately.

Specifically, the NOL deduction is amended by removing the \$5 million hard NOL cap and increasing the percentage cap to 35% in 2018 and 40% in 2019 and after. The change takes effect after the Department of Revenue publishes a notification that all or a part of the net loss deduction has been deemed unconstitutional as a result of a decision by the Pennsylvania Supreme Court. The court issued a decision finding part of the NOL deduction unconstitutional earlier this month, as previously reported.

The Manufacturing Innovation and Reinvestment Deduction is available to taxpayers who make a capital investment in excess of \$100 million for the creation of new or refurbished manufacturing capacity within three years of a designated start date. The project must be completed within five years. The Pennsylvania Department of Community and Economic Development will determine the maximum deduction for the taxpayer. The deduction must be equal to 5% of the private capital investment utilized and may be utilized each year for the 5 tax years. The deduction is nontransferable, the taxpayer cannot reduce its liability by more than 50% and any unused portion shall expire at the end of the corresponding tax year.

The Film Production Tax Credit is amended to state that the Department of Revenue can designate up to two tax credit districts for the purpose of enhancing, promoting and expanding film production. The tax credit districts must be located on deteriorated property and contain at least one qualified production facility and six soundstages. The property must be occupied by two or more qualified businesses that make a total capital investment of at least \$400 million within five years after the designation of the district. Tax credits may be authorized in fiscal year 2019-20 and thereafter.

Finally, the legislation extends the application date for additional Keystone Opportunity Zones that are currently allowed in law from October 2016 to October 2018.

Personal Income Tax

Personal income tax changes include:

- amending the Pennsylvania ABLE (Achieving a Better Life Experience) Act to allow a deduction for contributions to an ABLE account and exempting undistributed earnings in the ABLE account as well as distributions from the ABLE account;
- making the Wild Resource Conservation Fund, Organ and Tissue Donation Awareness Fund, Military and Family Relief Assistance Fund, Children's Trust Fund, and American Red Cross checkoffs permanent;
- requiring withholding of Pennsylvania income tax by the Pennsylvania State Lottery or the person making the lottery prize payment if Federal income tax is withheld;
- entities making rent and royalty payments on Pennsylvania property to nonresident over \$5,000 must withhold personal income tax on those payments;
- companies that bring out-of-state independent contractors into Pennsylvania for work in excess of \$5,000 must withhold personal income tax; and
- businesses are required to electronically file 1099-MISC forms for all employees and all classes of Pennsylvania source income.

Act 43 (HB 542) Laws 2017, effective December 29, 2017 and as noted

Sales and Use Tax Remote Seller Requirements and More Enacted

Recently enacted Pennsylvania legislation makes several changes to sales and use tax laws. The changes include requiring certain remote sellers, marketplace facilitators, and referrers to elect to either collect and remit the sales tax or comply with specified notice and reporting requirements. In addition, certain technical support services are not subject to sales and use tax. Corporate and personal income tax are reported separately.

Other sales and use tax changes include:

- a new exemption for beer kegs;
- a new carsharing fee; and
- a new fireworks tax.

Remote Seller, Marketplace Facilitator, and Referrer Requirements

The legislation requires remote sellers, marketplace facilitators, and referrers to either comply with existing sales and use tax laws, or:

- notify purchasers regarding the sales and use tax, and
- report certain information regarding purchasers or remote sellers to the Department of Revenue.

Remote sellers and marketplace facilitators must also provide reports to purchasers regarding their purchases. Referrers must also provide reports to remote sellers.

Definitions: A "remote seller" is a person who does not maintain a place of business in Pennsylvania and who makes retail sales through a forum of tangible personal property that is subject to sales or use tax. Marketplace facilitators, marketplace sellers, referrers, and employees are not considered remote sellers.

A "marketplace facilitator" is a person who facilitates retail sales of tangible personal property.

A "referrer" is a person who has an agreement or arrangement with a marketplace seller or remote seller to:

- list or advertise for sale one or more products of a marketplace seller or remote seller;
- receive consideration from the marketplace seller or remote seller from the sale offered in the listing or advertisement; and
- transfer a purchaser to a marketplace seller, remote seller, or affiliated person to complete a sale.

Furthermore, a person qualifying as a "referrer" does not have to collect a receipt from the purchaser for the sale. "Referrer" also includes a person who may also be a vendor. Newspaper printers and publishers and Internet advertising services are not considered referrers. In addition, a person who does not provide the marketplace seller's or remote seller's shipping terms or advertise whether a marketplace seller or remote seller collects sales or use tax is not considered a referrer.

A "marketplace seller" is a person who has an agreement with a marketplace facilitator under which the marketplace facilitator facilitates sales for the marketplace seller.

Election requirements: By March 1, 2018, and by June 1 of each subsequent calendar year, remote sellers, marketplace facilitators, and referrers with aggregate sales of \$10,000 or more in the previous 12-month period must file an election with the Department of Revenue to either:

- collect and remit the sales tax, or
- comply with certain notice and reporting requirements.

A remote seller, marketplace facilitator or referrer who does not submit an election will be deemed to have elected to comply with the notice and reporting requirements. Furthermore, remote sellers, marketplace facilitators, and referrers who elect to collect and remit the sales tax must obtain a sales and use tax license from the Department of Revenue.

For marketplace facilitators, the election requirement applies only to:

- retail sales through the marketplace facilitator's forum that are made by or on behalf of a marketplace seller that does not maintain a place of business in Pennsylvania; and
- retail sales made by a marketplace facilitator on its own behalf, if the marketplace facilitator does not maintain a place of business in Pennsylvania.

For referrers, the election requirement applies only to retail sales:

- (1) directly resulting from a referral of a purchaser to a marketplace seller that does not maintain a place of business in Pennsylvania;
- (2) directly resulting from a referral of a purchaser to a remote seller; and
- (3) of the referrer's own products, if the referrer does not maintain a place of business in Pennsylvania.

The referrer's election for retail sales under item (3) can be different from the election for retail sales under items (1) and (2).

Remote seller and marketplace facilitator notice requirements: Remote sellers and marketplace facilitators will be required to post a conspicuous notice on their forums to inform Pennsylvania purchasers that:

- sales or use tax may be due in connection with the purchase and delivery;
- Pennsylvania requires the purchaser to file a return if use tax is due; and
- the notice is required under statute.

Remote sellers and marketplace facilitators must also provide a written notice to each purchaser at the time of sale ("time-of-sale notice") that includes:

- a statement indicating that sales tax is not being collected in connection with the purchase;
- a statement indicating that the purchaser may be required to remit use tax directly to the Department of Revenue; and
- instructions for obtaining additional information from the department regarding the use tax.

This notice must be prominently displayed on all invoices and order forms and on each sales receipt or similar document.

Referrer notice requirements: Referrers electing to comply with the notice requirements will be required to post a conspicuous notice on their platforms to inform Pennsylvania purchasers of sales and use tax requirements. The notice must include statements indicating that:

- sales or use tax may be due in connection with the purchase and delivery;
- the person to whom the purchaser is being referred may or may not collect and remit sales tax to the Department of Revenue in connection with the transaction;
- Pennsylvania requires the purchaser to file a return if use tax is due and is not collected by the person to whom the purchaser is being referred; and
- the notice is required under statute.

In addition, the notice required of referrers must contain instructions for obtaining additional information from the department regarding the use tax. Furthermore, the notice may include pop-up boxes or another type of notification that appears when the referrer transfers a purchaser to another person to complete the sale.

Remote seller and marketplace facilitator reporting requirements: By January 31 of each year, a remote seller or marketplace facilitator that elects to comply with notice and reporting requirements must provide a written report to each purchaser required to receive the time-of-sale notice. The report must include:

- a statement indicating that the remote seller or marketplace facilitator did not collect sales tax on the purchaser's transactions and that the purchaser may be required to remit use tax to the Department of Revenue;
- a list, by date, indicating the type and purchase price of each product purchased or leased by the purchaser from the remote seller or marketplace facilitator and delivered to a location within Pennsylvania;
- instructions for obtaining additional information from the department regarding the use tax;
- a statement indicating that the remote seller or marketplace facilitator must submit a report to the department that includes the purchaser's name and the aggregate dollar amount of purchases that the purchaser made from the remote seller or marketplace facilitator; and
- additional information required by the department.

By January 31 of each year, remote sellers and marketplace facilitators that elect to comply with notice and reporting requirements must also provide a written report to the Department of Revenue. For each purchaser required to receive the time-of-sale notice during the previous calendar year, the report must include:

- the purchaser's name;
- the purchaser's billing address and, if different, the purchaser's last known mailing address;
- the address in Pennsylvania where products were delivered to the purchaser;
- the aggregate dollar amount of purchases that the purchaser made from the remote seller or marketplace facilitator; and
- the name and address of the remote seller, marketplace facilitator, or marketplace seller that made the sales to the purchaser.

Referrer reporting requirements: By January 31 of each year, a referrer that elects to comply with notice and reporting requirements must provide a written report to each remote seller to whom the referrer transferred a potential purchaser located in Pennsylvania during the previous calendar year. The report must include:

- a statement indicating that Pennsylvania may impose sales or use tax on the transaction;
- a statement indicating that the remote seller may be required to elect to either collect and remit the sales and use tax or comply with notice and reporting requirements; and
- instructions for obtaining additional information regarding sales and use tax from the Department of Revenue.

By January 31 of each year, referrers must also provide to the Department of Revenue a report containing a list of remote sellers who received the notice described above.

Effective and applicable dates for notice requirements and certain reporting requirements: The notice requirements and requirements for providing reports to the Department of Revenue:

- are effective February 1, 2018, and will apply beginning on April 1, 2018, for sales of products and services other than digital products and related services; and
- are effective February 1, 2019, and will apply beginning on April 1, 2019, for digital products and related services.

In this context, "digital products" include electronically or digitally delivered videos, photographs, books, any other taxable printed materials, applications (commonly known as apps), games, music, any other audio such as satellite radio service, and canned software.

Technical Support Services

Support services for digital and electronically delivered products and separately invoiced help desk and call center support services for canned software are not subject to sales and use tax.

Exemption for Beer Kegs

Kegs used to contain malt or brewed beverages are exempt from sales and use tax as packaging materials.

Carsharing Fee

A new fee is imposed on carsharing. For rentals of:

- less than two hours, the fee is 25 cents;
- two to three hours, the fee is 50 cents;
- more than three but less than four hours, the fee is \$1.25; and
- four hours or more, the fee is \$2.

The fee applies to rentals of motor vehicles that are subject to sales tax.

"Carsharing" means a membership-based service that provides an alternative to personal car ownership and:

- does not require a trip-specific written agreement each time a member rents a vehicle;
- does not require an attendant to be present at the beginning or end of a rental;
- offers members access to a dispersed network of shared vehicles 24-hours per day, seven days per week, 365 days per year; and
- allows a vehicle to be rented on a per-minute, per-hour, per-day, or per-trip basis, and at per-mile or per-kilometer rates that typically include fuel, insurance, and maintenance.

Consumer Fireworks Tax

Retail sales of fireworks that are suitable for use by the public are subject to a 12% consumer fireworks tax. The tax applies to the purchase price per item sold, including state and local sales taxes. The consumer fireworks tax is imposed in addition to the sales and use tax.

Act 43 (H.B. 542), Laws 2017, effective October 30, 2017, except as noted

Texas

Sales and Use Tax Rule on Resale Exemption and Certificate Updated

The Texas sales and use tax regulation on claiming a resale exemption has been amended to define key terms and incorporate Comptroller policies and prior legislation.

New Definitions

Definitions are added for "equipment," "federal government," "integral part," "Internet hosting service," "machinery," "purchaser," "seller," and "tax-free inventory."

Comptroller Policies

The following longstanding Comptroller policies have been reflected in the rule:

- A sale for resale may only be made to a purchaser engaged in the business of selling, leasing, or renting taxable items who intends to resell the item or service as a taxable item or with a taxable item;
- A sale of tangible personal property to a purchaser who acquires it for the purpose of reselling or transferring it outside the United States or Mexico does not constitute a sale for resale;

- To establish good faith acceptance of a resale certificate, the seller cannot know or have reason to know that the sale is not a sale for resale;
- A broker or dealer who only buys and sells raw commodities, such as natural gas, raw cotton bales, or raw aluminum, in bulk is not required to hold a sales tax permit and is not required to issue a resale certificate, but may issue a resale certificate if the seller requests it; and
- A seller may accept the Uniform Sales and Use Tax Certificate-Multijurisdiction as a resale certificate, but may not accept the Streamlined Sales and Use Tax Agreement Certificate of Exemption.

Prior Legislation

The following legislation is reflected in the rule:

- A taxable service provider is a consumer, rather than a reseller, of machinery and equipment used to perform its taxable service and, therefore, cannot purchase the machinery and equipment tax-free as a sale for resale, unless the service provider transfers primary possession of the machinery and equipment to a customer;
- A sale for resale includes the sale of a wireless voice communication device to be transferred as an integral part of a taxable service if payment for the service is a condition for receiving the wireless voice communication device; and
- A sale for resale includes the sale of a computer program to a provider of Internet hosting services who sells a license to use the program to an unrelated user of Internet hosting services, provided that the reseller does not retain a right to use the program under that license.

The amended rule is published in the *Texas Register* (October 27, 2017; 42 TexReg 6024) and available on the Secretary of State's website at <http://www.sos.state.tx.us/texreg/index.shtml>.

34 TAC §3.285, Texas Comptroller of Public Accounts, effective November 1, 2017

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