

SALES AND USE TAX NEWSLETTER

3rd Quarter
2023 Edition

KBF's quarterly newsletter updates clients on sales and use tax news, developments, and trends from around the country.



■ ARIZONA

Arizona Court of Appeals Re-Affirms State's Position on Remote Software Licensing

The Arizona Court of Appeals ruled in favor of the Arizona Department of Revenue, rejecting a refund request from an HR software company that challenged the taxation of their sales of software licenses. The court rejected the taxpayer's argument that their software did not qualify as tangible personal property, and re-affirmed the state's position that licenses to access cloud-based software are taxable as rentals of tangible personal property under Arizona's transaction privilege tax.

(ADP LLC v. Arizona Department of Revenue and City Of Phoenix, 1 CA-TX 21-0009, Arizona Court of Appeals, Division One)



CALIFORNIA

California Adopts Marketplace Sales Regulations

The California Department of Tax and Fee Administration (CDTFA) announced the adoption of Regulation 1684.5, Marketplace Sales. The regulation defines terms and clarifies registration requirements for marketplace facilitators and marketplace sellers. It specifies when a marketplace facilitator will be considered a seller and retailer of property and when an advertiser is not required to register with the CDTFA and to pay sales tax or collect and remit use tax on sales. Under the new regulations, an online marketplace that facilitates sales on behalf of sellers will be obligated to collect and remit sales tax on those sales. Under the regulation, “facilitate” includes when a person agrees to do anything directly or indirectly that makes it possible or easier for the marketplace seller to sell its products through the marketplace. These activities include “listing products for sale, communicating the offer or acceptance between the buyer and seller, taking orders for merchandise, or providing payment processing or fulfillment services.” Each of these activities on their own could obligate the marketplace to collect and remit sales tax and handling payments or providing fulfillment services are not required to trigger a sales and use tax collection obligation.

“Listing products for sale” is defined as “providing the means for another person to create or post a written, verbal, pictorial, graphic, or similar means of announcement of tangible personal property for sale in a marketplace, including, but not limited to, an advertisement that contains an announcement of tangible personal property for sale.” However, the regulation deems a website provider not to be facilitating a sale when a seller’s advertising only “refers purchasers to the seller by telephone, mail, email, website address, internet link, or other similar means to complete the sale, and the website provider does not participate further in the sale.”

(California Regulation 1684.5, Marketplace Sales, 2023)

San Francisco Postpones Gross Receipts Tax Rate Increases and Provides Relocation Credits

A recently enacted City of San Francisco, California (City) ordinance postpones a city gross receipts tax rate increase to January 1, 2025. The imposition of higher City GRT rates was set to go into effect beginning January 1, 2023. The new law provides gross receipts tax-related credits to businesses that open a new office or move an existing office to downtown San Francisco.

(News Release: Mayor Breed Signs Balanced Budget that Delivers Key City Priorities, City of San Francisco, California (7/26/23))



■ COLORADO

Colorado Determined Remote Seller's Food Products Were Not "Prepared Food" and Thus Exempt from Sales Tax

The Colorado Department of Revenue held that a remote seller of food products that are pre-cooked, packaged with an attached "FDA-approved food label," shipped to the company's customers by a third-party, and require further preparation to be consumed as intended, is considered selling "food for home consumption" rather than prepared food or food marketed for immediate consumption. The distinction makes sales of this type of food products exempt from Colorado state sales and use tax. However, because Colorado cities, towns, and counties are permitted to deviate from the state sales tax base with respect to certain exemptions, including Colorado's "food for home consumption" exemption, the remote seller will need to determine whether Colorado-administered local governments have adopted this exemption in calculating any Colorado local tax due.

(Private Letter Ruling PLR-23-003, Colo. Dept. of Rev. (6/14/23))



■ KANSAS

Kansas No Longer Taxes Delivery Charges as of July 1, 2023

As of July 1, 2023, Kansas no longer imposes sales tax on delivery charges that are separately stated on the invoice, bill of sale, or other documentation given to the purchaser. These changes are found in the state's definition of the sales price subject to sales tax and will affect both state and local taxes. "Delivery charges" are charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating, and packing. Based on this definition, the inclusion of handling costs in the price for delivery will not taint the taxability of the delivery charge.

(Kansas H.B. 2136 (2022), K.S.A. § 79-3602(ll), Kansas Department of Revenue Notice 23-02, Delivery Fees Charged By A Retailer (June 22, 2023))



■ LOUISIANA

Louisiana To Shift Oversight of Local Sales Tax Filing System

Effective January 1, 2024, Louisiana enacted legislation that will shift oversight of the state's uniform local sales and use tax return and remittance system from the Louisiana Department of Revenue (DOR) to the Louisiana Uniform Local Sales Tax Board (Board). The enacted legislation requires the Board to design, implement, manage, maintain, and supervise a single remittance system through which taxpayers can remit state and local sales and use taxes in a single transaction. The Uniform Electronic Local Return and Remittance Advisory Committee will advise and may make enforceable recommendations to the Board regarding the design and maintenance of the system.

The DOR will keep the current local sales and use tax filing system (Parish E-File) available until the Board certifies that the new system is fully designed, implemented and available to taxpayers, which can be no later than January 1, 2026.

(Act 375 (H.B. 558), Laws 2023; House Summary of Senate Amendments (HB 558))



■ MICHIGAN

Michigan Issues Bulletin Addressing Digital Goods

On July 31, 2023, the Michigan Department of Treasury issued a revenue administrative bulletin addressing the taxation of computer software and digital products. The revised bulletin is updated to include prewritten computer software in the definition of tangible personal property. Key definitions are listed as well as a general overview of the imposition of sales and use tax, sourcing of prewritten computer software, examples, and miscellaneous questions and answers.

Digital goods that are outside the definition of prewritten computer software are not taxable regardless of method of access. Some products that may give the appearance of digital goods may actually be prewritten computer software based on definition. Examples of prewritten computer software may include “applications and video games downloaded or otherwise installed onto electronic devices such as smartphones, tablets, and game consoles” and would be taxable provided a fee or charge was required for their acquisition. The guidance includes non-fungible tokens (NFTs) in a list of examples of digital goods as well as digital images or photographs, digital tickets/tokens, and digital fonts/logos/graphics.

(Michigan Department of Treasury, Sales and Use Taxation of Computer Software and Digital Goods, Revenue Administrative Bulletin 2023-10, July 31, 2023)



■ OHIO

Cleaning Company Owner Loses Ohio Responsible Party Appeal

In an appeal involving the listed owner, Daniel Biskind, of an Ohio cleaning company (Contract Cleaning LLC) regarding who was the responsible party for tax assessments issued for the period July-September 2016, the Ohio Board of Tax Appeals (BTA) affirmed the Ohio Tax Commissioner's findings that Biskind was indeed the responsible party of the business. The company was previously assessed for sales tax and employer withholding tax due to unfiled returns and did not fully satisfy those assessments. The Commissioner assessed Biskind as a responsible party. Biskind petitioned claiming he should not be considered a responsible party given changes to the business operations managers between 2008 and 2016. Even though Biskind portrayed his role as a passive member who delegated responsibilities for taxes to others, the BTA affirmed he met the definition of officer and employee per Ohio Adm. Code 5703-9-49 and that he was 100% owner. To be a responsible party, a person does not need to be a direct overseer of business operations. The sales tax responsible party statute R.C. 5739.33 includes a provision for personal liability for filing returns and remitting tax. Ohio Adm. Code 5703-7-15 additionally provides clarification on whether a member is "responsible for the execution of the employer's fiscal responsibilities." A person will have "control or supervision" if "the person has direct or indirect authority over" the person preparing and filing returns. The BTA found satisfactory evidence to show that Biskind maintained sufficient control over employees who handled tax returns, performed functions of hiring and employee termination, received financials for review, and instructed employees. As responsible party, Biskind is personally held liable for the unpaid tax assessments.

(Ohio Board of Tax Appeals, Biskind v. Harris, Case No. 2019-2398; Biskind v. McClain & Harris, Case No. 2019-2434, August 24, 2023)



■ TEXAS

Texas Policy Letter Addresses Taxability of Electronic Games and Downloadable Content, Virtual Currencies

The Texas Comptroller of Public Accounts (Comptroller) explained that existing state statutes, rules, and policy decisions provide that electronic games and associated content – including related virtual currencies – are subject to Texas sales and use tax as an amusement service regardless of whether access is purchased directly through a game's website or a redeemable card. According to the Comptroller, membership fees, subscription fees, or similar charges, "by whatever name called," for access to an electronic game or associated content are charges for membership or access to special privileges – and all are taxable as amusement services under Texas law.

(Accession No. 202309029L, Tex. Comptroller of Public Accounts (9/25/23))

Texas Creates Exemption for Family Care and Menstrual Items

On September 1, 2023, Texas SB 379 went into effect, making many medical, menstrual, maternity, and family care items exempt from sales tax. The law exempts many wound care, feminine hygiene, and family care products. This includes tangible personal property with the principal purpose of hygiene in relation to menstrual or post-partum care.

(Texas SB No. 379, effective September 1, 2023)

■ WASHINGTON

Washington Provides Guidance on Taxability of Business Assets

The Washington Department of Revenue (DOR) has issued guidance regarding the taxability of sales of business assets. The guidance states that sales of capital assets and consumable supplies are retail sales. These sales are not subject to Washington Business & Occupation (B&O) tax if a business does not regularly sell this type of property and would qualify for the "casual sales" B&O tax deduction. Casual sales are still subject to retail sales tax. The DOR's guidance provides examples of capital assets, including machinery and equipment, office furniture, and vehicles. Examples of consumable supplies include office supplies and forms, reference books, and canned software.

(Tax Topics: Selling Your Business, Washington Department of Revenue, August 22, 2023)



Washington Issues Guidance on Taxability of Items Manufactured for Own Commercial or Industrial Use

The Washington Department of Revenue has issued guidance regarding the tax treatment of items that are manufactured for a business's own commercial or industrial use. If a business manufactures special equipment that they then use to manufacture another product for sale, tax applies unless the business qualifies for the state's manufacturing sales and use tax exemption for machinery and equipment. When tangible personal property is manufactured for one's own use, use tax is owed on the value of the item. The value that is subject to tax is the selling price of similar products at comparable locations in Washington. If there are no similar products, the value that is subject to tax is the cost of the item manufactured. When using the latter approach, every cost attributable to manufacturing the item must be included, which includes direct and indirect overhead costs.

(Manufacturing Articles for Commercial or Industrial Use, Washington Department of Revenue, September 8, 2023)



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