

KBF

CERTIFIED PUBLIC ACCOUNTANTS

SALES AND USE TAX NEWSLETTER

2nd Quarter 2024



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



■ ARIZONA

Arizona Appellate Court Attributes Activities of In-State Distributors to Taxpayer in Determining Nexus

The Arizona Court of Appeals determined that an online auto parts retailer that utilizes Arizona distributors for shipping, warehousing, and handling services, had substantial nexus with the state and was subject to Arizona's transaction privilege tax. The Department of Revenue originally assessed tax on Arizona orders in an audit. The Arizona tax court later ruled that the assessment was unlawful since the taxpayer did not have substantial nexus during the audit period.

The Court of Appeals agreed with the Department of Revenue and vacated the

tax court's decision. The appeals court determined that in addition to its own employee travel to the state, the taxpayer's use of Arizona distributors constituted a physical presence that created a substantial nexus in Arizona. The court also noted that the taxpayer's sales to Arizona customers exceeded the threshold for an economic presence under the Arizona statute that implemented the Wayfair decision, however, the Court did not apply that statute retroactively to the audit period.

Rock Auto LLC. v. Arizona Dep't of Revenue; Arizona Court of Appeals Division One; No. 1 CA-TX 23-0002; No. TX2020-000778 (4/2/24)



■ COLORADO

Colorado District Court Finds that Subscription Video Service is not Taxable

On April 19, 2024, a Colorado District Court granted summary judgment in favor of a subscription video streaming service, concluding that its service was not subject to tax as a sale of tangible personal property. Based on the taxpayer's services, the court found that no "right, title or

interest" during the subscription period was transferred to the subscribers. The court determined that streaming services, while visible, are not taxable tangible personal property as they cannot be touched or possessed.

Netflix Inc. v. Colorado Department of Revenue et al., 2nd Judicial District of Colorado, case number 2023CV31825 (4/19/24)



■ KANSAS

Kansas Legislature Overrides Governor Veto to Enact New Exemptions and Deductions

The Kansas legislature overrode the governor's veto of H.B. 2098 which provides new exemptions and modifies the treatment of manufacturer's coupons for the state's sales and use tax. Changes to the tax code include sales tax exemptions on purchases made by disabled veterans, exemptions on sale of various items used by a communications service provider, and exemptions for installation and repair services related to communication services. With respect to the change related to manufacturer's coupons, only the amount paid by the customer is included in the sales tax computation.

2023 KS H.B. 2098



■ KENTUCKY

Kentucky Legislation Adds Exemptions and Modifies Filing Thresholds

H.B. 8 is a broad bill which impacts various industries and tax types. While many of the changes only impact specific groups of taxpayers, there were a few broadly applicable changes. Specifically, the more broadly applicable changes include moving the sales tax filing threshold from \$6,000 to \$12,000 for certain service providers, and establishing a new exemption for qualified data center projects.

H.B. 8 Ch. 166 (2024)



■ LOUISIANA

Streaming Service Found Not Taxable in New Orleans Under Internet Tax Freedom Act

The Louisiana Board of Tax Appeals overturned the City of New Orleans' assessment, ruling that music streaming services are not subject to tax in New Orleans under the Internet Tax Freedom Act ("ITFA"). The taxpayer was able to demonstrate that its service was substantially similar to music streaming services transmitted via satellite. Satellite transmitted music streaming services are not subject to the city's sales tax as it is afforded exemption by the and the Federal Telecommunications Act ("FTA"). As the ITFA prohibits discriminatory taxes on electronic commerce, the Louisiana Board of Tax Appeals determined that to subject only one of two substantially similar services to the city's sales tax would be discriminatory and in violation of the ITFA.

Apple Inc. v. Romy S. Samuel, Docket No. L01283, Board of Tax Appeals, State of Louisiana



■ MINNESOTA

Minnesota Retail Delivery Fee Goes Live

In 2023, the state enacted a new retail delivery fee, assessing a fee of 50¢ per transaction; the new tax was effective starting July 1, 2024. A “retail delivery” is a delivery of taxable tangible personal property or clothing to a person located in Minnesota. The fee applies to each transaction where charges for these items equal or exceed \$100. While the new tax does not specifically require delivery via a vehicle and prewritten computer software is considered taxable tangible personal property, it is included as one of the

exemptions from the new tax. Specifically, charges for the following items are not included when determining if a transaction meets or exceeds the \$100 threshold:

- Drugs, medical devices, accessories, and supplies
- Food, food ingredients, or prepared food
- Certain baby products (see Baby Product Exemption)
- Items delivered electronically, such as computer software
- Utilities delivered through wires or pipes, such as natural gas and electricity
- Items purchased for the purpose of resale

H.F. 2887 (2023)



■ NEW YORK

SaaS Determined to be Taxable Software Licensing in New York

The New York Tax Appeals Tribunal affirmed the decision by an administrative law judge that licensing access to a vendor management system under a SaaS model is taxable in New York. The administrative law judge reviewed customer contracts and determined that the licensing arrangement to access the vendor management system was truly a sale of prewritten software delivered over the internet and thus is subject to the state's sales tax.

New York Tax Appeals Tribunal, DTA No. 829516, May 2, 2024



■ OKLAHOMA

Oklahoma Enacts Exemption for Machinery Used in Digital Asset Mining

Oklahoma H.B. 1600 provides a sales tax exemption for sales of electricity, machinery and equipment which is used in the commercial mining of digital assets. The bill provides a non-exhaustive listing of eligible machinery and equipment; the exemption is effective November 1, 2024, and sunsets December 31, 2029.

H.B. 1600 (2024)

State Level Tax on Food removed in Oklahoma

Oklahoma H.B. 1955 becomes effective in August 2024; the bill removes the state sales tax on food. Additionally, the bill restricts any future local sales tax rate increases until June 30, 2025.

H. B. 1955 (2023)



■ TEXAS

Texas Implements Regulation Specifying Location Where Orders are Received for Online Orders and Fulfillment Warehouses

The new Texas regulation provides that when an order is fulfilled from warehouses or when the order is made through an automated website, the location where an order is "received" is the physical location of the seller or third party, specifically:

"The location where the order is received by or on behalf of the seller means the physical location of a seller or third party such as an established outlet, office location, or automated order receipt system operated by or on behalf of the seller where an order is initially received by or on behalf of the seller and not where the order may be subsequently accepted, completed or fulfilled. An order is received when all of the information from the purchaser necessary to the determination whether the order can be

accepted has been received by or on behalf of the seller. The location from which a product is shipped shall not be used in determining the location where the order is received by the seller."

The language in the amended regulation is similar to that of the Section 3.10.1C5 of the Streamlined Sales Tax Agreement ("SSUTA"). While the state has not adopted the SSUTA, the Comptroller of Public Accounts stated that the amendment will "promote uniformity with those states that have elected or will elect origin-based sourcing."

It is expected that Texas localities will continue to challenge the state on its interpretation, we will provide updates as litigation develops.

Amended Title 34 Tex. Admin. Code section 3.334



■ TEXAS

Texas Letter Ruling Provides Guidance Website-Related Services

The Texas Comptroller issued a private letter ruling on the taxability of certain website-related services, specifically: website design, development, marketing consulting, and advertising services.

- **Website design:** The taxpayer's website design service includes goal setting, site mapping, usability consulting, and planning for website architecture, but it does not include the development of a website. The website design services may be provided on a stand-alone basis or as part of a custom website design and development package. The state concludes that website design (or "blueprint") services are not taxable when provided on a standalone basis.
- **Website development:** The taxpayer's website development services include the creation and maintenance of a website; this requires the compilation, storage, and manipulation of data

and thus meets the definition of data processing. As such, website design services are taxable.

- **Marketing consulting services:** The taxpayer's marketing consulting services were not determined to fall under the state's list of taxable services.
- **Advertising services:** The taxpayer's advertising services were not determined to fall under the state's list of taxable services.

The taxpayer offered its services as part of a single retainer service, the lump sum received by its customers would cover both taxable and nontaxable services; the taxpayer must correctly account for the tax on the taxable services in its books and records even if the services are not separately stated on the invoice.

Letter No. 202404008L, Texas Comptroller of Public Accounts, April 2024



■ UTAH

Sales of Advertising Space not Taxable in Utah

The Utah State Tax Commission posted Private Letter Ruling 21-004 which states that sales of advertising space by an online platform are considered nontaxable marketing services. While the taxpayer offered a number of different services to its customers, the state looked to the "essence or primary object of the transaction" and determined that the services provided were nontaxable advertising/marketing services.

Private Letter Ruling No. 21-004 (2/13/24)



■ VERMONT

Exemption on Cloud Software Repealed in Vermont

Effective July 1, 2024, the state's sales and use tax exemption for remotely accessed prewritten computer software is repealed. As such, the previously exempt "cloud software" will be subject to Vermont's 6% sales and use tax. As a result of the legislation, the sale of prewritten computer software will now be treated consistently, regardless of whether it is accessed remotely or not.

H.B. 887 (2024)



■ WASHINGTON

[Washington Provides Sales and Use Tax Guidance for Online Classes](#)

The Washington Department of Revenue issued a notice related to the taxability of online classes. While online classes are subject to the state's business and occupation tax, not all online classes are subject to the retail sales tax. Specifically, classes that offer real-time interaction between the presenter and participants will not be subject to the retail sales tax, while online classes with limited or no real-time interaction will be subject to the retail sales tax.

Washington Department of Revenue, WA-Notice, February 12, 2024



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