State and Local Tax Technology Checklist

Guidance from the fourth quarter of 2022

To make recent state and local tax developments related to technology more accessible to our clients, Washington National Tax–SALT has compiled a technology checklist (Techlist) that summarizes state guidance issued during the fourth quarter of 2022. Topics covered include access to Web-based services, telecommunication services, digital goods, software, and streaming services. Highlights include:

California: California imposed a new 988 surcharge on sellers of telecommunications services and prepaid mobile telephony, effective January 1, 2023. The three-digit number was created to make it easier for individuals to seek immediate help during a mental health crisis. The new surcharge must be separately stated on service suppliers' invoices and may be combined with the state's existing 911 surcharge.

Colorado: The Colorado Department of Revenue addressed the taxability of a streaming company's sale of platform credits. The taxpayer's online platform enables people to view streaming videos, including videos created by third-parties referred to as "Streamers". The platform credits can be used to show support for Streamers, as well as provide enhanced interaction with those Streamers. The ruling concluded that no state or state-administered sales tax was due when the company sold the platform credits or when the credits were redeemed by the purchaser.

Georgia: The Georgia Tax Tribunal recently concluded that a ride-sharing company was required to collect sales tax on a separately-stated fee that was imposed on trips facilitated through the company's app. The fee was charged to riders to recover the costs of improving the safety of the company's platform. Although the taxpayer argued that the fee was associated with the cost recovery of nontaxable services, the Tribunal concluded that the fee was part of the "sales price" upon which Georgia sales and use tax is imposed.

New York: An Administrative Law Judge (ALJ) in New York concluded that a taxpayer providing email tracking services was selling nontaxable information services and not licensing taxable prewritten computer software. In the ALJ's view, the taxpayer was selling a bundled service, which required the primary function test to be applied to determine taxability. The ALJ determined that the primary function was to provide customers with reports regarding activity associated with emails that the customers sent to their prospective clients.

Texas: The Texas Comptroller determined that a Web-based weather forecasting service was not a taxable information service. In Texas, information services are subject to tax, but an exclusion is provided for the "sale of information primarily derived from laboratory, medical, or exploratory testing or experimentation or any similar method of direct scientific observation of physical phenomena." In this case, the taxpayer primarily derived its service from the direct scientific observation of physical phenomena – the weather.

We will continue to publish the Techlist on a quarterly basis to help keep clients apprised of important developments. If you have any questions about the Techlist, please contact Audra Mitchell or Reid Okimoto.

State	Category	Development	Authority
Arkansas	Streaming Services	The Eighth Circuit Court of Appeals ruled that the Arkansas Video Service Act (VSA) did not grant an express or implied right for the city of Ashdown and other municipalities to bring enforcement actions against video service providers. The VSA establishes a franchising scheme for authorizing video service providers to provide their services in political subdivisions within the state. The businesses sued by Ashdown were providing online video streaming services in Arkansas but did not obtain certificates of franchise and did not pay the VSA's required fee. Ashdown argued that the VSA created both express and implied rights of action for municipalities to bring claims against video service providers. The Eighth Circuit disagreed. First, the court reasoned that the VSA expressly conferred a right of action to the state Public Service Commission, so the legislature's failure to use explicit language regarding a right of action for municipalities supported the conclusion that the legislature did not intend to create such a right. Finally, the court found that municipalities are not a special class that the legislature intended to protect through the VSA; therefore, Ashdown did not have an implied right of action under the VSA.	No. 21-3435

State	Category	Development	Authority
Colorado	Streaming Services	In a recent private letter ruling, the Colorado Department of Revenue addressed a streaming company's sales of platform credits and the subsequent redemptions by purchasers of the credits. The company's online platform enables people to view streaming videos, including videos created by third-parties referred to as "Streamers". In return for purchasing streaming platform credits, the viewer receives the ability to send the credits along with small images or graphics to a Streamer to show support or to be noticed by the Streamer. The Streamer does not receive the credits or any dollar value associated with the credits at the time they are sent, but later receives a monthly payout from the company. The platform credits can also be used to purchase access to subscriber-only chats, or interactive enhancements to the Streamers' videos or chats. The Department analogized the sales tax considerations for sales of streaming platform credits to those arising from selling a gift card. If a gift card represents the issuer's agreement to provide goods or services, then sales tax will only be imposed when the card is redeemed and not when it is acquired. A subsequent transaction in which a purchaser redeemed a gift card would only be taxable if the purchaser received property that was subject to sales tax. Applied to the company's streaming platform credits, the Department found that they were not associated with the sale of tangible personal property, and therefore not subject to tax. To the extent that the credits compensate the Streamer, the Department viewed the credits as nontaxable gratuities. The Department considered the additional enhancements to be either sales of nontaxable services, or sales of electronically delivered computer software which is also excluded from taxation.	PLR-22-005

State	Category	Development	Authority
Nevada	Streaming Services	The Ninth Circuit Court of Appeals held that Nevada's Video Service Law (VSL) does not confer an express or implied right of action on cities to bring lawsuits against streaming service providers for failure to pay local franchise fees. Under the VSL, providers of video services are required to obtain a certificate of authority from the Secretary of State to provide video services. In addition, the VSL authorized local governments to impose franchise fees on the gross annual revenue derived by video service providers from local subscribers. The City of Reno alleged that certain streaming providers were video service providers as defined by law but failed to pay the city's franchise fees and sought monetary relief as well as a declaration that the streaming providers were covered entities under the VSL. Reno acknowledged that the VSL did not expressly create a private right of action for cities to sue for unpaid franchise fees, but argued that cities had an implied right of action under the VSL. The Ninth Circuit rejected Reno's argument based on a review of the VSL's statutory scheme. Specifically, the VSL's express provisions for enforcement vested in state agencies, not local governments. Further, nothing in the VSL's legislative history suggested an intent to permit a private right of action to local governments. Because Reno did not allege a cognizable cause of action, the court found that Reno had no basis to seek declaratory relief. Therefore, the Ninth Circuit affirmed the district court's dismissal of Reno's complaint.	No. 21-16560

State	Category	Development	Authority
Indiana	Streaming Services/ Digital Equivalent	In a recent revenue ruling, the Indiana Department of Revenue addressed whether a streaming company's sales of virtual items were taxable as sales of specified digital products. The taxpayer's online platform enables the viewing of streaming videos, including videos of third parties, referred to as "Streamers," performing activities such as playing video games or cooking. Viewers can interact with the live streams by commenting or sending virtual items to the Streamers. Virtual items are images that appear in a chat function which notifies the Streamer and other viewers that a viewer has sent the virtual item. A viewer must purchase virtual items, and the viewer can decide how many virtual items it will send to a Streamer. Sending virtual items does not grant a viewer any special privileges or access. Viewers may also spend virtual items on interactive overlays which provide enhancements to Streamers' videos or chats. When a viewer sends virtual items to a Streamer, the Streamer does not actually receive the virtual items or any dollar value conversion of the items. Instead, the taxpayer later rewards Streamers for the number of virtual items they receive in a monthly payout. Indiana imposes a sales tax on specified digital products transferred electronically. Indiana defines specified digital products as digital audio works, digital audiovisual works, and digital books. In addition, a digital code is subject to tax in the same manner as the product transferred electronically. A person is engaged in making a retail transaction when the person electronically transfers a specified digital product to an end user and grants the end user the permanent right to use the specified digital product that is not conditioned upon continued payment by the purchaser. The Department analyzed the sales tax considerations of the virtual items and concluded that they were neither specified digital products nor digital codes. Once a purchaser sends a virtual item, the purchaser cannot not display the virtual item a second time without purchasing and sending another virtual item. Therefore, in the Department's view, the purchaser did not have the requisite permanent use of the virtual items.	Revenue Ruling No. 2022-03ST

State	Category	Development	Authority
New York	Information Services	An Administrative Law Judge ("ALJ") for the New York Division of Tax Appeals recently concluded that a taxpayer providing email tracking services was providing nontaxable information services, not licensing taxable prewritten computer software. The taxpayer's mission was to help companies market smarter by identifying effective and ineffective email messaging. In all cases, the taxpayer's customers used their own email application to interact with their clients. To provide these services, the taxpayer tracked data received from email recipients and provided individualized reports that summarized a customer's sales leads. After an audit, the Division of Taxation ("Division") asserted that the taxpayer was selling prewritten computer software and issued an assessment accordingly. The taxpayer challenged this assessment. The ALJ disagreed with the Division's conclusion that the taxpayer was licensing prewritten computer software. In the ALJ's view, the taxpayer's service was a bundled service, and the primary function test must be applied to determine its taxability. The ALJ determined that the primary function of the taxpayer's service was to provide customers with reports regarding activity that occurred with the emails they sent to their prospective clients, including whether they read the emails, clicked links, downloaded attachments, or replied to the emails. To provide this service, the taxpayer tracked, processed, and analyzed data received from email recipients and generated information and individualized reports to assist clients with their email prospecting and customer relations. While the taxpayer provided software to customers as part of its services, the ALJ concluded that customers did not have the use of the software, or access to the software. Because the reports provided to clients consisted solely of the customer's own data and the reports were not furnished to or incorporated in reports to others, the ALJ concluded that the taxpayer was providing a nontaxable information service.	Matter of Petition of Yesware, Inc.

State	Category	Development	Authority
Texas	Information Services	The Texas Comptroller ruled that a Web-based weather forecasting service was not a taxable information service. The taxpayer's service included location-specific forecasts, severe weather alerts, and on-demand email and phone access to meteorologists. To provide its service, the taxpayer purchased third-party meteorological data and employed in-house meteorologists to create forecasting models. The taxpayer's clients included retailers, refineries, oil rigs, and technology firms that utilized the taxpayer's forecasts when determining whether to perform shut-down or emergency operations. In Texas, information services are subject to tax and are defined as "furnishing general or specialized news or other current information, including financial information." An exclusion is provided, however, for the "sale of information primarily derived from laboratory, medical, or exploratory testing or experimentation or any similar method of direct scientific observation of physical phenomena." Examples include geophysical survey information, polygraph tests, and medical test results. In response to a letter ruling request, the Comptroller found that the taxpayer primarily derived its service from the direct scientific observation of physical phenomena and, therefore, the service was not subject to tax.	Private Letter Ruling No. PLR20210503122657

State	Category	Development	Authority
Georgia	Other	The Georgia Tax Tribunal recently addressed whether a ride sharing company was required to collect sales tax on a "safe rides fee" or "booking fee" that was imposed on certain trips facilitated through the company's app. The separately stated flat fee was charged to a rider and paid over to the company directly to recover the costs of improving the safety of the company's platform by conducting driver background checks, developing safety features in the app, and other efforts. The issue before the Tribunal was whether the fee was included in the Georgia sales tax base. Under Georgia law, sales tax is imposed on the "sales price" of goods and services. The definition of "sales price" is broad and generally means the total amount for which property or services are sold without any deduction for expenses. The company asserted that under a departmental regulation governing taxicabs, it was only required to collect sales tax on fares related to transportation. In addition, in the company's view, the safety or booking fee was a distinct and identifiable charge to recover costs of certain non-taxable services and was therefore not part of the sales price of a ride. The Tribunal rejected the company's assertions, noting that Georgia's definition of sales price was broad and captured fees related to non-taxable services that were part of the total consideration paid for a ride service. Further, none of the specific exclusions from the definition of sales price captured the costs the company was recovering. The Tribunal rejected the company's assertions, noting that Georgia's definition of sales price was broad and captured fees related to non-taxable services that were part of the total consideration paid for a ride service. Further, none of the specific exclusions from the definition of sales price captured the costs the company was recovering.	Decisions | Georgia Tax Tribunal

State	Category	Development	Authority
Tennessee	Taxability of Software	The Tennessee Department of Revenue recently addressed the taxability of a taxpayer's platform and mobile application used to create and manage advertising listings. Under Tennessee law, computer software, including remotely accessed computer software, is subject to sales and use tax. The taxpayer's product was used to produce advertisements, which were then deployed to other platforms. The product then consolidated data related to the advertisements on a user's dashboard. The taxpayer suggested that while its product may involve access to and use of computer software, those components were ancillary to its primary function, which was the provision of nontaxable advertising services. The Department disagreed, determining that the taxpayer was providing software that facilitated the creation and management of a user's own advertising. The product – software – was being used for its functionality, and a customer was not purchasing an advertising service.	Ruling 22-07
Tennessee	Taxability of Software	The Tennessee Department of Revenue recently provided a ruling on a taxpayer's compliance monitoring services. The taxpayer's services utilized the taxpayer's own proprietary data set, which the taxpayer constantly verified, enhanced, and updated. The scope and extent of each of the taxpayer's four service offerings varied slightly, but generally each service allowed customers to monitor certain information (e.g., information on a customer's employees or vendors) against the taxpayer's proprietary data set. The customers accessed the services either through the taxpayer's online portal or through an API. Although the Department noted that the API could broadly be seen as taxable computer software, the Department applied the true object test and concluded that the use of the online portal or API was merely incidental to providing nontaxable information and data processing services. The Department's ruling noted that there was no additional charge for the API, and that the online portal and the API were being used only to gain access to the nontaxable services.	Ruling 22-08

State	Category	Development	Authority
California	Telecommunication Services	California implemented a 988 surcharge for sellers of telecommunications and prepaid mobile telephony services. Assembly Bill 988 establishes the 988 State Suicide and Behavioral Health Crisis Services Fund and imposes an $0.08 surcharge for each access line per month as well as each retail sale of prepaid mobile telephony service. A service supplier shall collect the surcharge from each service user at the time the supplier collects its billings from the service user. The surcharge must be separately stated in a billing, but the service supplier may elect to combine the existing 911 surcharge and the new 988 surcharge into a single item on a service user's billing. The 988 surcharge took effect on January 1, 2023.	Assembly Bill 988

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