State and Local Tax Technology Checklist

Guidance from the second quarter of 2024

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 second quarter of 2024. Topics covered include access to web-based services, data center exemptions, streaming services, and telecommunications services. Highlights include:

Louisiana: Before the Louisiana Board of Tax Appeals, a taxpayer successfully challenged a sales tax assessment from the City of New Orleans relating to music streaming subscriptions. The taxpayer argued that the City's taxation of its music streaming subscriptions was an illegal, discriminatory tax on electronic commerce that was barred by the Internet Tax Freedom Act (ITFA). The taxpayer put forward uncontroverted evidence that a satellite music provider's service was not taxed by the City, and the Board concluded that this represented a violation of the ITFA.

Utah: The Utah Tax Commission found that a taxpayer's affiliate marketing services, including the sale of online advertising space to merchants, were not subject to sales and use tax. The taxpayer procured and sold online ad space, managed an online platform for merchants and publishers, and offered tracking and reporting services for calculating commissions. Applying the essence of the transaction theory, the Commission determined that the primary purpose of the transaction was the provision of non-taxable advertising or marketing services, making the entire transaction nontaxable.

Oklahoma: Recently enacted House Bill 1600 provides a sales tax exemption for the purchase of machinery and equipment used in the commercial mining of digital assets. Eligible items include servers, computers, racks, power distribution units, cabling, switchgear, transformers, substations, software, network equipment, and electricity. "Commercial mining of digital assets" means the process through which blockchain technology is used to mine digital assets at a colocation facility.

Kansas: House Bill 2098, enacted by the Kansas Legislature over Governor Laura Kelly's veto, establishes a broad sales tax exemption for the purchase of equipment, machinery, software, ancillary components, appurtenances, accessories, and other infrastructure used in providing communications services. The exemption also covers services purchased by communications service providers for the repair, maintenance, or installation of such communication service.

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.

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State	Category	Development	Authority
Utah	**Access to Web-Based Services**	The Utah Tax Commission clarified that a taxpayer's affiliate marketing services, including the sale of online advertising space to merchants, were not subject to sales and use tax. The taxpayer procured and sold online ad space, managed an online platform for merchants and publishers, and offered tracking and reporting services for calculating commissions. The taxpayer charged a one-time set-up fee; a monthly minimum fee or an alternative transaction fee; and optional data feed fees. The Commission determined that the optional data feed fees were non-taxable delivery charges under Utah law. The Commission also found that the one-time set-up fee and the monthly/transaction fees were part of the "purchase price" for the taxpayer's marketing services and would therefore follow the taxability of those services. The Commission concluded that the taxpayer's services were not a bundled transaction but instead "worked together as a single item." Applying the essence of the transaction theory, the Commission determined that the primary purpose of the transaction was the provision of non-taxable advertising or marketing services, making the entire transaction nontaxable. With regard to the potentially taxable sale of the taxpayer's software in the form of its online platform, the Commission stated that the software primarily supported the nontaxable sale of advertising space, and therefore was not subject to tax.	Private Letter Ruling 21-004
Kentucky	**Data Center Exemption**	Kentucky's Department of Revenue provided guidance on a new sales and use tax exemption for the sale, purchase, use, storage, consumption, installation, repair, and replacement of data center equipment. Covered equipment includes servers, routers, monitoring systems, fiber optic cabling, network equipment, computer software, and other essential items, but excludes construction equipment, building materials, electricity, and administrative office equipment. To qualify, data centers must meet requirements and receive approval from the Kentucky Economic Development Finance Authority (KEDFA) under Kentucky law. The Department of Revenue will issue a certificate of exemption to approved companies, which can be used for tax-free purchases of data center equipment. This exemption is limited to sites within a consolidated local government with a population of 500,000 or more. Starting September 1, 2025, and annually thereafter, approved companies must report an itemized schedule of tax-free data center equipment purchases to the DOR on a fiscal year basis. This exemption is effective July 15, 2024.	Sales Tax Facts —June 2024

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Louisiana	**Data Center Exemption**	Effective July 1, 2024, Louisiana enacted House Bill 827, which provides for state and local sales and use tax rebates for taxes paid on the purchase or lease of eligible data center equipment and the development, acquisition, construction, lease, repair, refurbishment, expansion, and renovation of a qualified data center. Key elements include: 1. **Eligibility and certification:** Data centers must be certified by the Louisiana Department of Economic Development (LED). Approved data centers will be automatically issued a direct payment number for the contract's duration. 2. **Job creation and investment:** The data center must create at least fifty new direct permanent jobs and plan to invest a minimum of $200 million in new capital in Louisiana between July 1, 2024 and July 1, 2029. 3. **Rebate duration:** The rebate obligation lasts for 20 years, with the option for the LED to extend the agreement for an additional 10 years, totaling 30 years. 4. **Regulation:** The Louisiana Department of Revenue and Uniform Local Sales Tax Board may establish rules for the implementation of the exemption. 5. **Claw-back provisions:** Provisions are included to allow the LED to terminate the agreement and recapture rebates if the data center fails to meet the investment or job creation requirements.	H.B. 827
Tennessee	**Data Center Exemption**	Tennessee Governor Bill Lee signed H.B. 2182, which expanded Tennessee's sales and use tax exemption for qualified data centers. The new law broadens the definition of a qualified data center to include those transferred to an affiliate pursuant to a reorganization under § 368(a) of the Internal Revenue Code. The qualified data center must have previously made the required capital investment of over $100 million within three years and the creation of at least 15 full-time jobs paying 150 percent of the state's average occupational wage. H.B. 2182 took effect May 1, 2024.	H.B. 2182
Oklahoma	**Other**	Oklahoma's House Bill 1600 provides a sales tax exemption for the purchase of machinery and equipment used in the commercial mining of digital assets. Eligible items include servers, computers, racks, power distribution units, cabling, switchgear, transformers, substations, software, network equipment, and electricity. "Commercial mining of digital assets" means the process through which blockchain technology is used to mine digital assets at a colocation facility. To qualify, commercial mining activities must occur in a colocation facility with a load reduction agreement with the local electric cooperative, municipality, electric utility, or market operator to temporarily reduce or curtail the customer's use of electric power in order to respond to inclement weather or other adverse conditions. This exemption takes effect on November 1, 2024 and ends on December 31, 2029.	H.B. 1600

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Louisiana	**Streaming Services**	The Louisiana Board of Tax Appeals granted taxpayer's motion for summary judgment challenging a sales tax assessment from the City of New Orleans relating to sales of taxpayer's music streaming subscriptions. In its motion, taxpayer argued that taxing its music streaming subscriptions was an illegal, discriminatory tax on electronic commerce barred by the Internet Tax Freedom Act (ITFA). Under ITFA, a "discriminatory tax" is one imposed on electronic commerce but not generally imposed on transactions involving similar property, goods, services, or information accomplished through other means. Taxpayer put forward evidence, which was not disputed by the City, that a satellite service provider's music streaming services were not subject to the City's sales tax, as the Federal Telecommunications Act preempts local taxation of direct-to-home satellite service. Based on this evidence, the Board concluded that the City was attempting to impose its sales tax in a discriminatory manner in violation of ITFA.	*Apple Inc v. Samuel, La. Board of Tax Appeals,* No. L01283
New York	**Taxability of Software**	The New York State Division of Tax Appeals upheld an administrative law judge's decision that a taxpayer providing a vendor management system (VMS) for linking customers with temporary labor suppliers was liable for sales tax on its VMS fees. While the taxpayer's services included consulting and training, these services were packaged with the VMS software as one integrated service. The Division noted that the taxpayer's customer agreements granted a license to use the VMS, which was a web-based application delivered via a software-as-a-service (SaaS) model. The Division found that the VMS software fell within the definition of prewritten software, and was therefore taxable as tangible personal property under New York law. The taxpayer argued that the primary purpose of its service was connecting labor buyers and suppliers, with software merely enhancing efficiency. However, the Division rejected this argument, finding that the software was the central element of the taxpayer's business, and affirmed the administrative law judge's decision.	In re Beeline. com, Inc., N.Y. Tax App. Trib., No. 829516
New York	**Taxability of Software**	The New York State Division of Tax Appeals affirmed the sales tax assessments of taxpayers that provided facilities management services as bundled subscriptions that included software components. The taxpayers' facilities management services included the provision of 24/7 call center access, a web-based portal, work order management, vendor management, electronic invoicing, and data analytics. The administrative law judge agreed with the Division of Taxation that the taxpayers' subscription sales of facilities management services were a mixed bundle of property and services which included prewritten software. The taxpayers argued that the software component of their services was a software ticketing system that merely functioned as a communication tool between the taxpayers and their customers and vendors. The ALJ rejected this argument, however, finding that the taxpayers had advertised that the software was an integral part of their product, and that the technical elements of the software did in fact provide important functionality to the taxpayers' customers. The ALJ found that when a bundle of taxable and nontaxable property is sold together for one charge, the entire charge is subject to tax, and here, the taxpayers' subscriptions were properly deemed to be taxable prewritten software.	In re FacilitySource, LLC , N.Y. Tax App. Trib., No. 829500

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Vermont	**Taxability of Software**	The Vermont General Assembly enacted House Bill 887, overriding Governor Phil Scott's veto, to impose sales tax on remotely accessed software, among other provisions. The definition of "tangible personal property" now includes prewritten computer software "regardless of the method in which the prewritten computer software is paid for, delivered, or accessed, including remotely or hosted by a vendor or the vendor's designee, or both." This provision takes effect on July 1, 2024.	H.B. 887
Massachusetts	**Telecommunication Services**	The Massachusetts Department of Revenue published Technical Information Release 24-3 to summarize the Commissioner's position with respect to the Massachusetts Appeals Court's decision in *Pixley v. Commissioner of Revenue.* In the *Pixley* case, the Appeals Court ruled in favor of the taxpayers, reversing a previous decision by the Superior Court. The dispute centered around the validity of Department of Revenue Directive 11-2, which stipulated that the taxable sales price of a cell phone sold in a bundled transaction (where a consumer buys a phone at a discount and commits to a wireless service contract) should be the higher of either the amount paid by the consumer or the wholesale cost of the phone. The Appeals Court found that Massachusetts sales tax law does not permit taxing an amount higher than what the consumer pays. Therefore, Directive 11-2 was deemed invalid. As a result of this ruling, the Commissioner stated that Directive 93-9, which also required collecting tax on non-cash consideration exchanged in bundled transactions, was also invalidated. Other existing regulations and directives, including 830 CMR 64H.1.4 and Directive 94-2, remain valid. These include provisions stating that discounts on the price of a cell phone at the time of sale must be excluded from the sales price and that phones provided at no or nominal cost as part of bundled transactions are considered promotional items. For promotional items, the vendor is responsible for paying sales or use tax on the phone's wholesale price, though the vendor may collect sales tax from the customer on the nominal price and offset it against their tax liability. The Department of Revenue will apply these rules prospectively and retroactively to any open tax periods, allowing vendors who overpaid sales tax based on Directive 11-2 to seek abatements.	TIR 24-3: *Pixley v. Commissioner of Revenue*
Kansas	**Telecommunication Services**	House Bill 2098, enacted by the Kansas Legislature over Governor Laura Kelly's veto, makes a number of changes to Kansas' sales and use tax laws. The bill establishes a broad sales tax exemption for the purchase of equipment, machinery, software, ancillary components, appurtenances, accessories, and other infrastructure used in providing communications services. "Communications service" means internet access service, telecommunications service, video services, or any combination thereof. The exemption also covers services purchased by communications service providers for the repair, maintenance, or installation of such communication service. The bill includes a detailed, non-exhaustive list of items qualifying for the exemption. This exemption takes effect on July 1, 2024, and is set to expire on July 1, 2029.	H.B. 2098

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Washington	**Telecommunication Services**	The Washington Court of Appeals affirmed a lower court's decision and ruled that a taxpayer's sales of prepaid wireless airtime were subject to the City of Renton's municipal utility tax. The taxpayer's business involves buying wireless airtime from network carriers and "reselling" the airtime to consumers and wholesale retailers in the form of prepaid wireless airtime cards. The City assessed the taxpayer for municipal utility taxes on both the consumer and wholesale sales. The taxpayer appealed, but the City's hearing examiner and the King County Superior Court both ruled in favor of the City. Before the Court of Appeals, the taxpayer argued it was not a "telephone business" under state law and that its wholesale sales were exempt. However, the court found that the taxpayer provided access to telephone networks through its prepaid airtime sales, meeting the statutory definition of a telephone business. With regard to the taxpayer's claim that its wholesale sales should be exempt as sales for resale, the court concluded that the taxpayer retained control over wireless airtime in its contracts with retailers, and that retailers did not resell this airtime independently. Therefore, the taxpayer's wholesale sales were not exempt from the utility tax.	*Tracfone Inc. v. City of Renton;* No. 85094-6-I
West Virginia	**Telecommunication Services**	The West Virginia Intermediate Court of Appeals affirmed a lower court's decision denying a taxpayer's use tax refund claim based on the taxpayer's provision of free cell phones to customers. The taxpayer owned and operated wireless network equipment as well as branded retail stores in West Virginia. Following the taxpayer's purchase of retail stores formerly operated by a third-party retailer, the taxpayer purchased mobile phones and gave them away for free to customers of the former retailer in order to retain them as subscribers of the taxpayer's affiliated wireless telecommunications provider. The taxpayer paid use tax on these phones but later sought a refund, arguing that the phones qualified for the state's "direct use exemption" or, alternatively, that the phones qualified for the purchase-for-resale exemption. The appellate court upheld the lower court's decision, which found that the phones were used for marketing purposes, and not directly used in the taxpayer's communication activities, thereby disqualifying them from the direct use exemption. The appellate court also agreed that the phones were not purchased for resale since they were given away by the taxpayer without charge, and no sales tax was collected from customers. Therefore, the taxpayer's use tax refund claim was denied.	*Shenandoah Pers. Commc'ns LLC v. Irby*, W. Va. Ct. App., No. 23-ICA-235

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