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Top 10 Sales Tax Developments



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Should Use Tax Be Apportioned?

- *Ellingson Drainage, Inc. v. Dep't of Revenue, No. 30280 (S.D. February 7, 2024)*
 - Facts:
 - Ellingson brought equipment into the state for 30 drainage projects.
 - South Dakota DOR assessed a 4.5% use tax on the value of the equipment that Ellingson used in the state from March 2017 to January 2020.
 - State valued the property at \$1.23 million, after accounting for depreciation, resulting in an assessment of ~\$60,000 in use tax and ~\$15,000 in interest.
- Massachusetts DOR also seeking use tax on rolling stock (trucks and trailers)
 - Directive 23-1 issued providing DOR's administrative position that a taxpayer whose "rolling stock" (e.g., a truck or trailer) enters the state for more than **six days** will be subject to the full amount of use tax on the rolling stock, subject to a credit for tax paid in other jurisdictions.

Should Use Tax Be Apportioned? (cont'd)

- ***Ellingson Drainage, Inc. v. Dep't of Revenue, No. 30280 (S.D. February 7, 2024)***

- **Holding:**

- Upheld the DOR's assessment, reasoning: "Having paid the use tax on its equipment that had otherwise not been subject to sales or use tax in another state, Ellingson was and is free to bring the equipment back to work on jobs in South Dakota where Ellingson will continue to enjoy the privilege of conducting its business without being subject to additional use tax."
- Cert petition filed with SCOTUS on May 7, 2024. **Cert. denied 10/7/24.**
- Is Dilworth, 322 U.S. 327 (1944), still good law? "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and . . . may have to justify themselves on different constitutional grounds."

Fair Apportionment Prong - developments

- **Internal Consistency**

- Internal Consistency Test - concerned with multiple taxation.
- ***Comptroller of MD v. Wynne (2015)***
 - MD's tax scheme failed the internal consistency test, because that tax's identical application by every state would place interstate commerce at a disadvantage as compared with intrastate commerce, by creating an incentive for MD taxpayers to opt for intrastate rather than interstate economic activity.

- **External Consistency**

- External Consistency Test - concerned with whether the taxing authority is seeking to tax its fair share based on in-state activity.
- ***Goldberg v. Sweet (1989)***
 - Expands on the external consistency test by reasoning that a tax is externally consistent if it is reasonably limited to the in-state activity, which triggers the taxable event considering its practical or economic activity.

Fair Apportionment Prong – developments (cont'd)

- **External Consistency (cont'd)**
 - ***Okla. Tax Comm. v. Jefferson Lines, Inc. (1995)***
 - Adopted the general principle that if a tax is internally consistent, it will similarly be found externally consistent as well. This presumption can be overcome by showing successive taxation that is so closely related to the transaction as to indicate the potential unfairness of imposing sales tax on the total transaction price.

Pros and Cons of Use Tax Apportionment

- **Reasons to Support Use Tax Apportionment**
 - It's a better way to address temporary use of product in a state
 - Use tax should be based on FMV of a product taking into consideration the time a product is used in a state
 - Current credit for tax legally paid to another state does not work
- **Reasons to be Concerned with Use Tax Apportionment**
 - Current credit for sales/use tax legally paid to another state mitigates need for states to apportion use tax
 - Adds complexity, determining FMV and time product used in a state would be burdensome
 - States would be inconsistent on how apportionment would work, and they may no longer allow a full credit for sales tax legally paid to another state
 - Would such apportionment, if done yearly, mimic many states tax on personal property?

Toolpushers Supply Co. v. Miss. Dept. Rev., Miss. S. Ct., Dkt. No. 2021-CT-01186-SCT, 02/22/2024

- Sales tax imposed on all retail sales, meaning all sales except those defined as wholesales
- Wholesales require that the
 - Dealer purchasing for resale be licensed under Miss. Code Ann. § 27-65-27 if located in MS and
 - Sale made in good faith to a retailer regularly selling or renting that property
- 2013 – 2016 audit period
 - Toolpushers had collected copies of sales tax permits issued under Miss. Code Ann. § 27-65-27 from all customers
 - DOR, BOR, BTA, Chancery court, Court of Appeals and Supreme court agreed there are 2 requirements to validate wholesale has occurred
- What constitutes good faith?
 - Do you resell this property?
 - Do you use/consume this property?

'business/sales-tax-frequently-asked-questions

General

Does Mississippi impose a sales tax? ▼

What is the difference between sales and use tax? ▼

What is the difference between real property and tangible personal property? ▼

What is the difference between gross proceeds of sales and gross income? ▼

What are wholesale sales? ▲

Wholesale sales are sales of tangible personal property to licensed retail merchants, jobbers, dealers, or other wholesalers for resale. It does not include sales to users or consumers that are not for resale. The seller must maintain the sales tax number or exemption letter for these customers along with a description of the items sold and the sales amount of the items.

[Back to Top](#)

Walmart Starco LLC v. Dir. Of Revenue (Mo. Admin. Comm'n Feb. 3, 2023)

- A taxpayer was not prohibited from claiming a resale exemption for purchases of information technology (IT) equipment because the equipment was ultimately purchased for resale
- The taxpayer, a wholly owned subsidiary of a large retailer, regularly purchased IT equipment, such as electronic price scanners, credit card readers, computers, and servers, using a resale exemption
 - After the purchase, the taxpayer made various modifications to the IT equipment at its Missouri warehouse. The equipment was later sold to other group members for use in their brick-and-mortar stores for a marked-up amount
 - Group members using the equipment in the retail stores accrued and remitted use tax on these sales based on rates in the jurisdiction in which the store was located
- The Department denied the resale exemption under the state supreme court's decision in *Custom Hardware Engineering & Consulting, Inc.*, which held that a taxpayer that "tested and certified" equipment before shipping it to customers who did not, themselves, remit sales or use tax, could not claim the resale exemption
- The Commission determined that a key fact in *Custom Hardware* was that the taxpayer did not intend to resell the equipment

Walmart Starco LLC v. Dir. Of Revenue (Mo. Admin. Comm'n Feb. 3, 2023) (cont'd)

- Here, evidence showed the taxpayer intended to resell the equipment at the time of the purchase, and the subsequent purchasers remitted sales and use tax in the appropriate jurisdiction
 - Therefore, the taxpayer was entitled to the resale exemption
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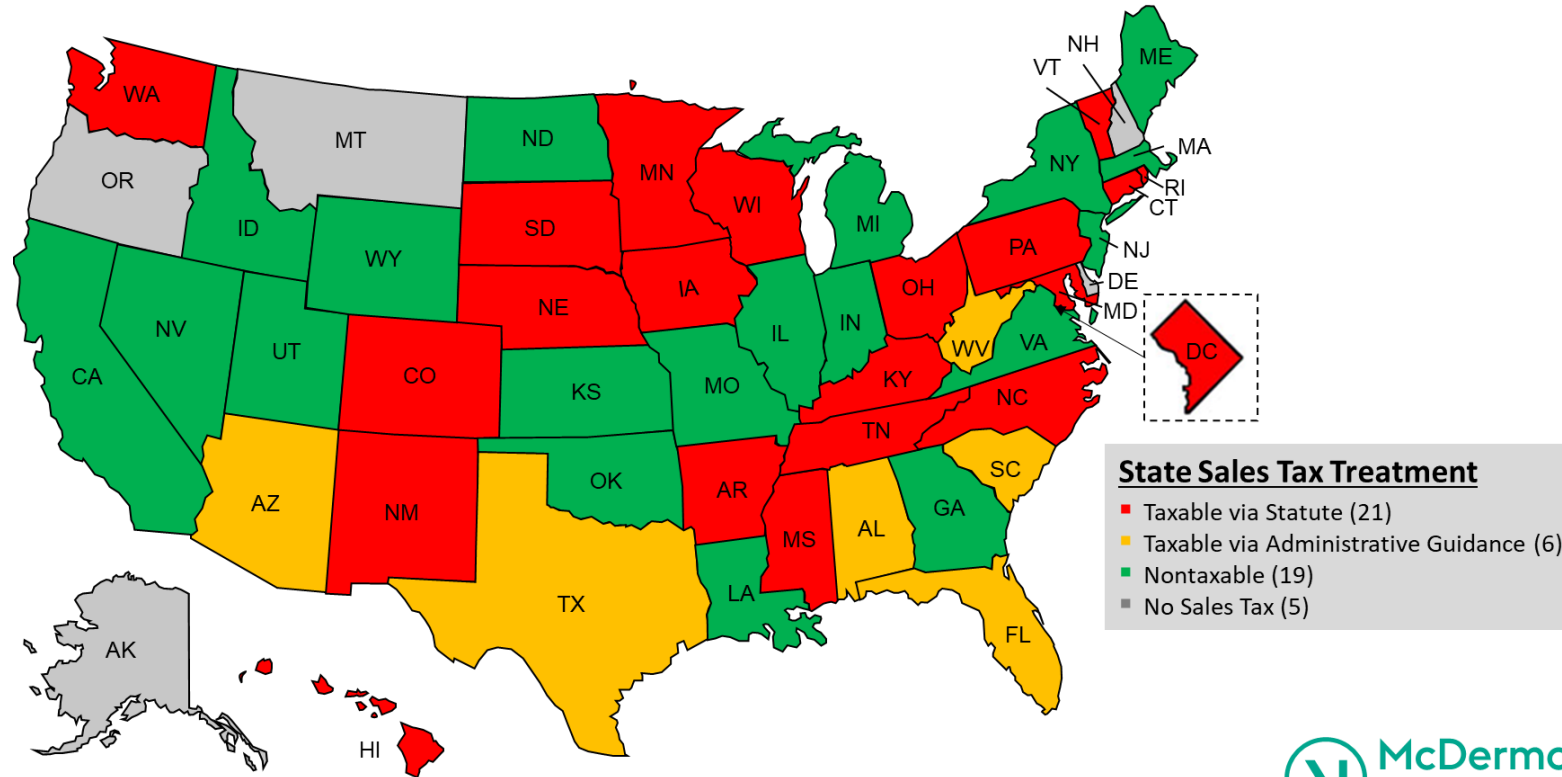
Alsco, Inc. V. Tennessee Dep't of Revenue, Tenn. Ct. App., M2022-01019-COA-R3-CV, 9/6/23

- The Tennessee Court of Appeals affirmed chancery court's conclusion that taxpayer qualified for an industrial machinery sales tax exemption.
- The taxpayer rented hygienically clean textiles to its customers for a single use, after which the textiles were retrieved to be sanitized so they could be rented out again.
- Sanitation process required highly specific chemicals to remove soils from the textiles.
- Tennessee Department of Revenue argued that the process was not manufacturing because there was no fabrication or processing as a result of the cleaning process.
- Taxpayer argued that the chemical cleaning process resulted in a change in composition of the textiles which created a marketable product.
- The Court looked to a prior Tennessee Supreme Court case (*Beare Co. v. Tennessee Department of Revenue*) to define "processing" and noted that nothing in the prior court decision indicated that the change in state or form could not be to a state or form the textile had been at some point in the past.

ADP, LLP v. ADOR and City of Phoenix (Az. Ct. App. Jan. 31, 2023)

- The Arizona Court of Appeals upheld a superior court's order that a taxpayer was renting software subject to the state's Transaction Privilege Tax (TPT) rental classification
 - The TPT applies to and sale, lease or rental of tangible personal property
- The taxpayer, which provides HR and payroll solutions, argued:
 - That software was not tangible personal property;
 - That taxpayer was providing services, not renting out software; and
 - That imposing a tax on an internet-based product when no tax had been imposed for in-person services violated the Internet Tax Freedom Act (ITFA)
- The court upheld the imposition of the tax, ruling that:
 - Under a 1943 decision of the state supreme court, a product that was "perceptible to the sense" was tangible personal property;
 - Because taxpayer's customers gained use and control of the software, the taxpayer was renting out property rather than providing a service; and
 - That the product offered over the Internet was distinct from the in person services that had been offered before they were automated, so there were no ITFA concerns

Taxation of Streaming Services



Streaming Tax Proposals (2023-2024)

- **Massachusetts**
 - H.4631/S.2771 (fmr. H.74/S.34) (2024): Levies a 5% gross receipts tax on a streaming entertainment provider's gross revenues derived from the sale or provision of streaming entertainment services.
- **Michigan**
 - HB 4965 (2023): Clarifies that direct-to-home satellite service and streaming video content does not constitute "video service" under the Uniform Video Services Local Franchise Act.
- **Missouri**
 - HB 2057/SB 872 (2024) (enacted): Clarifies the definition of "video services" subject to franchise fees to explicitly exclude all streaming services.
- **New York**
 - AB 5900/SB 2581 (2023): Imposes 5% excise tax on direct broadcast satellite services or video streaming services to fund community media reinvestment fund.
- **Virginia**
 - HB 30/SB 30 (2024): Imposes sales tax on software application services; computer-related services; website hosting and design; data storage; and streaming services (included a B2B exemption).
- **Vermont**
 - SB 181 (2023): Levies a 5% tax on the gross revenues of streaming entertainment providers and cable companies; telecommunication and broadband companies are not excluded from the definition of "cable companies".

Other Streaming Tax Issues

- Bloomington, IL (Amusement Tax)
 - On July 11, 2022, the city amended its amusement tax ordinance to include streaming.
 - Chapter 39, Article XIX
 - “AMUSEMENT — Includes the provision of exhibitiv e entertainment, including, but not limited to, the following activities and sports: ... Any video streaming, audio streaming or remotely accessed online games made available to patrons on a pay-per-use, rental or other subscription basis, but not transactions where the patron pays for the rights of permanent use”. Bloomington Municipal Code § 39-1901(E).
- CA Utility Users Tax (UUT)
 - Third-party local audit firm Avenu Insights & Analytics continues to push California cities to audit over-the-top streaming service providers for UUT compliance.
 - Avenu argues that many of its client-cities have broad/modernized ordinance sufficient to capture such services within the scope of the “video services” imposition.
 - Many city ordinances define “video services” as “‘video programming’ using one or more channels by a ‘video service supplier,’” and a “video service supplier” as a person providing “one or more channels of video programming.”
 - Since streaming video suppliers do not provide “channels of video programming” under the plain language of most UUT ordinances, they should not be required to collect the UUT on charges for streaming video services.
 - *Disney vs. City of Santa Barbara*, Docket No. 24CV02314 (Cal. Super. Ct. Apr 24, 2024): Petition seeks appellate review of Santa Barbara’s Hearing Officer’s decision (Jan. 25, 2024) upholding the city’s application of its “Video Users’ Tax” (enacted in 2008) on streaming services.
- Class action litigation pending in state/federal court alleging failure of over-the-top video streaming services providers to pay AZ, IN, MO, NV, and OH “franchise fees” to localities.

Other Streaming Tax Issues

- **West Virginia**

- In 2021, the West Virginia State Tax Division issued TSD-445 providing that sales of all streaming services are subject to the state's sales and use tax unless a specific exemption applies.
- The guidance distinguishes streaming services from digital products, which are not taxed.
- In Sept. 2021, the Division amended its Streamlined Sales Tax Taxability Matrix, stating that "West Virginia imposes a sales tax on the provision of services. The provision of streaming services is subject to this tax. However, rentals and similar nonpermanent use of digital audio works are not subject to this tax."
- Enforcement began November 1, 2021, after an initial period where businesses were given relief for non-compliance.
- The SST Governing Board reviewed the Division's actions, with some contention regarding compliance with the SSUTA.
- In Oct. 2022, the motion to find the state out of compliance failed on a roll-call vote
- The Business Advisory Council filed a petition for resolution and reconsideration of the Board's actions
- In its 2023 State Annual Compliance Review Report, the Compliance Review and Interpretations Committee recommended that the state be found not out of compliance with the agreement
- In Nov. 2023, the Board took the recommendation under consideration; 18 states voted that West Virginia was not out of compliance

Illinois: Leveling the playing field.... The saga continues

- 35 ILCS 105 – Use tax provisions
- 35 ILCS 120 – Retailer’s occupation tax (ROT)
- In many instances the use tax is often lower than the ROT

- Effective January 1 2020: 35 ILCS 185 Leveling the Playing Field for Illinois Retail Act
 - Act intended to simplify the collection of Illinois taxes from remote sellers by
 - Establishing Certified Services Providers
 - Maintaining electronic database of ROT rates taxability of products
 - Retains origin sourcing for all transactions by retailers maintaining a physical presence in Illinois.
 - Out of state sellers with no IL presence must collect ROT at destination rate

- Effective January 2025, SB 3362
 - Even for retailers with a presence in IL, when sales of TPP occur from location outside IL, this is now also subject to ROT at the destination rate.

Marketplace Facilitators

- Sourcing
 - Tennessee Notice #20-15: updates sourcing rule for services sold. All sales including taxable services, made through a marketplace facilitator are sourced to where product is received
 - Missouri MPF only applies to seller's use tax and not sales tax
- Delivery services and double taxation: Seek relief for issues around double taxation.
 - Aug 2024 – Streamline indicated they were working with companies to release guidance on how member states could handle food delivery companies
 - NCLS has advised states should consider “tax paid on purchases resold deduction”
 - CA, FL, MD and TN already have carveout exceptions
- Information collection
 - California expands scope of impacted marketplaces required to collect seller information in SB 1144 effective July 2025.

SST Sourcing/Situsing Rules

- **Waterfall (Hierarchy) Approach - Section 310.A of SSUTA**

- **First**, when the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location – e.g., over-the-counter sale.
- **Second**, when the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser)
- **Third**, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
- **Fourth**, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
- **Fifth**, (default to origin sourcing) the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold). SSUTA is trying to avoid this by requiring 5- or 9-digit zip code.

SSUTA New Sourcing Requirements for Liability Relief

- For over 3 years the SSUTA states and the business community have participated in a workgroup to address sourcing of products that do not require an address (e.g., some digital products).
- At the SSUTA May, 2024 Gov. Board Meeting the SSUTA was amended to:
 - Require sellers to ask for full purchaser address information or the purchaser's 9-digit zip code, and those fields on an Internet site cannot be listed as "optional."
 - Require a seller to at least obtain a 5-digit zip code for liability relief,
 - Allow states with local taxing jurisdictions to use a blended or the highest rate in a 5-digit zip code. Currently, the default is the lowest rate in a 5-digit zip code.
- While the BAC opposed some of these changes, the amendment passed. One very frustrating amendment to the amendment made the day before the Governing Board met was the removal of refund provision that would require states using a blended rate or the highest rate in a 5-digit zip code to provide refunds to purchasers in certain circumstances. It is hoped that will be revisited.

SSUTA Sourcing – Special Rules

- Special rules and/or examples provided, including for
 - Lease or rental of tangible personal property
 - Watercraft, modular, modular, manufactured or mobile homes, Motor vehicles, semi-trucks, aircraft
 - Software, licenses, subscriptions, computer related services, maintenance
 - Direct mail, telecommunications, personal services

SSUTA Sourcing – What is Possession?

- **“Receive” and “receipt”**
 - Taking possession of tangible personal property
 - Making first use of services; or
 - Taking possession or making first use of digital goods, whichever comes first
- Does not include possession by a shipping company on behalf of purchaser.

SSUTA Treatment of Services

- **First Use of Services**
 - Subjective
 - Can apply simultaneously at multiple locations
- **Other Approaches used by States**
 - State where the services are provided; or
 - Where the benefit of the services is received by the purchaser
- **Significant risk for duplicate taxation**

The MTC Digital Tax White Paper Project

- Beginning in June 2021, the Multistate Tax Commission (MTC) Uniformity Committee embarked on a project to produce a white paper on the state sales taxation of digital products.
- Among the MTC project's initial conclusions in November 2021 were:
 - “The majority of people are supportive of this project and can see value from the MTC proceeding to help provide information and guidance to policymakers, taxpayers, and tax administrators.”
 - “Washington state is a good model among the states as to how to tax digital items given the broad definitions and clear guidance.”
 - In 2009, Washington enacted a sweeping statute that extended its sales tax base to a broad range of digital commerce including digital goods, digital automated services, and remote access software. The Washington statute has a very limited B to B exemption.
- At the August 2022 meeting of the Uniformity Committee, the committee reviewed the proposed draft outline and agreed that a project work group should be formed to provide ongoing input and review of the white paper, as it is developed.
- At its October 2022 meeting, the work group asked MTC staff to begin work on possible definitions, specifically requesting ideas on how to define the universe of “digital products” that will be the focus of the project's efforts.
- The workgroup has not formalized a White Paper to date and has most recently been speaking with stakeholders about the impact of bundling.
- NSCL also has a workgroup looking at states imposing tax on digital products.

SSUTA – SLAC Workgroups

- SLAC previously had a workgroup to address whether remotely accessed software should be defined separately or part of prewritten computer software.
 - Workgroup dismissed but some states and businesses would like to see more uniformity in this area.
- Other SLAC Workgroup Activity:
 - Disclosed Practices, primarily to assist small sellers with understanding the position of the states on certain issues such as employees attending trade shows in a state
 - Multiple State Tax Rates – Nebraska/New Jersey have a reduced “state” tax rate in certain locations – should the SSUTA be amended to allow multiple rates?
 - Oral Hygiene – should states be allowed to exempt oral/dental hygiene products from other types of hygiene products?
 - Expansion of Digital Codes – currently paying the tax upfront on the purchase of digital codes is limited to “specified digital products.” Should that be expanded to all products and services?
 - Issue Resolution Process – does the SSUTA need amended to “clarify” how that process works and potentially require a review of what petitions can be filed?
 - Sales Tax Holidays – should products subject to a sales tax holiday be expanded and how are periodic payments occurring/billed during a holiday handled?

Evolving Landscape of EV Charging Taxability

- Sales Tax
 - Imposition of sales tax on electricity extends to EV charging (Examples: AR, IN, LA, MO)
 - Imposition of tax on taxable services (Example: MN imposes sales tax on EV charging as a taxable parking service)
- EV Charging Excise Tax - Examples
 - KY – Electric Vehicle Power Excise Tax - \$.03/kWh (Effective 2022)
 - UT – Electric Vehicle Charging Tax – 12.5% (Effective 2024)
 - WI – Electric Vehicle Charging Tax - \$.03/kWh (Effective 2025)
- Alternative Fuel Tax
 - PA – “alternative fuel” defined to include “electricity used to propel vehicles on public highways.” \$.0172/kWh – rates published on annual basis. Law signed by PA Governor in 2024 adds EV charging specific clarifications to the existing law.
- Electricity Excise Tax
 - IL – tax to be collected from Purchaser by Delivering Supplier. DOR guidance (General Information Letters) provides the tax is imposed on EV charging. Pending proposed regulation is being worked on. \$.0033/kWh (first 2,000 kWh in a month)

Retail Delivery Fees

- **States with Retail Delivery Fees**
 - Colorado – Effective 7/1/22
 - Started at \$0.27 and 7/1 each year through 6/30/25 it increases by one cent
 - Applies to all retailers with sales over \$500,000 – requirement to separately state fee removed in 2023
 - If any item is subject to Colorado’s sales tax, the fee applies
 - Minnesota – Effective 7/1/24
 - \$0.28 per order that is \$100 or more
 - Applies to all retailers with sales over \$1,000,000
 - Has multiple exclusions: drugs, medical devices and supplies, food (including prepared food, baby products, purchasers exempt from sales tax, and deliveries by a food/beverage retailer
 - Note: while Minnesota does not tax clothing, clothing deliveries are subject to the State’s retail delivery fee

Retail Delivery Fees (cont'd)

- **States with Retail Delivery Fee Proposals**

- Nebraska

- During a special legislative session called by Governor Pillen in late July, 2024 to reduce property taxes, several delivery fee proposals were introduced; however, none of them passed

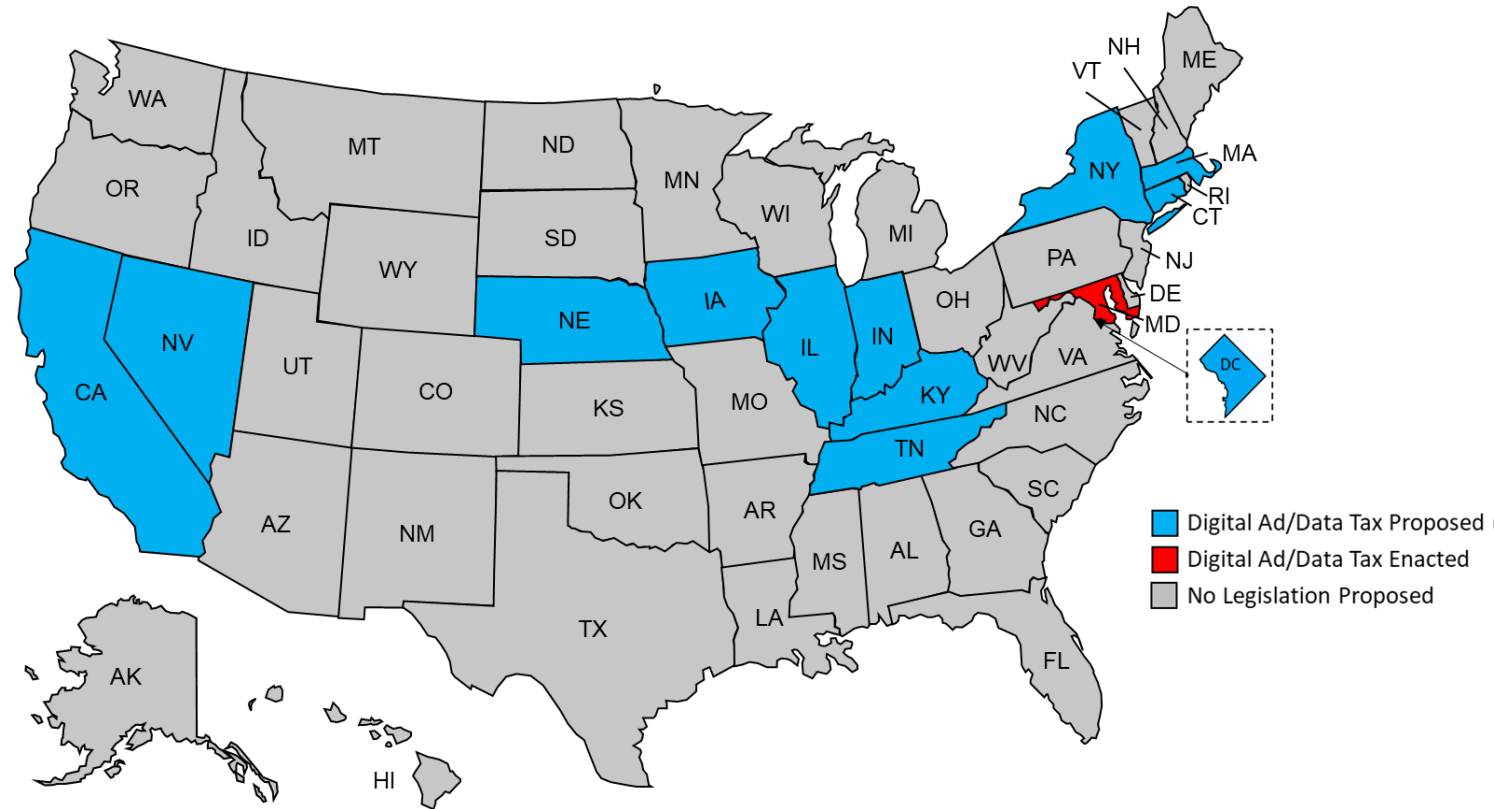
- Washington

- Washington legislators in June, 2024 reviewed a study on the revenue the State could receive from enacting a retail delivery fee

Retail Delivery Fees – Pros and Cons

- It's likely retail delivery fee legislation will be introduced in several states in 2025
- **Reason for States to Enact Retail Delivery Fees**
 - Motor fuel tax revenue is declining and/or not keeping up with cost for road upkeep
 - Additional state revenue is needed
 - Encourage purchasers to shop local and not have products shipped to home
- **Problems with States Enacting Retail Delivery Fee Proposals**
 - It's a new tax/fee and implementation costs are very expensive
 - Lack of any uniformity will only make compliance and implementation of delivery fees more costly
 - Can be a regressive tax on certain purchasers and imposes double tax on delivery vehicles subject to both a state's motor vehicle tax and the retail delivery fee
 - Excluding or including products differently from a state's sales tax system adds compliance burdens

Digital Advertising Services & Data Tax Proposals (2023-2024)



Data Tax Proposals (2023-2024)

- **California**
 - Data (Barter): SB 1327 Sen. Glazer's proposal to fund journalism
- **District of Columbia**
 - Plattner-style personal data tax: DC Tax Revision Comm'n
- **Illinois**
 - Plattner-style personal data tax: SB 2307
- **Massachusetts**
 - Personal data tax: S.1896 (formerly S.1938) (reporting req.)
- **New York**
 - Plattner-style personal data tax: SB 2012/AB 3959 (formerly SB 4959/AB 6199)
 - Personal data tax: SB 1845 (formerly AB 946/SB 3790), SB 5662
- **Tennessee**
 - Data (Barter): HB 2234 (SB 2065)

New York's Approach to Tax Data

- **SB 1845 (2024) (fmr. AB 946/SB 3790 (2021); AB 9112/SB 6102 (2020))**
 - Would impose an additional 5% tax on the gross income of “every corporation which derives income from the data individuals of this state share with such corporations”
 - The bill does not provide further detail on the scope of the proposed new imposition language
 - Six-member Data Fund Board would invest revenue collected and distribute net earnings to each taxpayer
- **SB 2012/AB 3959 (2024) (fmr. SB 4959/AB 6199 (2021)) – The “Plattner” Bill**
 - Sponsored by Senate Finance Committee Chair Liz Krueger (D), who has been working with Robert Plattner.
 - Creates a monthly excise tax on collecting “consumer data” from NY consumers by “commercial data collectors,” regardless of data format
 - Entities with common ownership are treated as a single taxpayer and are jointly liable for the tax
 - Tax computed on a graduated basis depending on number of NY consumers the commercial data collector collects data on within a month
 - Presumes a consumer is a NY resident if their mailing address or IP address is in NY, unless proven otherwise
 - Commercial data collector and DTF may agree on a methodology for determining the number of NY consumers
 - A credit is allowed if another state imposes an identical tax on data associated with the same NY consumer
- Other states that have introduced Plattner-style commercial data collector excise tax bills include:
Illinois (SB 2307 (2023)), **Nevada** (AB 421 (2023)), and **Washington** (HB 2107 (2022))

California's Data Extraction Mitigation Fee (SB 1327)

- Purports to tax “digital barter transactions” (i.e., the value of personal data that users provide to platforms in exchange for putatively free services), with digital advertising revenue used as a proxy for the value of the personal data transfers subject to the tax.
- Would impose a new “data extraction mitigation fee” of 7.25% on gross revenues on any person engaged in digital data extraction transactions in California.
 - Amended to remove references to “digital” – expands DEMF to all ad services revenues (attempt to avoid ITFA)
- Despite the bill’s title, the California legislation includes only digital advertising services in the gross receipts tax base – similar to the Maryland DAT.
- Only applies to firms that earn \$2.5 billion or more from such California-sourced activities.
- Provides a carve-out for news media entities.
- “Fee mitigation revenue,” after covering constitutional and administrative allocations, is earmarked for a fund that would be used to finance deductions and wage tax credits claimed by qualifying news organizations.
- Gross receipts from data extraction transactions are sourced to California if the user is located in the state.
- The legislation passed the California state Senate in July 2024.
- Legislation sidelined following a deal struck between Google and the state in August.

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