

# Top Sale Tax Cases and Other Developments 2021 Edition

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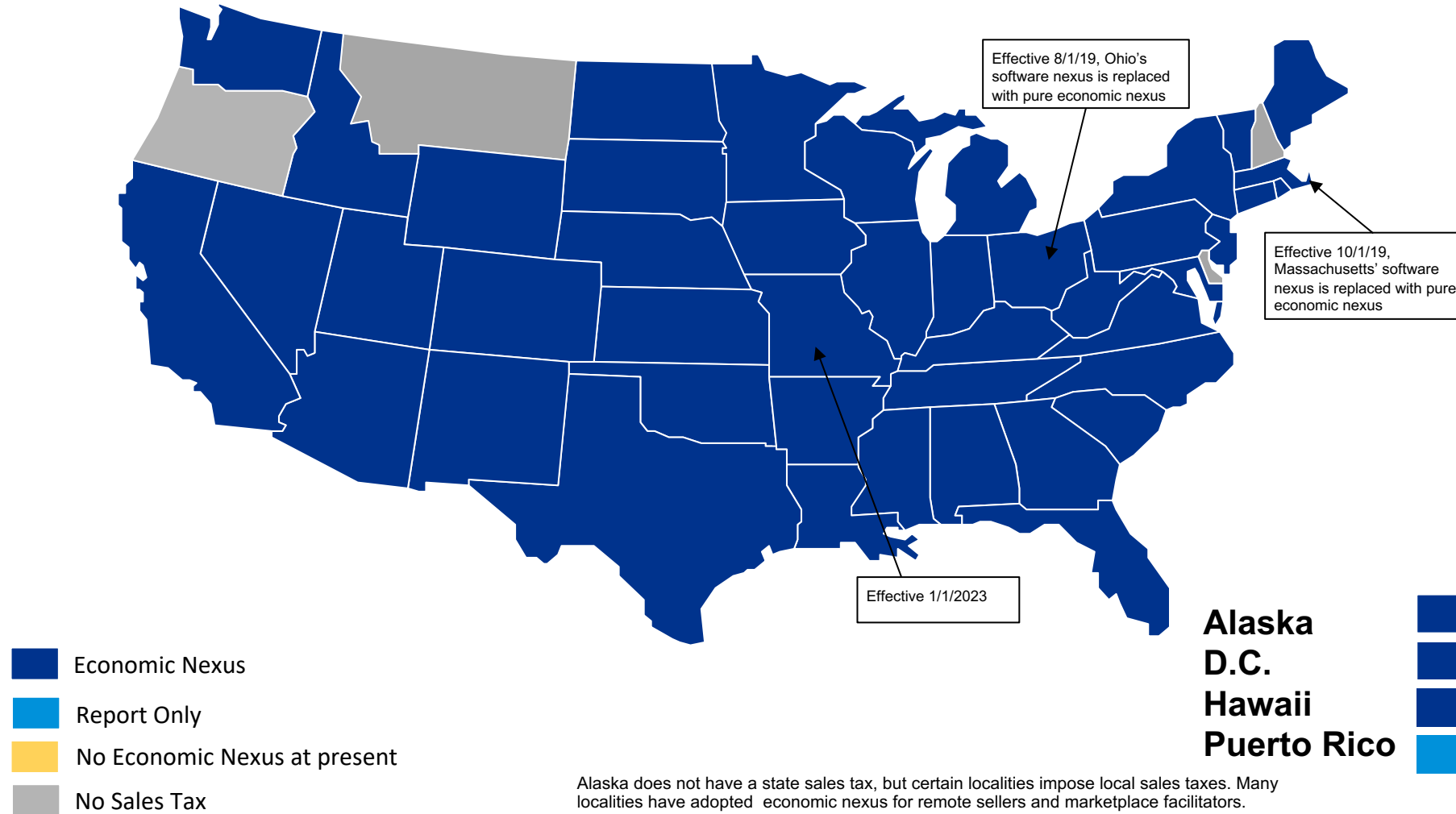
# AGENDA

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1. Economic Nexus Updates
2. Marketplace Facilitator Updates
3. Digital Product Base Expansion
4. Software and SaaS
5. ITFA Updates
6. Online Learning
7. Sourcing – Local Tax Incentive Warfare
8. Refund Process Updates
9. Process, Process, Process
10. Making Compliance Impossible

# 1. Economic nexus – Sales and Use Tax – as of 9/1/2021

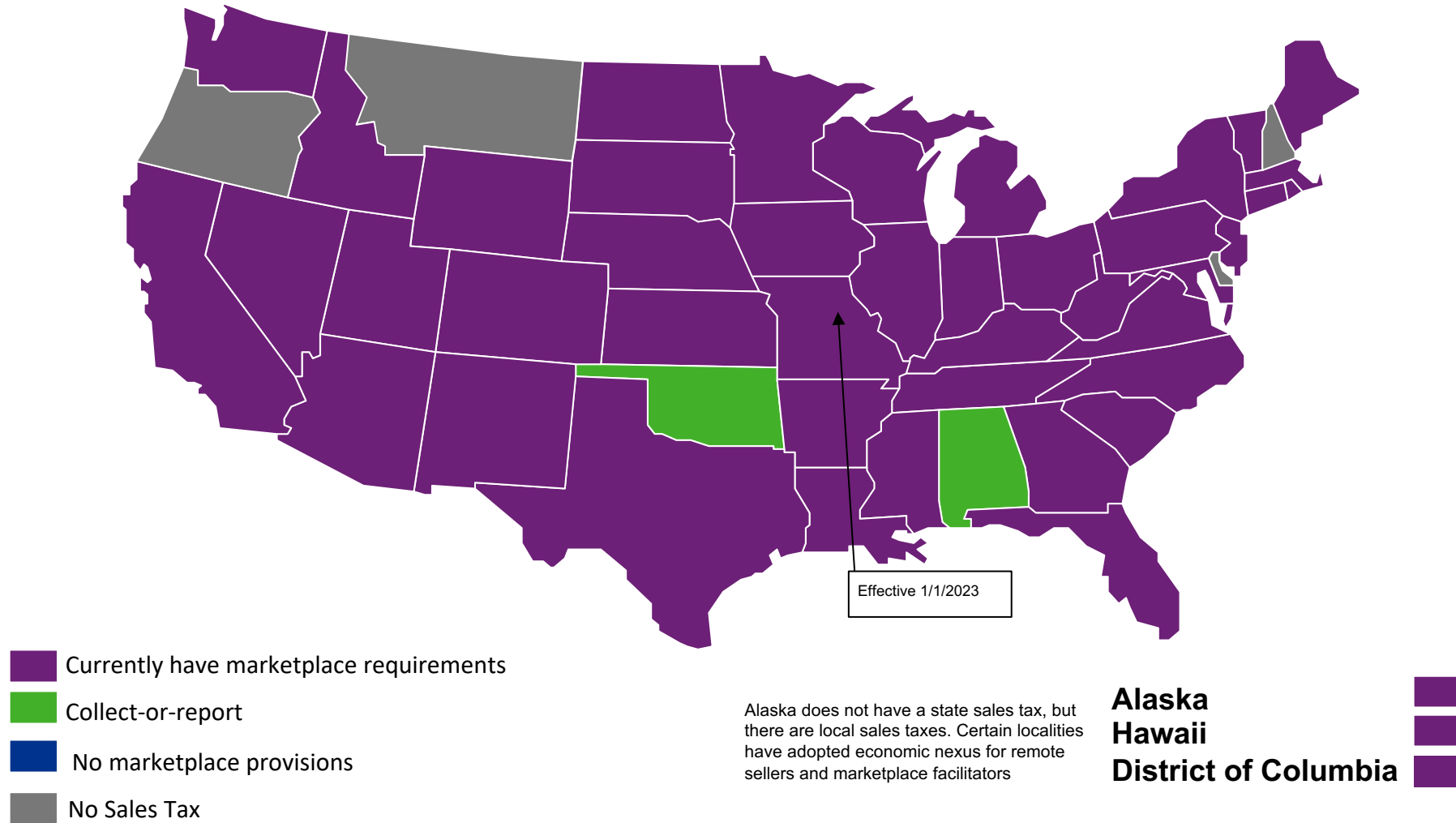
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# 2. Marketplace Requirements –

as of 9/1/2021

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## 2. Marketplace Requirements

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- **How far does a Marketplace Seller's obligation go?**
- In California, as of September 13, 2021, legislation is pending signature that would require marketplace facilitators to collect and remit certain fees imposed on facilitated sales.
- If signed, Assembly Bill 1402 would require a marketplace facilitator to collect fees administered pursuant to the Fee Collection Procedures Law that are imposed on the retail sale of tangible personal property.
- The relevant fees include a charge under the Lead-Acid Battery Recycling Act, a lumber products assessment, an electronic waste recycling fee, and the California tire fee.

### 3. Digital Base Expansion – Maryland

- House Bill 932 (veto overridden February 12, 2021) - Redefines the term “retail sale” to include the sale of certain digital products, thus subjecting such sales to Maryland sales tax
  - A “digital product” is “a product that is obtained electronically by the buyer or delivered by means other than tangible storage media through the use of technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities”
  - The bill sets forth a non-exclusive list of digital products that generally follow definitions used in a number of states for audio and audio-visual products as well as e-books, and specifically includes ring tones, e-greeting cards and digital newspapers, magazines, and other media
- The bill also expands the sales and use tax to sales to end users of subscriptions to, access to, streaming of, or the purchase of a digital code for receiving or accessing digital products
  - For sourcing purposes, the retail sale of a digital code or digital product is presumed to be sourced to the state in which the customer’s tax address is located, and specific hierarchy applies to determine a customer’s tax address
- Sales and use tax does not apply to a sale of a digital product for use or consumption in research and development

## 3. Digital Base Expansion – Maryland

- The Maryland Comptroller’s Office issued Business Tax Tips #29 , “Sales of Digital Products and Digital Code” (3/9/2021) regarding HB 932 which significantly expanded the list of “digital products” subject to tax to include:
  - Electronically delivered software and SaaS;
  - A sale, subscription or license to access content online;
  - Customer lists, mailing lists, medical records, and similar products;
  - Access to a chat room, discussion, weblog, or any other venue that permits users to communicate electronically in real time;
  - Access to or use of virtual items, such as skins, renders and in-app purchases, purchased for use in a video or online game;
  - Photographs, artwork, illustrations, graphics and similar products; and,
  - Satellite radio services
  
- **Senate Bill 787 (enacted May 30, 2021) excludes certain educational products and custom software from the definition of a digital product**

### 3. Digital Base Expansion – Maryland Cont'd

- The Maryland Comptroller's Office *revised* Business Tax Tips #29 - Sales of Digital Products and Digital Code (6/3/2021). The publication notes that the term "digital code" has been amended to mean a number, symbol, alphanumeric sequence, barcode, or similar code.
- In addition, the publication clarifies that the following are exempt from the definition of "digital product":
  - pre-recorded or live instruction by a public, private, or parochial elementary or secondary school or at a public or private institution of higher learning;
  - skill or professional instruction in a buyer's current or prospective business, occupation, or trade if the instruction is not pre-recorded and has an interactive element;
  - seminars, discussions, or similar events hosted by a nonprofit or business organization if not pre-recorded and has an interactive element; and
  - professional services obtained electronically or through technology having electrical, digital, magnetic, wireless, optical, or electromagnetic capabilities.



### 3. Other Proposals to Tax Sales Derived from Digital Advertising (2020-2021)

- **Connecticut**
  - SB 1106 (2021) – incorporated into the budget revenue bill (HB 6443)
    - AG issued opinion questioning constitutionality of bill on separation of powers grounds
    - Removed from budget prior to passage
- **Massachusetts**
  - H. 3081 (2021) and H. 2894 (2021)
- **Montana**
  - HB 363 (2021)
- **New York**
  - SB 1124 (2021) (i.e., the Digital Ad Tax Act or “DATA”), identical to 2020 proposal (SB 8056A and AB 10706)
- **Texas**
  - HB 4467 (2021)
- **Washington**
  - Bill Request H-0028.1 (2021) – never introduced
- **West Virginia**
  - SB 605 (2021)

## 3. Sales Tax on Digital Advertising Proposals (2020-2021)

- **District of Columbia**
  - HB FY2021 Budget Support Act - Advertising and Personal Information Tax Amendment Act of 2020
    - Proposal to create a 3% sales tax on the gross receipts from “the sale of or charges for advertising services, including digital advertising services”
- **Louisiana**
  - HB 612 (2021)
    - Would impose state and local sales and use tax on “sales of digital advertising rendered by an advertising business”
- **New York**
  - AB 743/SB 302 (2021)
    - Would expand the sales tax base to include “digital advertising services”
- **Texas**
  - SB 1711 (2021)
    - Proposed sales tax expansion to “advertising services”
- **South Carolina**
  - HB 3392/SB 823 (2021)
    - Tax all services proposal (not advertising specific)

### 3. Proposals to Tax Sales Derived from Social Media Specific Ads (2020-2021)

- **Arkansas**

- SB 558 (2021)

- Would have imposed sales tax on advertising revenue from social media platforms with annual gross revenue from social media advertising services in Arkansas of at least \$500,000.
    - Would add a new sales tax subchapter imposing 7% sales tax on a social media provider's gross revenue from social media advertising services in Arkansas, plus \$1 for the average number of Arkansas account holders during a calendar year.

- **Connecticut**

- HB 5645 (2021)

- Proposed tax on social media provider's apportioned annual gross revenue derived from social media advertising services located in Connecticut.

- **Indiana**

- HB 1312 (2021)

- Social Media Surcharge Tax imposed on social media providers with more than 1 million active Indiana accounts that have annual gross revenue of at least \$1M from social media advertising services in Indiana, and that derive economic benefit from data people in Indiana share with the company.

- HB 1572 (2021)

- Require social media providers with more than 1 million active Indiana users to pay an annual fee of \$5 per Indiana account holder, per year.

### 3. Proposals to Tax Sales Derived from Social Media Specific Ads (2020-2021)

- **SB 6727 (2021)**

- Introduced May 13, 2021 and referred to Senate Finance Committee
- The “data economy labor compensation and accountability act”
- Would establish Office of Consumer Data Protection
- Creates new annual tax on “data controllers” and “data processors” applicable to tax years beginning after Jan. 1, 2022
  - Tax equals 2% of annual gross receipts from all domestic and foreign sources multiplied by the percentage of “data subjects” who reside in NY.
  - Exemptions for data controllers and data processors (1) established within the previous 3 years or (2) with gross receipts of less than \$5M.

- **AB 946/SB 3790 (2021)**

- Introduced Jan. 6, 2021 and Jan. 30, 2021, respectively
- Repeat from 2020 session – AB 9112/SB 6102
- Would impose an additional 5 percent 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.
- The legislation would also establish a six-member Data Fund Board, to invest the tax revenue collected and distribute net earnings “to each taxpayer of the state” in a manner determined by the Board.)

### 3. Proposals to Tax Sales Derived from Social Media Specific Ads (2020-2021)

- **SB 4959/AB 6199 (2021)**

- Sponsored by Senate Finance Committee Chair Liz Krueger (D)
- Introduced Feb. 19, 2021 and March 10, 2021, respectively
- Creates a monthly excise tax on the collection of “consumer data” of individual New York consumers by “commercial data collectors”
  - “*Commercial data collector*” is defined as “a for-profit entity that: (i) collects, maintains, uses, processes, sells or shares consumer data in support of its business activities; and (ii) collects consumer data, other than consumer contact information, on more than one million New York consumers in a month within the calendar year.”
  - “*Consumer data*” is defined as “any information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked with a consumer, whether directly submitted to the commercial data collector by the consumer or derived from other sources.”
- Applies regardless of the format (electronic or otherwise) in which the consumer data is collected
- Tax computed on a graduated basis depending on the number of New York consumers the commercial data collector collects data on within a month. For example:
  - 1-2 million consumers = 5 cents per month on the number of New York consumers over one million  
**Ex., 1.5 million New York consumers would result in monthly excise tax liability of \$25,000 [500k x 5 cents]**
  - Over 10 million consumers = \$2,250,000 plus 50 cents per month on the number of New York consumers over 10 million  
**Ex., 15 million New York consumers would result in monthly excise tax liability of \$4,750,000 [\$2,250,000 + (5M x 50 cents)]**

### 3. Proposals to Tax Sales Derived from Social Media Specific Ads (2020-2021)

- **SB 4959/AB 6199 (2021)**

- Rebuttable presumption (requires evidence that the consumer's primary residence is outside New York) that consumer whose information indicates a New York home address, mailing address or IP address is a New York consumer for purposes of the excise tax
- Business entities with common ownership [per IRC section 1563(a)] are treated as a single taxpayer for purposes of meeting the definition of commercial data collector and are jointly and severally liable for any tax due
- Commercial data collector and DTF may agree on a methodology for determining the number of New York consumers for purposes of calculating the tax
- Commercial data collector may claim credit against tax paid with respect to a New York consumer when another state imposes an identical tax with respect to the same consumer
- Commercial data collector that pays the excise tax must file a return in subsequent months until it reports no tax liability for 12 consecutive months
- General tax administrative procedures would apply
- DTF may prescribe rules and regulations necessary to carry out the proposed excise tax
- Would apply to all tax years commencing on or after the first day of the first month that begins more than six months after the law takes effect

# 4. Software and SaaS

## State of Play

Iowa	Maryland	Pennsylvania	Rhode Island	Tennessee	Washington
L. 2018, SF 2417	L 2021, SB 787	L. 2016, H1198	L 2018, HB 7200	L 2015, HB 644	L 2009, ESHB 2075 & SHB 2620
1/1/2018	3/14/2021	8/1/2016	10/1/2018	1/1/2016	7/26/2009
Expressly imposes tax on “software as a service”.	Expressly imposes tax on digital products	Expanded the definition of tangible personal property.	Expressly imposes tax on “vendor-hosted prewritten computer software”	Expanded the definition of computer software.	Expressly imposes tax on “remote access prewritten software” and “digital automated services.”
No statutory definition of Software as a Service.	<i>Digital product” means a product that is obtained electronically by the buyer or delivered by means other than tangible storage media through the use of technology 11 having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar 12 capabilities. 13</i>	tangible personal property” includes, “video, photographs, books, and any other taxable printed matter whether delivered electronically or digitally, streamed or accessed, applications; games; music; any other audio; canned software; or any other tangible personal property that is otherwise taxable electronically or digitally delivered, streamed or accessed (including maintenance and support).”	“Vendor-hosted prewritten computer software” means prewritten computer software that is accessed through the Internet and/or a vendor-hosted server regardless of whether the access is permanent or temporary and regardless of whether any downloading occurs.”	“For purposes of subdivision (a)(1), use of computer software includes the right to access and use software that remains in the possession of the dealer who provides the software or in the possession of a third party on behalf of such dealer.”	“Remote access prewritten software is the charge made to consumers for the right to access and use prewritten computer software, where possession of the software is maintained by the seller or a third party, regardless of whether the charge for the service is on a per use, per user, per license, subscription, or some other basis.”  “Digital automated services means services transferred electronically that use one or more software applications.”

## 4. Software and SaaS Hawaii

- In Tax Information Release 2021-06, the Department confirmed its position that the sale of canned or prewritten software or a license to use canned or prewritten computer software is treated as the sale of tangible personal property, regardless of the delivery method.
- A taxpayer producing custom software for a licensed seller is providing services to the licensed seller, regardless of whether the custom software is transferred to the licensed seller through a sale or as a license to use the custom software.
- While many states distinguish between custom and prewritten computer software for purposes of determining taxability, Hawaii taxes both sales of tangible personal property (i.e., prewritten software) and services (i.e., custom software),
- Sales at retail are subject to the 4.0 percent General Excise Tax (GET) rate. Wholesalers of tangible personal property and services are subject to the 0.5 percent wholesaler's GET rate.



## 4. Software and SaaS Massachusetts

- Oracle USA, Inc. v. Comm’r of Rev. (Mass SJC-13013 (5/21/2021):
- The Massachusetts Supreme Judicial Court ruled that Microsoft and Oracle were entitled to apportion sales tax on software purchased by a Massachusetts company for use in multiple states and seek a tax refund.
- The Massachusetts Department of Revenue’s sought to deny the refund claim on the basis that the companies had failed to meet the requirements set forth in a regulation for obtaining a multiple points of use certificate at the time of purchase.
- The Court ruled that regulations do not preclude taxpayers from achieving apportionment through the abatement process, and that the certificates referenced in the Commissioner’s regulation were not exclusive prerequisites to apportionment.

## 5. ITFA or PITFA

Recall – The Internet Tax Freedom Act was first enacted in 1998 –

- Implemented a 3-year moratorium preventing state and local governments from (1) taxing internet access, or (2) imposing multiple or discriminatory taxes on electronic commerce; extended 8 times
- ITFA originally enacted to protect and incubate a fledgling industry, but made permanent because of the “ubiquity of the Internet” and its impact on the economy
- Made permanent in 2016 - Codified at 47 U.S.C. § 151 and prohibits:

**“Any tax imposed by a State or political subdivision thereof on electronic commerce that -**

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means;

(iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means.”

## 5. ITFA – Pending Sales Tax Cases

- *Apple Inc. v. Chicago, Cook County, IL, 2018 L 050514*
  - 2018 complaint amended 1/19/21 to include video streaming and other electronic services to original claim that Chicago amusement tax violate ITFA’s anti-discrimination provision
  
- *Apple Inc. v. Hegar, Travis County, TX, No. D-1-GN-20-004108, 4/16/21 (pending):*
  - Apple filed a lawsuit on a refund claim asserting that the Texas Comptroller incorrectly assessed sales tax against Apple by classifying the services as taxable “data processing services,” and thus violated ITFA’s ban on taxing internet access
  - Apple also argues that Texas violated ITFA by imposing a discriminatory tax on electronic commerce
  - Apple contends that its services are similar to “offline, non-internet-based services,” such as physical storage services, which are not taxable services in Texas

## 6. Online Learning – What is it?

- Matter of Study.com LLC; Docket No. 2020-310-2-0649 (April 20, 2021)
  - The taxpayer operated an online virtual learning platform that sold monthly subscription access to six different types of learning plans. The learning plans had varied features, and all learning plans were accessible only through the online platform. The taxpayer also earned internet advertising revenue under a pay-per-click model.
  - Iowa imposes a sales tax on software as a service (SaaS), as well as on the furnishing of enumerated services.
  - Department guidance outlined that SaaS includes vendor-hosted computer software accessed (either temporarily or permanently) through the internet or a vendor-hosted server and that the content or material accessed by way of the SaaS does not impact the taxability of the software itself.
  - Therefore, all the taxpayer's learning plans were determined to be taxable as SaaS because, despite their varied features, the plans were only accessible through the platform.
  - Lastly, the Department addressed that the taxpayer's pay-per-click internet advertising was not an enumerated service, and therefore was not subject to Iowa sales tax.

## 6. Online Learning – What is it?

- North Carolina Private Ruling June 22, 2021
  - The taxpayer operated a platform on which students could choose from an array of on-demand streaming educational videos, each accompanied by a written transcription.
  - The taxpayer also offered access to interactive quizzes, the results of which could be downloaded, and certificates of completion. Any student could access the videos, and the taxpayer was not an elementary or secondary school or an institution of higher learning, as federally-defined.
  - North Carolina imposes tax on “certain digital property,” which includes “digital audiovisual works,” regardless of whether the purchaser has a right to permanent use or whether use is contingent upon making continued payments.
  - The Department found the videos to be taxable as digital audiovisual works, as the taxpayer was not a qualifying education entity.

## 6. Online Learning – What is it?

- Washington Tax Topic Guidance:
  - Live online classes that permit real-time participation are not subject to sales tax, provided that the interaction between the presenter and participant is part of the live class and is not just “a separate ability to ask questions.”
  - Both live streaming classes without real-time participation and pre-recorded classes that do not permit real-time interaction are subject to sales tax and the B&O tax under the Retailing classification.

## 7. Sourcing – Local Tax Incentive Warfare

- Texas has frozen the implementation of new sales tax sourcing rules
  - Historically, 34 Tex. Admin. Code § 3.334(h)(3)(C) provided that when an order was placed over the internet and the seller fulfilled that order at a location that is a place of business in Texas, the sale was considered to be consummated at that place of business where the order was fulfilled. Accordingly, local sales tax was sourced to that fulfillment location
  - Effective October 1, 2021, [34 Tex. Admin. Code § 3.334\(b\)\(5\)](#), provided that “[o]rders not received by sales personnel, including orders received by a shopping website or shopping software application...are received at locations that are not places of business of the seller.” The new rule would effectively move internet orders out of Texas’ general rule of origin sourcing and place them into a destination-based sourcing regime
  - The City of Round Rock sued the Comptroller’s Office as sourcing changes would have altered local sales tax sourcing agreements and “cost the city millions”
  - By [agreement](#) of the parties, the trial court has enjoined the Comptroller from implementing or enforcing 34 Tex. Admin. Code § 3.334(b)(5) until a final hearing on the merits or a further order from the court
  - The trial on the merits is currently set for the week of June 13, 2022

## 8. Refund Process Updates - Tennessee

- Tennessee *finally* simplified its sales and use tax refund process effective 10/1/2021
- Tennessee PC 480, Acts of 2021 repeals language that states, “Sales or use taxes which were collected from or passed on to customers by the taxpayer shall not be refunded, unless the taxpayer has refunded or credited the sales or use tax to its customers.”
- The new law adds language to state that a person that paid taxes to a dealer is included in the definition of a “taxpayer” (who can receive a refund) if that person requests a refund from the dealer, who subsequently declines to issue a refund, and the dealer attests, on a form to be prescribed by the Commissioner, that
  - (1) the tax at issue has been remitted,
  - (2) the dealer has not and will not claim a refund of such taxes, and
  - (3) the dealer has not taken and will not take a credit for the tax at issue
- Also included in the definition of a taxpayer is a person that requests a refund from a dealer and is unable to obtain the attestation, if they contacted the dealer in writing at least 90 days before the expiration of the statute of limitations.



## 8. Refund Process Updates - Louisiana

- Louisiana's Uniform Local Sales Tax Board adopted regulations (LAC 72:I.111) that establish requirements for the filing of refund claims for local sales and use taxes.
- Among the provisions are rules
  - (1) allowing taxpayers to submit multi-parish refund claims to the Board or to the individual parishes themselves, while single-parish claims must still be submitted to the parish itself;
  - (2) stipulating that supplemental information requested by a tax collector and timely provided by the taxpayer does not alter the filing date of the claim; and
  - (3) providing that claims that have not been approved within one year of the date received may be appealed to the Louisiana Board of Tax Appeals

## 9. Process, Process, Process

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- *Zimmer US, Inc. v. Gerregano*, Tenn. Ct. App., No. M2020-00171-COA-R3-CV, 07/19/21
- The taxpayer filed a refund claim in 2015 and entered into three consecutive “Agreements to Extend Statutory Period of Limitations” with the Department of Revenue.
- Although the parties participated in conferences to resolve their differences, the Department issued no decision on the taxpayer’s claim
- Before the last extension expired, the taxpayer filed a refund suit, but the trial court dismissed the complaint because the one-year statute of limitations to challenge a deemed denial of a refund claim had expired
- On appeal by the taxpayer, the appeals court noted that lawsuits “challenging the denial or deemed denial of a claim for refund” are permitted within one year of the date of the filing of the refund claim
  - The appeals court rejected the taxpayer’s argument that a general reference in the extension agreements to the section of the law that establishes the statute of limitations for refund suits (among other statute of limitation provisions) was significant enough to extend that deadline, or created ambiguity that should be resolved in the taxpayer’s favor
  - Rather, the court found that the extensions explicitly referenced the statutory period of limitations that applied to the *assessment* of taxes or the *refund* of taxes by the Department, but did not make any reference to the statute of limitations for filing suit to challenge a denial or deemed denial of a refund claim
  - The appeals court also rejected the taxpayer’s arguments that the agreements with the Department were ambiguous and that the trial court’s decision was inequitable
  - Under the plain language of the extension agreements, the appeals court agreed with the trial court that the Department’s intention was not to consent to a suit being filed beyond the statutory one-year period

## 10. Making Compliance Impossible – aka the Opposite of SST

- Massachusetts House Bill 5164 (signed 12/11/20)
- Requires certain vendors to make accelerated sales tax payments effective April 1, 2021
- Vendors with sales tax liability of more than \$150,000 in the preceding calendar year (and operators with room occupancy tax liability of the same amount) are required to remit taxes collected on any taxable sale made on or before the 21st day of the filing period by the 25th day of that period
- A penalty of 5 percent of any underpayment will be assessed, provided that no penalty may be assessed if the amount remitted by the 25th of the month is at least 70 percent of the amount owed for the entire filing period
- September DOR News: Taxpayers subject to these rules will be asked to break down online sales versus in-store sales and meals tax filers will be asked to break down cash sales versus credit card sales

# That's All Folks!

## The Honeymooners

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