



Podcast Transcript

Tech and Tax Roundup on State Taxation of Technology

Date: February 10, 2021

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Run Time: 11:17

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Hunsaker: Hi there folks. Welcome back to the State Tax Show. I'm Matt Hunsaker. Today, a quick roundup on some tech related issues around the nation.

Every once in a while I like to take a deep dive into an issue. Well, today is not that day. You see, I have a bit of a backlog of tech related tax matters, so I'm going to run through a few of those just real quickly. If my quick overview leaves you wanting more, just let me know and I'll revisit with more detail.

Let's start in the Windy City. Chicago has a few unique taxes. It taxes streaming services under its city amusement tax. That's video streaming, audio streaming, and some online games. It also has a personal property lease transaction tax, and that applies to non-possessory computer leases, so think cloud computing.

Ever since Wayfair, folks have been trying to get some guidance from the city on its views on Nexus. Well, that day has come. A couple of weeks ago, the city provided a \$100,000 economic Nexus threshold. Some call it the safe harbor, and I guess it is in the sense that they're not going to say they have economic presence or having sales below \$100,000. But they still will say you have Nexus if you have physical presence in the city or agreements with other businesses in the city, and even if you have advertising directed at residents. So that's quite a hole in this safe harbor. This rule goes into effect on July 1st, but the city has said that if you've been paying tax, even though you're under the threshold, that they do not intend to give you a refund.

Moving on to Kansas, Kansas is one of the final three states without marketplace facilitator legislation. But that could change based on a proposal from the Kansas governor in her budget report for the fiscal year 2022. But more importantly for our discussion today, that very same proposal would also start imposing sales tax on sales of digital property and subscription services. I haven't looked at the proposal too closely, but it appears that it is somewhat in alignment with the streamlined definition of digital products. But importantly, it specifically includes streaming services, which often don't make it into the definition by name, which leaves a fair amount of ambiguity as to whether streamed digital content is subject to sales tax.

Speaking of streaming, Colorado just adopted final rules that address electronic downloads and streaming services. The short story is that electronically delivered digital media is going to be subject to sales tax regardless of how you get it, whether that be on a VHS tape, download, or even a stream. Essentially, they fall into the camp of taxing digital equivalents to what was previously taxable physical media. This rule is effective January 30th, but there is some question as to whether it will apply to prior years under audit, so that remains to be seen.

On to Tennessee. The Department of Revenue issued Ruling 20-13, and in that ruling, they concluded that a restaurant delivery service, you know the ones that connect you with a local restaurant when you're working late? They concluded that it was not a marketplace facilitator and they made that conclusion based on the statutory carve out for what's called a delivery network company, and this really makes me happy. It's just good policy to take local businesses or I guess local transactions out of the marketplace facilitator regime, because those local people are already collecting and remitting sales tax, and so the marketplace facilitator rules don't really facilitate or enhance compliance with sales tax.

Indiana has introduced a bill, that's House Bill 1312, and it would impose a surcharge tax on social media providers. Here's how it would work. It would apply to providers that maintain a public social media platform, having more than one million active Indiana account holders, and they have to have annual gross revenue from social media advertising in Indiana of at least \$1 million and get economic benefit from the data that their Indiana subscribers give to it.

So that's what gets you into the tax regime, and once you're in, the tax would be annual gross revenue from Indiana sources times 7%, and you would also get an extra \$1.00 of tax for each Indiana account holder. So it's kind of a per capita blend with a gross receipts tax. This would go into effect on January 1, 2022, and I want to talk more about this one, but I think I will do it in the context of our next digital advertising episode, which I think we will probably have in the not too distant future.

Speaking of digital advertising, New York has introduced a gross revenue tax on digital advertising. That is Senate Bill 1124. The rate is between 2.5% to 10%, based on the annual global revenues of the digital advertising company, and this bill is an addition to another bill that would simply include digital advertising services in the sales tax base. So we kind of have two competing bills here, one

that creates a new tax regime, kind of like Maryland, and then another one kind of takes the DC approach of just expanding the sales tax base. Again, I'm going to say more on this in short order as things heat up in Maryland with the potential veto override on their digital advertising tax, which I believe could happen as early as this Thursday.

While we are on the digital advertising trail, we need to visit Washington's latest B&O Tax bill. You see, one of the reasons why digital advertising taxes are so hot right now is that states are essentially trying to monetize some of the value that digital advertisers get from residents' personal information. It's really a big mess of tax and public policy, but Washington is looking to take a slightly different approach. Instead of actually taxing digital advertising directly, they have proposed a bill, and that's House Bill 1303, that would include a whole new category of B&O Tax payers for persons who are engaging within this state in the business of making sales of personal data or exchanging personal data for consideration.

The B&O Tax rate, and that's a gross receipt rate, would be 1.8%. The problem with these types of digital advertising taxes is that the devil is really in the details, particularly how you source these very ethereal transactions, and the legislatures seem to be punting at coming up with workable rules, and I think that's the case here.

The primary enforcement rule is that you take the number of residents whose data you sell, that's Washington residents, and divide it by the number of people in the United States, whose data you sell, so it's a population-based test. So it is not based on revenue, it's based on actual people. Now, if this doesn't work, which based on my forays into the world of digital advertising, it won't, then you simply use the ratio of Washington residents to U.S. residents so that the rule would presume that you do this data selling activity uniformly throughout the United States. I think there are all kinds of fair apportionment issues there that are probably going to keep us lawyers busy for a while if it passes.

Now, this bill does not live in the isolated world of tax. There are a number of other data privacy provisions in the bill, so the tax part is just an element of a broader regulation of data privacy. And I'll leave it at that for now. This is a really interesting bill and I want to dig in a little deeper, but I want to do that with one of my partners in our digital assets and data management practice group who really know this stuff in and out. I'm sure I left out a few things, including some pretty notable ones, but don't worry, we'll get to them all eventually. I just want to take a quick tour of what's going on generally in the tech world. Now, I plan on doing a software and cloud computing update, so you notice I kept those issues in reserve. Stay tuned for that one, it should be interesting. I'll be back next Monday with a new episode. Until then have yourselves a great week.

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