State and Local Tax Technology Checklist

Guidance from the first quarter of 2023

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 first quarter of 2023. Topics covered include access to telecommunication services, web-based services, software, and streaming services. Highlights include:

Alabama: The taxpayer convinced the Alabama Department of Revenue that royalty payments for licensing medical billing codes were not subject to sales and use tax. The taxpayer licensed its software using the billing codes to customers but did not specifically charge them royalty payments. The Department ruled that the copyright owner did not transfer title to the billing codes to the taxpayer, and therefore, the agreement with the copyright owner did not constitute a sale or exchange of the codes.

Arizona: The Arizona Court of Appeals upheld a lower court's decision that a human resource services provider was selling software rentals subject to Transaction Privilege Tax. The court concluded that the application software was "perceptible" to users, and that the users were exerting control over the software. The court further held that the tax did not violate the Internet Tax Freedom Act (ITFA) because the taxpayer's product simply automated tasks that were previously done by human effort.

Louisiana: The Louisiana Board of Tax Appeals held that subscriptions to a cloud-based storage plan were not subject to New Orleans city sales taxes. The Board agreed with the taxpayer that its cloud storage services were included in the definition of "Internet Access" under the Internet Tax Freedom Act. Therefore, the City could not impose sales taxes on subscriptions to the service sold to customers located in the city.

Kentucky: Kentucky House Bill 360 expands the definition of taxable telemarketing service to include services provided to another person via text messages. This change is currently effective retroactively to January 1, 2023.

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
Louisiana	Access to Web-Based Service	The Louisiana Board of Tax Appeals addressed whether subscriptions to a cloud-based storage plan were subject to New Orleans city sales taxes. The taxpayer at issue manufactured and sold various devices, such as computers, smartphones, and tablets. Owners of the devices were allowed to remotely store up to five gigabytes of personal digital content at no cost. Additional storage capacity was available in exchange for a monthly subscription fee. The software required to access the remote personal electronic storage was preloaded onto the devices sold by the taxpayer and was available to any customer with Internet access. Following an audit, the City of New Orleans/ Orleans Parish assessed City sales tax and the French Quarter Economic Development District sales tax on the subscription fees charged to customers located in New Orleans. The taxpayer protested the assessment, arguing that the receipts from its cloud subscription services were not taxable under the Internet Tax Freedom Act (ITFA), which prohibits states and localities from taxing "Internet Access." Notably, the definition of "Internet Access" in the ITFA includes access to "personal electronic storage capacity." The taxpayer argued that its services fell within the plain language meaning of this provision because it provides subscribers with "personal electronic storage capacity." The Board agreed, noting that individual customers used the service for accessing, storing, and retrieving their data, and it was accessible on a computer or other device through the Internet. The Board also noted that personal electronic storage services are not included in the state's list of enumerated taxable services.	*Apple, Inc. v. Samuel*
Florida	Other	A computer hardware and software vendor's Florida sales tax refund claim filed on behalf of a customer was denied because the vendor did not previously refund the sales tax to its customer. The vendor declined its customer's refund request for undisclosed reasons, and instead filed a refund claim on behalf of the customer directly with the Department of Revenue. Additionally, the vendor chose not to refund the customer with the overpaid sales tax amounts prior to filing the refund claim. The Department denied the vendor's refund claim, explaining that Florida law requires a vendor to first refund the sales tax to its customer, and that this rule operates to protect the Department from exposure to potential liability. This decision was later affirmed by the Division of Administrative Hearings.	*Oracle America, Inc. v. Department of Revenue*

State	Category	Development	Authority
Georgia	Streaming Services	The Georgia Court of Appeals affirmed a lower court's dismissal of a suit filed by various localities against providers of streaming video services. The localities alleged that the providers were required under Georgia law to obtain a state franchise and pay franchise fees to local governments before streaming video services to Georgia customers. The Court of Appeals determined that the localities had no right of action under the relevant state law. Although the statute granted localities a right of action when a dispute emerged over the amount of fees required to be paid by a state-franchised provider, the law did not grant a similar right of action permitting a locality to force a non-franchised provider to obtain a franchise from the state. In the Court's opinion, the state Attorney General held the authority to compel a provider to obtain a franchise, not the localities.	*Gwinnett Cnty. v. Netflix Inc.*
Alabama	Taxability of Software	The Alabama Department of Revenue determined that royalty payments for licensing medical billing codes were not subject to sales and use tax. The taxpayer licensed a copyright owner's medical billing codes for use in its proprietary medical billing and medical use software. The taxpayer licensed its software to its customers but did not specifically charge customers for the royalty payments. The Department held that the billing codes were not considered computer software but rather copyrighted content within the computer software. Further, the copyright owner was not transferring title to the billing codes to the taxpayer. Thus, because the licensing agreement with the copyright owner did not constitute an actual or beneficial sale or exchange of the codes, the royalty payments were not subject to sales and use tax.	Revenue Ruling 22-003

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Arizona	Taxability of Software	The Arizona Court of Appeals upheld a lower court's decision that a human resource services provider was selling software rentals subject to Transaction Privilege Tax. The taxpayer's software product at issue allowed customers' employees to enter time and other employment data over the internet, which the taxpayer used to generate the employees' paychecks. The court rejected the taxpayer's argument that its product was intangible property, holding that software was tangible personal property because it was perceptible to its users. The court further held that a customer's use and control over the software established that it was renting the software from the taxpayer, not purchasing a service. Finally, the court held that the tax did not violate the Internet Tax Freedom Act because the taxpayer had changed the nature of its product by automating tasks that were previously done by human effort, and the imposition of tax under these circumstances was not discriminatory.	*ADP, LLC v. Arizona DOR & City of Phoenix*
Kentucky	Taxability of Software	Kentucky House Bill 360 expands the State's definition of taxable telemarketing services to include text messages. The definition of "telemarketing services" previously meant services provided via telephone, facsimile, email, or similar modes of communication that are unsolicited by the third-party recipient of the communication and which are for the purposes of (a) promoting products or services; taking orders; or providing information or assistance regarding the products or services; or (b) soliciting contributions. House Bill 360 revised the definition of "telemarketing services" to include services provided to another person via text messages or various forms of social media. Following the passage of House Bill 360, Kentucky enacted House Bill 5, removing "various forms of social media" from the telemarketing services definition. The addition of text messages remains and that change is effective retroactively to January 1, 2023. In addition, House Bill 360 imposes tax on warranties for prewritten computer software access services; provides an exclusion for prewritten computer software access services purchased for use outside the state and transferred electronically outside the state for use thereafter solely outside the state; and provides an exemption for prewritten computer software access services sold to or purchased by a retailer that develops prewritten computer software for print technology and uses and sells prewritten computer software access services for print technology.	H.B. 360, H.B. 5

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Missouri	Telecommunication Services	The Missouri Court of Appeals upheld a circuit court's decision that cable companies using VoIP technology were subject to local business license taxes. The taxpayers generated the gross receipts at issue using VoIP technology in the telephone services arm of each company's business. The court rejected the taxpayers' argument that the Telecom Act of 1996 and the Cable Act of 1984 preempted the local business license tax ordinances because federal regulation of an activity does not typically preclude its taxability at the state and local level. The opinion highlighted the Telecom Act's tax savings provision and the Cable Act's safe harbor for state and local taxes of general applicability as additional evidence against preemption. The court also affirmed that (1) one of the taxpayers was a telephone company that provided telephone service taxable at the local level as defined in Missouri's license-tax-enabling statutes; (2) each local jurisdiction's ordinance language was given individualized treatment and effect; (3) the circuit court had the authority to hear the case; and (4) the circuit court was correct to not dismiss St. Louis County from the case.	*Collector of Winchester, Missouri, et al. v. Charter Communications*
Washington	Telecommunication Services	The Washington Court of Appeals affirmed that a taxpayer's receipts of funds under the federal Lifeline program were subject to the state's retailing business and occupation (B&O) tax and sales tax. The federal Lifeline program, administered by the non-profit Universal Service Administrative Company (USAC), assists in providing access to telecommunications services to qualifying low-income consumers. The taxpayer, a seller of prepaid wireless telecommunications services, received reimbursements from USAC to apply to qualifying customers' bills for providing its services. The taxpayer argued that its receipt of funds from USAC should not have been subject to tax because the reimbursements were not associated with a retail sale. The court disagreed, reasoning that Congress expected that Lifeline funds would be applied to the consumer's bill, which presupposed a sale, or toward providing a prepaid wireless plan, which also falls under Washington's definition of a retail sale. Therefore, the taxpayer was not entitled to a refund.	Assurance Wireless, USA, LP v. State of Washington DOR

State	Category	Development	Authority
Florida	Web-Based Training	The Florida Department of Revenue concluded that a taxpayer's online learning platform which offered streaming and downloadable videos was subject to the State's Communications Services Tax (CST). In a Technical Assistance Advisement, the Department rejected the taxpayer's position that the platform constituted an information service, and instead found that the platform was a video service because it provided the transmission of video, audio, or other programming service to purchasers, including digital video. Since the statutory definition of a "video service" contains no test for the primary purpose of the transaction, the underlying purpose of the taxpayer's platform was irrelevant. Because the platform met the definition of a video service, it was subject to the CST.	Florida Department of Revenue 22A19-002R

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