



**COST 2014 SALES TAX CONFERENCE AND
AUDIT SESSION**

February 23 – 26, 2014

Dallas, TX

Legislation and Litigation Update in the Western United States

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Agenda





California

Technology Transfer Agreements

- ***Nortel Networks, Inc. v. BOE***, 191 Cal App. 4th 1259 (2011)
 - Software licensed by taxpayer to operate switching equipment exempt from sales/use tax under statutes regarding technology transfer agreements (TTA)
 - BOE's regulatory attempt to limit scope of TTA statute by excluding prewritten software invalid



California

Technology Transfer Agreements (cont'd)

- Changes to Regulation 1507 proposed to conform to *Nortel*
- Study commenced to develop method to estimate fair market value of tangible personal property transferred in a TTA
- Discussions with interested parties ongoing



California

Technology Transfer Agreements (cont'd)

- ***Lucent Technologies, Inc. v. BOE***, (LASC Case No. BC402036)
 - On September 27, 2013, a trial court granted taxpayer's motion for summary judgment regarding issue whether sale of software qualified as a TTA exempt from sales tax



California

Local Tax Allocation/Incentive Agreement Issues

- ***City of Palmdale v. BOE***, 206 Cal. App. 4th 329 (2012)
 - Local sales/use tax allocation case in which Court of Appeal issued a scathing rebuke of BOE's procedures in local tax matters and refused to approve a settlement by the parties
 - Case remanded to trial court and dismissed



California

Local Tax Allocation Issues (cont'd)

- Numerous cases pending in court and administratively
 - ***City of Irvine v. BOE***, SFSC Case No. CPF-11-511586
 - ***Petition of City of Fillmore***, SBE Case No. 466375
 - ***Petitions of Cities of Agoura Hills, et al.***, SBE Case No. 469672



California

Local Tax Allocation Issues (cont'd)

- **Pending cases (cont'd)**
 - ***Petitions of Cities of Fontana, et al .,*** SBE Case No. 435564
 - ***Petitions of Cities of Fillmore, et al.,*** SBE Case No. 469672



California

Class Actions Re Improper Collections of Tax

- ***Loeffler v. Target Corp.***, 173 Cal. App. 4th 1229 (2009)
 - Court of Appeal held that consumers are barred by CA Constitution and state laws from asserting class action claims against retailers for alleged improper collection of sales tax
 - Oral argument before CA Supreme Court on February 4, 2014



California

New Exemption for Manufacturing and R&D Equipment

- Biotech and manufacturing companies
- Operative July 1, 2014 and before July 1, 2022



California

Exhaustion of Administrative Remedies

- ***D.R. Systems, Inc., v. BOE***, Case No. D060856 (2013)
 - Unpublished decision in which Court of Appeal reversed trial court and concluded there were triable issues of fact whether BOE should be equitably estopped in asserting failure to exhaust administrative remedies
 - Upon remand, case settled



California

Series of Pending Cases Throughout CA Regarding Closure of Redevelopment Agencies

- In 2012, Governor Brown closed down redevelopment agencies
- Disputes have arisen whether under Assembly Bill No. 1484, the withholding of local tax distributions by the BOE is unconstitutional



Colorado

Direct Marketing Assoc. v. Huber, No. 10-cv-1546, 2012 WL 1078175 (U.S. Dist. Ct. Colo. Mar. 30, 2012), remanded by ***Direct Marketing Ass'n v. Brohl***, 735 F.3d 904 (10th Cir. 2013)

- Colorado law provided that vendors are required to provide additional information to the State concerning in-state purchases, including information regarding the purchasers, when they are not collecting sales/use tax on such purchases
- The U.S. District Court granted the Direct Marketing Association's (DMA) motion for a preliminary injunction preventing Colorado from enforcing its sales tax notice and reporting regime
- Tenth Circuit dismissed
- Injunction dissolved on December 10, 2013 by District Court
- Substantially similar case pending in state courts with preliminary injunction hearing on January 24, 2014
- DMA granted extension to file petition for writ of certiorari with U.S. Supreme Court until February 28, 2014
- CDOR has issued a notice (Dec. 19, 2013) to provide guidance pending lawsuits



Colorado

***City of Golden v. Aramark Educational Services, LLC*, 310 P.3d 262 (Colo. Ct. App. 2013)**

- Aramark entered into food services contracts with the Colorado School of Mines under which Aramark provided all the food in the food service facilities
- Court held that when individuals purchased food from Aramark-operated facilities using cash, checks or credit cards, Aramark was making retail sales subject to Golden's sales tax
- Furthermore, the same conclusion applied to meal plan sales
- Aramark was not exempt as either a wholesaler or for making sales to the government



Colorado

Coors Brewing Co. v. City of Golden, Colo. Ct. App., Dkt. No. 12CA1813 (June 6, 2013)

- Coors purchased rolled sheets of aluminum to make the ends and tabs of beer cans
- Approximately 20% was scrap because it remained on the sheet after the ends and tabs were punched out
- Coors collected it as scrap and resold it
- The City assessed use tax on the scrap asserting that it was used during the manufacturing process
- The court rejected the city's position because Coors always intended to resell the scrap



Colorado

Expedia, Inc. v. City and County of Denver, Co. Dist. Ct., Dkt. 12CV1446 (March 12, 2013)

- Denver District Court upheld an assessment of Denver's lodging tax against online travel companies that operate websites allowing customers to book reservations for hotels in Denver



Colorado

Legislative

- Colorado passed a bill, contingent on Congress' adoption of the Marketplace Fairness Act by Dec. 31, 2013, that would simplify the collection of sales tax from out of state retailers. L. 2013, H1295
- On Dec. 15, 2013, CDOR issued a report of its recommendations to the General Assembly about establishing a revenue neutral uniform sales and use tax base throughout the state as called for pursuant to L. 2013, H1288
- For any person entitled to a sales or use tax exemption or who has overpaid such tax, the deadline for applying for a refund is three years after the 20th day of the month following the date of purchase rather than three years after the date of purchase. L. 2013, H1009



Hawaii

Nexus Legislation Pending

- On January 13, 2014, House Bill 1651 prefiled in Hawaii House of Representatives
- Contains both click-through and affiliate nexus provisions
- Would take effect on July 1, 2015, if Hawaii does not enact a law in accordance with a federal law authorizing states to require collection of sales/use taxes by remote sellers



Idaho

Legislative

- Application software, except that for entertainment use, accessed over the internet or wireless media, is excluded from the definition of taxable “tangible personal property.” L. 2013, H243
- The terms “primary” and “primarily” are statutorily defined for purposes of the predominant or greatest use of property tests. L. 2013, H15



Kansas

Nexus Legislation Enacted

- Senate Bill 83 enacted in 2013
- Adds both click-through and affiliate nexus provisions



Nebraska

Lyman Richey Corp. v. Neb. Dept. of Rev., Dist. Ct. of Lancaster County, Dkt. No. Cl112-3031 (Feb. 25, 2013)

- Taxpayer was issued a notice of deficiency
- Neb. Rev. Stat. 77-2709(7) provides for 60 days to file a petition for redetermination in response to a notice of deficiency
- Taxpayer appealed, but relied on rules of civil procedure which allow three extra days in the case of mailing
- DOR dismissed appeal on the basis that the rules of civil procedure do not apply and court agreed



New Mexico

Nexus

- ***New Mexico Taxation and Revenue Department v. Barnesandnoble.com LLC*, 303 P.3d 824 (June 3, 2013)**
 - NM Supreme Court affirmed the Court of Appeal and concluded that the in-state activities of a sister corporation (Booksellers), which had stores in NM, were sufficient to create substantial nexus in the State for bn.com



New Mexico

Barnesandnoble.com (cont'd)

- Court concluded that Booksellers engaged in activities on behalf of bn.com which were significantly associated with its ability to establish and maintain a market for its sales in the State
- Key in-state activities included:
 - Sales of gift cards
 - Sharing of email addresses
 - Shared loyalty program
 - In-state use of trademarks and logos



North Dakota

Legislative

- Sales tax exemption for materials used to construct facility to produce liquefied natural gas. L. 2013, H1410
- Sales tax exemption for construction of electrical power plants extended to June 30, 2017. L. 2013, H1382
- Sales tax exemption for materials used to construct a facility to extract or process byproducts associated with coal gasification. L. 2013, H1413
- For periods after 6/30/2013, the maximum compensation discount allowed to retailers for collecting the sales tax goes to \$110 per return. L. 2013, H1464
- Sales tax exemption for materials used to construct telecommunications service infrastructure. L. 2013, S2142



South Dakota

Magellan Pipeline Co. v. South Dakota Department of Revenue and Regulation, 837 N.W.2d 402 (S.D. S.Ct. 2013)

- South Dakota grants a sales tax exemption for “pipe lines” services in SDCL 10-45-12.1
- Taxpayer provides the transportation of refined petroleum products in its pipeline system and also provides additional services such as additive injection and equipment calibration
- The S.D. Supreme Court held that under the plain language rule, the exemption is not limited to “transportation” services but applies more generally to “pipeline services” which includes the Taxpayer’s additional services



South Dakota

AEG Processing Center No. 58 v. South Dakota Department of Revenue and Regulation, 838 N.W.2d (S.D. S.Ct. 2013)

- Taxpayer was issued a final administrative decision finding the taxpayer liable for unpaid sales tax
- Taxpayer appealed to the circuit court but did not pay the tax or file a bond until a few days after the appeal deadline
- The circuit court dismissed, and the S.D. Supreme Court affirmed the dismissal holding that the requirement to pay or post a bond is jurisdictional and substantial compliance is not satisfactory



Texas

Refund Claims

- ***Ryan LLC v. Combs***, Cause No. D-1-GN-12-002388
 - On May 10, 2013, a trial court concluded that the Comptroller's rule (34 Tex. Admin. Code § 3.325) which imposed additional burdens, conditions, and restrictions on sales and use tax refund claims in excess of the specific provisions of Texas Tax Code §111.104 was invalid



Texas

Taxability of Software

- ***Verizon Business Network Services v. Combs***, 2013 Tex. App. Lexis 4338 (April 3, 2013)
 - Court of Appeal affirmed trial court and concluded that the feature enhancements or software loads purchased by Verizon during the refund period are taxable under the sales tax and, alternatively, the use tax



Texas

Sale for Resale Exemption

- ***Combs v. Health Care Services Corporation***, 401 S.W. 3d 623 (June 7, 2013)
 - Supreme Court concluded that a government contractor qualified for the sale for resale exemption in connection with purchases of goods and services used to administer federal health insurance programs



Utah

DirectTV, Inc. v. Utah State Tax Commission, Utah Dist. Ct. (4th Jud. Dist.), Dkt. 110402039 (June 27, 2013)

- Utah Code Ann. 59-26-104.5 allows multichannel video providers who pay franchise fees to run cable on public property a credit against the sales tax collected from purchasers of their service measured by up to 50% of their franchise fees
- DirectTV challenged the preference on Equal Protection grounds
- The Utah court upheld the credit on the basis that cable companies incur far greater expenses than satellite companies, and it was reasonable for lawmakers to so classify the companies



Utah

Legislative

- Sales tax exemption enacted for machinery and equipment used to provide electronic financial payment services. L. 2013, S171
- Sales tax exemption for access to a database if the primary purpose is to view or retrieve information from the database unless the amounts are for certain digital products. L. 2013, S124
- Sales tax exemption for the purchase short term longing consumables by businesses providing accommodations. L. 2013, S84
- Authorization for certain remote sellers who voluntarily collect sales tax to retain 18% of such amount. L. 2013, H300



Washington

Department of Revenue v. AOL, Inc., Thurston Cty. Sup. Ct., Dkt. 12-2-01200-5 (June 4, 2013)

- WDOR issued retail sales tax assessment on AOL's purchases of managed modem service for 2002 through 2006
- Superior Court affirmed Board of Tax Appeals finding that AOL's purchases qualified as "internet service" and is excluded from taxation as a "network telephone service"



Washington

Sprint Spectrum, LP v. State of Washington, 302 P.3d 1280 (Wash. Ct. App. 2013)

- Sprint provided cell phones free of charge if customers signed a two-year contract
- Sprint recouped the value of the phone through the service charge which was subject to sales tax and Sprint argued that it was a bundled sale of both for which sales tax was collected
- WDOR assessed use tax on phones fully discounted and sold for \$0
- Court of Appeals held that the service and phone were separate transactions. When fully discounted, vendor is liable for use tax
- Application now to loyalty programs?



Washington

Northwest Territorial Mint v. Wash. Dept. of Rev., Wash. Ct. App., Dkt. 68065-0-1 (Unpublished March 4, 2013)

- Taxpayer received an adverse Board of Tax Appeals decision and appealed it to Superior Court
- Taxpayer served the Department of Revenue and the Attorney General's Office, but not the Board
- Court of Appeals held that failure to serve the appeal on the BTA within 30 days after service of the BTA's final order was fatal
- Similar to *Sprint Spectrum v. State*, 235 P3d 849 (Wash. Ct. App. 2010)



Washington

Washington Det. No. 12-0260, 32 WTD 156 (released July 30, 2013)

- A retailer entered into a credit card agreement with a third party lender under which the lender would own and service credit card accounts, charging the taxpayer a yearly fee based on the amount of uncollected debts
- Taxpayer sought a bad debt deduction
- Relying on *Home Depot*, the DOR's Appeals Division held that because the bank was the sole owner of the accounts taxpayer was not entitled to the deduction. However, Home Depot focused on who was entitled to the federal bad debt deduction
- Currently pending before the Board of Tax Appeals – Macy's and Kohl's, both of whom, under their facts, receive the federal bad debt deduction



Polling Question

Under a physical presence test, which of the following SHOULD NOT constitute sufficient nexus?

1. Taxpayer whose only office is in the taxing jurisdiction (revenues, office and people in jurisdiction)?
2. Taxpayer that was the lessee of specialized rail cars used to ship its product to a single customer into the taxing jurisdiction (revenues and property in jurisdiction)?
3. Taxpayer that grossed over \$48 million from 1,675 recorded sales to customers in jurisdiction, and used its vehicles to deliver product (for which it charged separately), traveling 141,491 miles on taxing jurisdiction's roads (sales, employees and property in jurisdiction)?
4. One and two, but not three?



Polling Results



Washington

Wash. Dept. of Rev. v. Sage V Foods, LLC,
Thurston Cty. Sup. Ct., Dkt. 12-2-01893-3
(Aug. 20, 2013)

- Taxpayer that was the lessee of specialized rail cars used to ship its product to a single customer in Washington lacked substantial nexus



Washington

Space Age Fuels, Inc. v. State of Washington, Wash. Ct. App., Dkt. 44195-1-II (Dec. 31, 2013)

- An Oregon based seller grossed over \$48 million from 1,675 recorded sales to customers in Washington, and used its vehicles to deliver product (for which it charged separately), traveling 141,491 miles on Washington roads
- Taxpayer argued that delivery alone cannot constitute nexus
- The Court of Appeals disagreed, and furthermore distinguished *Sage V Foods* which used a common carrier to move its rail cars



Washington

Legislative

- Proposed – to repeal trade-in exemption and use tax exemption for extracted fuel, tax bottled water and janitorial services
- On November 11, 2013, the Governor signed various aerospace industry tax preferences, including an extension of the sales tax exemption for construction material, labor and services. L. 2013, S5952
- A B&O deduction became effective Oct. 1, 2013, for amounts received by a paymaster to reimburse for employee costs of affiliates



Wyoming

In the Matter of the Appeal of Travelocity.com LP, Wyo. St. Bd. Equalization, Dkt. 2010-112 et al (Feb. 28, 2013)

- The Wyoming State Board of Equalization has held that online travel companies are “vendors” obligated to collect sales tax on the total sales price, including the portion that is considered a facilitation charge



Questions?

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