



Taxation in the Digital Age

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E-Commerce SALT Issues

- **Income Tax**

- Tangible v. intangible property
- Nexus issues
- Sourcing issues (sales/receipts and property factors)

- **Sales Tax**

- Nexus determinations (sales and use tax collection)
- Taxability of goods and services

Income Tax Issues

- Tangible v. intangible property
- Nexus
 - License of software for use = economic nexus (*Geoffrey*)?
 - PL 86-272
 - Sale of TPP with solicitation activity = nexus (but potential protection by the federal law)
 - “Economic nexus” theories
- Sourcing issues
 - Sales/receipts factor
 - Property factor

Sales Tax Issues

- Nexus
 - Click-through (or “Amazon”) statutes
- Taxability of digital goods and services
 - Classification of digital transactions as TPP vs. service vs. distinct classification for digital products
 - Software licensing and sales
 - Cloud computing

Income Tax Issues

Tangible v. Intangible Property

- Are software and digital products considered tangible or intangible property?
- Why does it matter?
 - **Nexus** – physical presence if taxpayer licenses software for use in a state?
 - **Public Law 86-272** – applies only to solicitation of sales of tangible personal property, not to sales of intangible property or services
 - **Apportionment** rules: sales and property factors
 - No definition of tangible personal property in UDITPA or most other corporate income tax statutes

Tangible v. Intangible Property

- **Sales/use tax statutory definitions:**
 - TPP = “Personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses”
 - TPP often includes electricity, water, gas, steam and prewritten computer software

Tangible v. Intangible Property

- **Case law definitions of TPP:**
 - Early cases generally held that software is intangible property based on the idea that the information contained in the software is intangible
 - *State v. Cent. Computer Servs., Inc.*, 349 So. 2d 1160 (Ala. 1977)
 - *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976)
 - *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248 (Md. 1983)
 - Sales may still be subject to sales tax if conveyed in tangible medium (software cannot be separated from tangible medium – compare with true object test)

Tangible v. Intangible Property

- **Case law definitions of TPP (cont'd):**
 - In more recent years, many courts have held software to be tangible property even if conveyed electronically because it is composed of electrons that have a physical existence, make physical things happen, and can be perceived by the senses.
 - *South Cent. Bell Tele. Co. v. Barthelemy*, 643 So.2d 1240 (La. 1994) (a true “intangible” like a legal right)
 - *South Cent. Utah Tel. Ass’n v. Auditing Div. of the Utah State Tax Comm’n*, 951 P.2d 218 (Utah 1997) (same)
 - *Graham Packaging Co. v. Commonwealth*, 882 A.2d 1076 (Pa. Commw. Ct. 2005) (involving a license to use software)

Tangible v. Intangible Property

- **Case law definitions of TPP (cont'd):**
 - *Andrew Jergens Co. v. Wilkins*, 848 N.E.2d 499 (Ohio 2006) (property tax)
 - *Appeal of Retail Marketing Servs., Inc.*, 1991 Cal. Tax LEXIS 26 (Cal. State Bd. of Equal. 1991) (coupons constitute “intangible property” for purposes of computing property factor because the coupons represent the customer’s right to the discount and thus the paper itself has no intrinsic value)
 - *Norwest Corp. v. Comm’r*, 108 T.C. 358 (1997)
 - The U.S. Tax Court held that software was TPP for purposes of the federal investment tax credit based, in part, on legislative intent that TPP should be construed broadly

Tangible v. Intangible Property

- **Case law definitions of TPP (cont'd):**
 - Not all courts have adopted this view
 - *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119 (Tex. Ct. App. 1996)
 - Software was not TPP subject to property tax because the “imperceivable binary pulses” that make up computer application software are not capable of being seen, weighed, measured, felt or otherwise perceived by the senses
 - *Globe Life & Accident Ins. Co. v. Okla. Tax Comm’n*, 913 P.2d 1322 (Okla. 1996) (same)
 - *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688 (Conn. 1989) (physical aspect is tangential)

Tangible v. Intangible Property

- **Federal rules:**
 - Sale of prewritten software treated as tangible property for sourcing purposes even if the parties characterize the transaction as a license – Treas. Reg. § 1.861-18(g)(1); Treas. Reg. § 1.861-18(h), Example 1.
 - Computer software treated as intangible property for IRC §§ 179 and 197 purposes

Nexus / P.L. 86-272

- *AccuZIP, Inc. v. Dir., Div. of Taxation*, 25 N.J. Tax 158 (2009); *Quark, Inc. v. Dir., Div. of Taxation*, 25 N.J. Tax 158 (2009)
 - Software is TPP for nexus purposes (federal authorities under Treas. Reg. 1.861-18(g) are persuasive, but not dispositive)
 - Taxpayers selling copies of copyrighted software to the public
 - Purchaser owns physical copy and licenses software rights
 - Taxpayers own no physical property in the state
 - AccuZIP not doing business in state (because no contact other than sales) and thus has no nexus with the state
 - Taxpayers protected by P.L. 86-272 in any case because the sale of prewritten software is a sale of a tangible product even though it may be characterized as a licensing agreement

Nexus / P.L. 86-272

- Illinois Dep't of Rev. General Information Letter IT 98-0077-GIL, 09/07/1998; Illinois Private Letter Ruling No. IT 90-0007-PLR, 01/08/1990
 - Canned computer software is TPP and custom software is intangible property for P.L. 86-272 purposes
 - Relied on sales/use tax statutory definition of TPP
- Mass. DOR Directive No. 96-2 (July 3, 1996)
 - License of canned software, transferred on a tangible medium to be used for any purpose other than commercial reproduction, treated as the sale of TPP

Nexus / P.L. 86-272

- Va. Public Document Ruling No. 91-57, 03/29/1991
 - Both custom and canned software is intangible property for income tax purposes
- Utah Advisory Opinion No. 93-002DJ, 03/19/1993
 - Taxpayer that provides in-state customers access to third party databases through “gateway” has nexus with the state and is not protected by Public Law 82-272; canned software licensed to customers to enable use of gateway
 - The use of the database is characterized as services
 - The sale/license of canned software is characterized as the sale/license of tangible personal property

Apportionment

- **Sales Factor**
 - If TPP, destination-based sourcing generally applies – but what if electronic transfer?
 - If intangible property or services, then:
 - Cost of performance: based on where income producing activities take place
 - Marketplace-based sourcing: based on where customer is located/intangible is used by licensee
 - Commercial domicile of taxpayer
 - Do throwback/throwout rules apply and, if so, how?
 - Apply only to sales of tangible personal property
 - If software is TPP, but transmitted electronically, where are sales thrown back?

Apportionment

- **Sales Factor (cont'd)**
 - Cal. Rev. & Tax Code § 25136
 - Beginning Jan. 2011, sales of intangibles are sourced to California “to the extent the property is used in this state.”
 - *Appeal of Adobe Sys., Inc.*, 1997 Cal. Tax LEXIS 257 (Cal. S.B.E. 1997)
 - CA-based taxpayer licensed software to customers in MA
 - MA auditor: royalties sourced to MA (destination-based, consistent with treatment of software as TPP)
 - CA SBE: royalties sourced to CA because income-producing activities (R&D, technical support, negotiation of license contracts) took place in CA (consistent with treatment of software as intangible property)
 - Cannot be cited as precedent

Apportionment

- **Sales Factor (cont'd)**
 - *Microsoft Corp. v. Franchise Tax Board*, No. CGC-08-471260 (Cal. Super. Ct. filed Jan. 22, 2008)
 - FTB claims that software licensed to OEMs is TPP for purposes of determining sales factor, which would result in royalties sourced to location of ultimate user
 - Microsoft claims that software is intangible property, which would result in royalties sourced under cost of performance rule to Washington
 - Cal. Rev. & Tax Code § 25128.5(a)
 - Allows single sales-factor election for tax years beginning on or after 1/1/2011

Apportionment

- **Sales Factor (cont'd)**

- *Am. Bus. Info. Inc. v. Egr*, 650 N.W.2d 251 (Neb. 2002)
 - Taxpayer sold database information to customers on physical media and electronically
 - Nebraska law defines TPP by reference to federal income tax law
 - Court thus follows *Norwest* decision in holding that software constitutes TPP for purposes of taxpayer's sales factor

Apportionment

- **Sales Factor (cont'd)**

- *BellSouth Adver. & Publ. Corp. v. Chumley*, 2009 WL 2632773 (Tenn. Ct. App. 2009)
 - Taxpayer had substantial receipts from the sale of advertising in directories distributed in Tennessee; the parties stipulated that the sales were “sales other than sales of tangible personal property”
 - Taxpayer asserted that using a “greater proportion” COP approach, the advertising revenues were excluded from the numerator of the sales factor
 - The commissioner argued that because all of the revenue was derived from directories physically distributed in Tennessee, Tennessee was the real site of the “earnings producing activity”
 - The court ultimately applied the UDITPA Section 18 analysis, noting the inconsistency between the fact that the revenue came from Tennessee but a strict COP approach to the sales factor would source the revenue outside Tennessee

Apportionment

- **Sales Factor (cont'd)**
 - Wis. Stat. § 71.25
 - Cost of performance replaced with market-based sourcing
 - Receipts include amounts received as payment for purchase, license, or use of intangible property within Wisconsin

Apportionment

- **Property Factor**

- In general, applies only to tangible property
- California Franchise Tax Board manual: software is tangible property, so included in property factor
 - Sourced to state where storage media located
 - Custom software is also TPP once placed in service
- *Appeal of Retail Mktg. Serv., Inc.*, 1991 Cal. Tax LEXIS 26 (Cal. S.B.E. 1991)
 - Coupons constitute “intangible property” for purposes of computing property factor because the coupons represent the customer’s right to the discount and thus the paper itself has no intrinsic value

Apportionment

■ Property Factor (cont'd)

- Ariz. Corp. Tax Ruling 01-2, 05/01/2001
 - Arizona conforms to the IRC in the determination of the value and nature of business assets
 - Therefore, computer software that has been treated as TPP and capitalized for federal tax purposes will be treated similarly for purposes of Arizona's property factor (and for tax purposes generally)
- Fla. Admin. Code Ann. 12C-1.0153
 - Canned software treated as TPP for property factor purposes

Sales Tax Issues

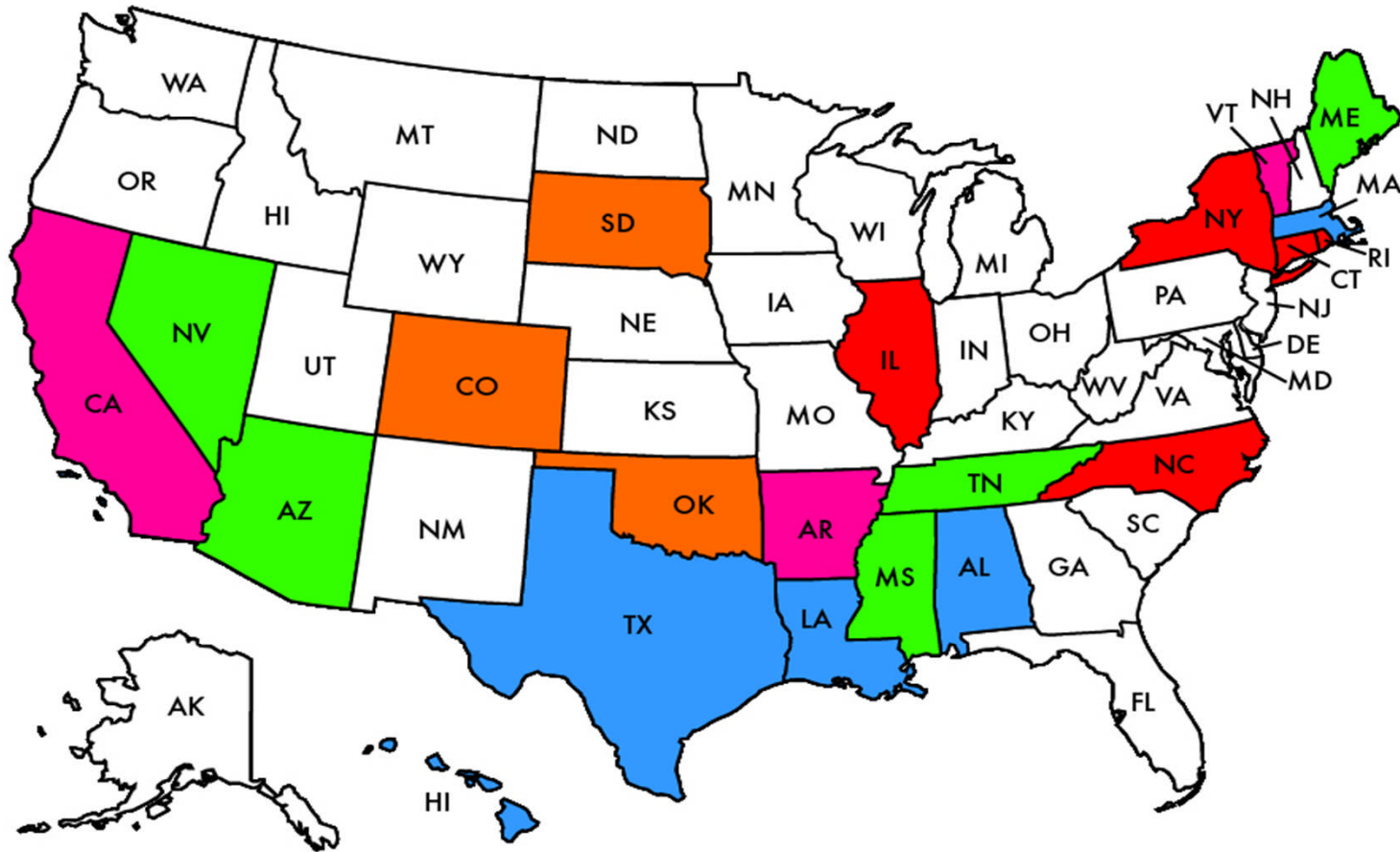
“Amazon” Statutes and Click-Through Nexus

- Goal is to force out-of-state retailers to either collect and remit use tax on purchases by in-state customers, or to impose disclosure/reporting requirements on such retailers
- First enacted in New York in 2008
- Subsequently enacted—in one form or another—in Arkansas (2011), California (2011), Colorado (2010), Connecticut (2011), Illinois (2011), North Carolina (2009), Oklahoma (2010), Rhode Island (2009), South Dakota (2011), and Vermont (2011)

“Amazon” Statutes and Click-Through Nexus

- States that introduced or enacted click-through nexus legislation in 2011:
 - Arkansas (ENACTED)
 - Arizona
 - California (ENACTED)
 - Colorado*
 - Connecticut (ENACTED)
 - Hawaii
 - Illinois (ENACTED)
 - Louisiana
 - Maine
 - Massachusetts
 - Mississippi
 - Oklahoma*
 - Rhode Island*
 - South Dakota (ENACTED)
 - Tennessee
 - Texas
 - Vermont (ENACTED)

* Repeal efforts



- State has enacted a click-through nexus law – affiliate program
- State has enacted a click-through nexus law – notice and/or other type of provision
- State has enacted two types of click-through nexus laws – affiliate program and a notice or other type of provision
- A click-through nexus bill is currently pending in the 2011 legislative session
- Click-through nexus legislation was considered but has been shelved in the 2011 legislative session

Current through 6/30/2011

“Amazon” Statutes and Click-Through Nexus

- **Click-through nexus models:**
 1. Collection laws (affiliate programs)
 2. Disclosure/reporting laws
 3. Controlled group laws
 4. Other laws

“Amazon” Statutes and Click-Through Nexus

■ Click-through nexus models:

1. Collection laws (affiliate programs)

- E.g., New York – N.Y. Tax Law § 1101(b)(8)(vi)
 - Provides that a seller of tangible personal property is presumed to be doing business in New York if the seller “enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller.”
 - The seller must have had cumulative gross receipts of \$10,000 in the previous four quarters due to sales from all such referrals by New York residents.
 - This presumption can be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States Constitution during the four quarterly periods in question.

“Amazon” Statutes and Click-Through Nexus

- **Click-through nexus models:**

- 2. Disclosure/reporting laws

- E.g., Colorado – Colo. Rev. Stat. Ann. § 39-21-112(3.5) (2010)
 - Establishes three disclosure / reporting requirements.
 - First, each retailer that does not collect Colorado sales tax is required to notify Colorado purchasers that sales/use tax is due on certain purchases made from the retailer and that the purchaser is required to file a Colorado sales or use tax return.
 - Second, such retailers are also required to make an annual notification to its Colorado purchasers by January 31 of each year, including purchaser-specific information (e.g., date of purchase, amounts, whether sales was tax-exempt or taxable).
 - Third, retailers that do not collect Colorado sales tax must file an annual statement by March 1 for each purchaser to the Colorado Department of Revenue, showing the total amount paid of Colorado purchases of such purchasers during the preceding calendar year.

“Amazon” Statutes and Click-Through Nexus

- **Click-through nexus models:**

- 3. Controlled group laws

- E.g., South Dakota – SB 147 (2011)
 - A retailer that is part of a “controlled group of corporations” having a “component member” that is a retailer engaged in business in South Dakota will be presumed to be a retailer engaged in business in South Dakota.
 - This presumption may be rebutted by proof that during the calendar year at issue the component member that is a retailer engaged in business in South Dakota did not engage in those activities on behalf of the retailer.

“Amazon” Statutes and Click-Through Nexus

■ Click-through nexus models:

4. Other laws

- E.g., Texas – HB 2403 (2011)
 - A retailer is engaged in business in Texas if it “holds a substantial ownership interest in, or is owned in whole or substantial part by, a person who maintains a location in this state from which business is conducted and if:
 - (A) the retailer sells the same or a substantially similar line of products as the person with the location in this state and sells those products under a business name that is the same as or substantially similar to the business name of the person with the location in this state; or
 - (B) the facilities or employees of the person with the location in this state are used to: (i) advertise, promote, or facilitate sales by the retailer to consumers; or (ii) perform any other activity on behalf of the retailer that is intended to establish or maintain a marketplace for the retailer in this state, including receiving or exchanging returned merchandise.”

“Amazon” Statutes and Click-Through Nexus

- **Ensuing litigation over click-through nexus laws**
 - New York – *Amazon.com LLC v. New York State Dep’t of Taxation & Finance*, 2010 N.Y. App. Div. LEXIS 7943 (2010)
 - Appellate Division upheld the facial constitutionality of the law but remanded the case to the trial court to determine the as-applied constitutionality.
 - North Carolina – *Amazon.com v. Lay; Jane Doe 1 et al. v. Lay* (W.D. Wash. Oct. 25, 2010)
 - Wash. district court ruled that N.C. could not require the disclosure of the customer information it sought on 1st Amendment grounds; did not rule on validity of statute.
 - Colorado – *Direct Marketing Ass’n v. Huber* (D. Colo. Jan. 26, 2011)
 - District court granted DMA’s preliminary injunction against Colorado.
 - Illinois – *Performance Marketing Ass’n, Inc. v. Hamer* (N.D. Ill., filed 6/1/2011)
 - PMA has brought constitutional challenges and ITFA challenge.

“Amazon” Statutes and Click-Through Nexus

- The click-through nexus landscape changes daily
 - Bills have been introduced throughout the 2011 session; often more than one in the same state
 - A few states have introduced and/or enacted more than one type of click-through nexus law
 - Several repeal efforts were entered into in 2011, but none were successful
- On June 21, Connecticut made its statute retroactive to May 4, 2011
- Large Internet-only retailers (e.g., Amazon.com and Overstock.com) terminate affiliate program operations in states where offending laws have been enacted

Digital Products and Services

- Many states have started to impose their sales tax upon a certain subset of “digital products”
- The origin of this probably lies within the Streamlined Sales and Use Tax Agreement (“SSUTA”)
 - Goal was to delineate categories upon which to impose the tax or exempt in their entirety
 - Digital products definition was broken out

Digital Products and Services

- **Definitions under the SSUTA, effective January 1, 2009:**
 - “Specified digital products” are defined to include the following three things:
 - “Digital audio visual works” – “a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any”
 - “Digital audio works” – “works that result from the fixation of a series of musical, spoken or other sounds, including ringtones”
 - “Digital books” – “works that are generally recognized in the ordinary and usual sense as books”
 - “Transferred electronically” means “obtained by the purchaser by means other than storage media.”

Digital Products and Services

- **Many states have carved out and tax certain digital goods, such as:**
 - Kentucky (Ky. Rev. Stat. Ann. §§ 139.010, 139.200)
 - Imposes tax on the retail sale of “digital property,” regardless of the user rights granted by the seller, or whether the buyer is obligated to make continued payments as a condition of the sale. “Digital property” means any of the following which is transferred electronically: (1) Digital audio works; (2) Digital books; (3) Finished artwork; (4) Digital photographs; (5) Periodicals; (6) Newspapers; (7) Magazines; (8) Video greeting cards; (9) Audio greeting cards; (10) Video games; (11) Electronic games; or (12) Any digital code related to this property.
 - New Jersey (N.J. Rev. Stat. §§ 54:32B-3, 54:32B-2(zz))
 - Effective May 1, 2011, “specified digital products” are taxable.
 - Such products are defined as “an electronically transferred digital audio-visual work, digital audio work, or digital book,” and includes digital code used to obtain a product.

Digital Products and Services

- **Other states have not specifically adopted a broad tax on digital goods, but have some version of tax on electronic delivery of otherwise tangible items, including:**
 - Alabama (*Smith v. DOR*, No. S. 05-1240 (Ala. Dep't of Rev. Admin. L. Div. 2006))
 - Photographer's sale of digital images transmitted electronically are taxable because they constitute tangible personal property.
 - Colorado (Colo. Gen. Info. Letter No. GIL-09-25, 05/13/2009)
 - Sales of downloaded documents are taxable as TPP.
 - Louisiana (La. Admin. Code § 61:I.4301(C))
 - Definition of tangible personal property includes “‘on demand’ audio and video downloads.”
 - Maine (Me. Rev. Servs., Sales, Fuel & Spec. Tax Div., Instr. Bulletin No. 3, 07/28/2008)
 - Applies to sales of photographs, portraits, and videotapes, including the sale of a digital product delivered electronically.”

Digital Products and Services

- In contrast, some states have determined that TPP delivered electronically is *not* taxable (at least in certain circumstances):
 - Florida (Florida Tech. Assistance Advisement 11A-002, 01/13/2011)
 - Sales transactions involving only digital transmissions via the Internet to a customer's computer, without any other evidence of the transfer of something tangible, are not sales of TPP for sales/use tax purposes.
 - Such sales instead constitute services that are not subject to sales and use tax.
 - On the other hand, files transferred via a hard drive, CD, flash drive, or DVD are TPP and thus subject to sales/use tax.

Digital Products and Services

- **Treatment of software**
 - Last substantial effort was to determine whether software was:
 - Tangible personal property
 - Always
 - When delivered on tangible medium
 - When electronically delivered
 - Load and leave
 - If it was TPP, it was taxable
 - And now the question is taxability of the use of software, regardless of whether it's TPP

Digital Products and Services

- **Treatment of software (cont'd)**
 - States have taken varying (and often inconsistent) positions, including:
 - Not TPP, because no tax on electronically delivered software
 - Not a sale of TPP (software) because no transfer occurs
 - Not taxable because server is not located in the state
 - True object is a service and ASP/SaaS is not an enumerated taxable service
 - Taxable as an information, communication or data processing service (or exempt from such definitions)
 - Taxable as a sale of software
 - With license
 - Without license
 - If downloaded or
 - If not able to download

Digital Products and Services

- **Treatment of software (cont'd)**
 - Three sales and use tax issues pertaining to software:
 1. Prewritten vs. custom software
 - States typically tax only prewritten
 - However, some tax both (D.C., Tenn., W.V.)
 2. Method of delivery (i.e., by tangible medium or electronically)
 - Most states tax software regardless of how delivered
 - A few states exempt software delivered electronically (Colo., Mo.)
 3. Rights transferred to end user
 - Finally, a few states only tax software if the end user receives less than full ownership rights (such as a license to use it) (Ill.)

Cloud Computing

- An increasingly common business model is to provide online services, otherwise known as “cloud computing.”
- Cloud computing is defined as “a model for enabling convenient, on demand network access to a shared pool of configurable computing resources (e.g. networks, servers, storage applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.”
 - *National Institute of Standards and Technology, NIST.gov*

Cloud Computing

- **There are two primary platforms for providing online services:**
 - (1) Software as a service (“SaaS”), and
 - (2) Application service provider (“ASP”).
- **Means of delivery include:**
 - The Internet (including downloading, web-browser access, streaming access)
 - Wireless carrier
 - Satellite

Cloud Computing

- **Definition of SaaS:**

- “The capability provided to the consumer is to use the provider’s applications running on a cloud infrastructure. The applications are accessible from various client devices through a thin client interface such as a web browser (e.g., web-based email). The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, storage, or even individual application capabilities, with the possible exception of limited user-specific application configuration settings.”
 - *-National Institute for Standards and Technology, NIST.gov*

Cloud Computing

■ Definition of ASP:

- “[A]n entity that retains custody over (or ‘hosts’) software for use by third parties. Users of the software hosted by an ASP typically will access the software via the Internet. The ASP may or may not own or license the software, but generally will own and maintain hardware and networking equipment required for the user to access the software. The ASP may charge the user a license fee for the software (in instances where the ASP owns the software) and/or a fee for maintaining the software/hardware used by its customer.”
 - -1 Colo. Code Regs. § 201-5(p.16)(2)(a) (2010), repealed Mar. 1, 2010
- The Kansas Department of Revenue has noted that the common features of ASPs include: (1) they fully own and operate the software applications; (2) they own, operate, and maintain the servers that support the software; (3) they make information available to customers via the Internet or a “thin client”; and (4) they bill on a “per-use” basis or on a monthly/annual fee.
 - -Kansas Opinion Letter No. O-2010-005, 06/22/2010

Cloud Computing

- **Some states are attempting to impose sales/use tax on these online services.**
- **E.g.:**
 - Washington
 - Wash. Rev. Code 82.04.050 – Sales tax is imposed on the sale of a “digital automated service,” defined to mean “any service transferred electronically that uses one or more software applications.”
 - Wash. Dep’t of Revenue Special Notice (11/02/2010) – Digital goods are taxable, unless they are purchased and used solely for a business purpose. This notice states that “online searchable databases (OSD) are digital automated services (DAS)” and not digital goods. As a result, OSDs do not qualify for the business purpose exemption, and therefore they “are subject to retail sales or use tax unless some other exemption applies.”

Cloud Computing

- **On the other hand, several states have declined to extend sales/use tax to cloud computing, such as:**
 - Florida
 - Fla. Technical Assistance Advisement 10A-051, 12/06/2010 – Sales of online authentication services to customers via the provision of a digital certificate (which allow an end user to recognize that he or she is indeed accessing the customers' website) are not taxable.
 - Kansas (Kansas Opinion Letter No. O-2010-005, 06/22/2010)
 - Fees charged by an ASP provider to its customers for ASP services are not subject to sales tax. Such fees include recurring monthly charges, set-up fees, support fees, training fees, data migration fees, and forms programming fees. However, the sale of canned software that can be used independent of the ASP service is subject to sales tax.
 - Massachusetts (Letter Ruling 11-4, 04/12/2011)
 - A technology company's online services assisting organizations in their employee application gathering and selection process are not subject to sales and use tax because the services do not involve the transfer of prewritten software or a license to use software.

Cloud Computing

- **Web hosting:**
 - Will hosting a website on a server situated in State X result in sales tax obligation for a taxpayer?
 - Is server presence alone enough to trigger nexus?
 - Texas
 - 34 Tex. Admin. Code § 3.286(a)(2)(E) – “Engaged in business” is defined to include deriving “receipts from a rental or lease of tangible personal property that is located in this state” or owning or using “tangible personal property that is located in this state, including a computer server or software.”
 - Tex. Pol’y Letter Ruling 201103016L (3/24/2011) – Announced that the state is reviewing application of this rule, as the wording has been interpreted more broadly than intended. Specifies that only having a website on a server located in Texas is not sufficient to create nexus.
 - HB 1841 (2011) – Provides that a “person whose only activity in this state is conducted as a user of Internet hosting is not engaged in business in this state”

Digital Goods and Services Fairness Act of 2011

- On May 12, 2011, federal lawmakers introduced H.R. 1860, which would prevent state and local governments from imposing “multiple and discriminatory” taxes on digital goods and services.
- The act prevents states and localities from taxing digital products differently than their tangible counterparts.
- Was referred to referred to House Subcommittee on Courts, Commercial and Administrative Law on 5/23/2011.

Questions?

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