

Sales Tax & SSTP Update

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December 14, 2009

Agenda

- ▶ Fiscal Update and Legislative Themes
- ▶ Nexus
- ▶ Computer Software, Access and Related Services
- ▶ Digital Goods and Services
- ▶ Bad Debts
- ▶ Services and Bundled Transactions
- ▶ Class Action Cases
- ▶ Streamlined Sales Tax Update

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Fiscal Update and Legislative Themes

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Nexus

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Attributional Nexus

► **Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services (Conn. Super. 4/9/09)**

- Department asserted teachers actions (e.g., passing out and remitting order forms, earning bonus points when books were sold) created nexus for seller of books to students
 - Issue: Were teachers acting as “representatives” on behalf of the taxpayer in Connecticut
- Court held that the teachers were not a “sales force”
 - The decision to participate in the program was at the teacher’s discretion, the teachers often purchased books for themselves, and the bonus points remained with the classroom

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Affiliate Nexus -- Wisconsin

► **Effective July 1, 2009, legislation redefines retailer (with a requirement to collect tax) to include any person who:**

- Has an affiliate in Wisconsin
- Retailer is related to the affiliate
- Affiliate uses facilities or employees in the state to advertise, promote or facilitate the establishment of a market for sales of items by the retailer in Wisconsin or for providing services to the retailer’s customers in Wisconsin, including accepting returns or resolving customer complaints

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Duty to Collect

► Town Fair Tire Centers Inc. v. Commissioner of Revenue (Mass. Supreme Judicial Court, Aug. 25, 2009)

- Taxpayer operating tires stores in both N.H. and Mass. was required to collect and remit use tax on tires sold to Mass. residents at its N.H. stores.
- Appellate Tax Board ruled that the taxpayer could determine based on drivers' licenses and license plates that sales to Mass. residents were **intended to be used** in Mass.
- Supreme Judicial Court overturned ATB finding that **actual use** in Mass. was required and Town Fair did not know that
- Court did not address constitutional issues

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New Hampshire Response

► AN ACT prohibiting retailers from disclosing private customer information to foreign states in connection with the collection of certain sales and use taxes

► "No retailer shall provide to a foreign state any private customer information for use in the determination of sales or use tax liability of the customer in the foreign state or for use in the determination, collection, and remittance of sales or use tax by the retailer with respect to a New Hampshire retail purchase transaction, unless the foreign state has first provided to the retailer written confirmation that the foreign state provided prior written notice of its intent to collect a use tax on such retail transaction to the commissioner of revenue administration, and no later than 60 days following the commissioner's receipt of such notice by the foreign state, the department of justice has submitted to the commissioner its determination that the foreign state's sales and use tax statutes" meets 9 separately stated requirements.

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Unrelated In-State Presence

► Dell Catalog Sales LP v. New Mexico Taxation & Revenue Dep't., (N.M. Ct. App. 2008)

- Taxpayer's principal place of business was Texas. It did no own or lease property in New Mexico, had no retail stores in the state and no employees or agents in the state. All order are place by phone, mail, fax or internet. All shipments are made by common carrier.
- Taxpayer offers a limited warranty, which is a return to factor.
- Taxpayer also offers service contracts, which provide at-home repair services via an unrelated third-party service provider. Customers contact Taxpayer when a repair is needed.
- New Mexico audited the taxpayer and assessed gross receipts tax.
- Taxpayer protested assessment:
 - Administrative hearing held for the State.
 - Court held on behalf of State.
 - A Petition for writ of certiorari to the U.S. Supreme Court was filed on December 15, 2008.

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Computer Software, Access and Related Services – Hot Cases & Issues

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Computer Software and Services - Hot Cases & Issues

► **Teksystems v. Farr (Tenn. Court of Appeals, May 11, 2009)**

- Court affirmed lower court decision holding that software fabricated and installed by contract employees of temporary IT staffing company is not a taxable sale of software.
- Tennessee has exemption that applies to “the fabrication of software by a person for such person’s own use or consumption”; software must be fabricated by the user and consumer to qualify.
- Despite contrary language in contract, court observed that the clients exercised extensive, if not complete, control over the contract employees and noted the contract employees were not hired to develop a predetermined “end product.”
- Court concluded that the contract employees were agents of the clients and, thus, their computer software related services were not subject to tax because the in-house exemption applied.

► **Effective July 1, 2009, Public Chapter 530 provides that exemption only available if person fabricating is a “direct employee.”**

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Computer Software and Services - Hot Cases & Issues

► **Services Necessary to Complete Sale**

- Florida
- Texas
- Virginia

► **Fabrication Labor / Services to TPP**

- Minnesota
- New Jersey
 - NJ Proposed Regulation

► **Software Access: Software or Services**

- ASPs, SaaS, cloud computing

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Digital Goods and Services

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- ### Digital Goods
- ▶ **Offshoot of Streamlined requirements**
 - Required to explicitly impose tax on digital goods or electronically transferred items
 - Required to use Streamlined definitions
 - Prohibition against taxing digital as TPP
 - ▶ **Legislation adopted in 2009 in Kentucky, Mississippi, North Carolina, Vermont, Washington State and Wisconsin**
 - ▶ **Legislation passed in 2008 in Indiana, Nebraska, South Dakota, Tennessee, Utah**
 - ▶ **Expansion of base in Mississippi, North Carolina, Vermont, Washington and Wisconsin**
 - ▶ **Others argue that they preserved prior base**

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Digital Goods – Who Taxes What?

| State | Audio | A-V | Books | Other |
|----------------|-------|-----|-------|---|
| Indiana | Yes | Yes | Yes | |
| Kentucky | Yes | No | Yes | Finished artwork, photographs, periodicals, newspapers, greeting cards and video games |
| Mississippi | Yes | Yes | Yes | |
| Nebraska | Yes | Yes | Yes | |
| North Carolina | Yes | Yes | Yes | Magazines, newspapers, newsletters, reports, other plus, photos, and greeting cards if taxed in tangible medium |
| South Dakota | Yes | Yes | Yes | All sales, leases and rentals of any product transferred electronically |
| Tennessee | Yes | Yes | Yes | |
| Utah | Yes | Yes | Yes | All products transferred electronically if taxable when "transferred ... other than electronically" |
| Vermont | Yes | Yes | Yes | |
| Washington St. | Yes | Yes | Yes | See Next Slide |
| Wisconsin | Yes | Yes | Yes | Finished artwork, photographs, periodicals, greeting cards and electronic games |

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Bad Debts

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Bad Debts

► **Home Depot Cases**

- A home improvement products retailer that contracted with a third-party finance company to issue and manage private-label credit cards under the retailer's name requested a refund on its bad debts.
- Issue argued in:
 - New York - Denied
 - Ohio - Denied
 - Oklahoma - Denied
 - Washington - Denied

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Services and Bundled Transactions

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Taxation of Services -- Maine

- ▶ **Originally to take effect on January 1, 2010 – Sales and use tax imposed on various services**
 - Admissions, amusements and entertainment
 - Installation, repair and maintenance of specified items
 - Does not include equipment at a manufacturing facility or commercial vehicles
 - Personal property services
 - Largely confined to services for individuals
 - Excludes certain commercial services
 - Transportation and courier services
 - Transmission and distribution of electricity
- ▶ **Signatures obtained to place a question on the June 28, 2010 ballot on whether to approve this law.**

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Services - Hot Cases

▶ Employment Services

- ▶ *Manpower Inc. v Wisconsin Department of Revenue*, Docket No. 05-S-046, Wisconsin Tax Appeals Commission, August 12, 2009
 - ▶ Temporary help services are not subject to tax despite the fact that the underlying service performed by the temporary worker may otherwise be subject to tax.
 - ▶ The Wisconsin Department of Revenue sought to impose tax on any temporary services that matched those services enumerated as taxable under Wisconsin code.
 - ▶ Temporary help services themselves are not specifically enumerated as taxable.
 - ▶ The Wisconsin Tax Appeals Commission held that temporary help services are not subject to tax.

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Class Action Cases

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Class Action Cases

► *Loeffler v. Target Corporation*, (CA 5/12/09)

- Held: California Constitution and state laws prevent consumers from bringing civil class action litigation against corporations for alleged improper collection of state sales tax.
- Plaintiffs argued that Target was not entitled to collect sales tax reimbursement on purchases of hot coffee “to go” because sales tax should not have been due.
- Target countered that the California Constitution and state law provides methods for seeking refunds and class action lawsuits of this type were not among the allowed methods.
- Court:
 - California Constitution bars injunctions against the collection of state taxes and allows only tax refund procedures that have been approved by the state legislature. The procedures approved by the legislature do not include civil actions against the retailer that collected the tax.
 - The only remedy provided by the legislature to consumers seeking a refund of sales tax from retailers is to obtain a refund from the retailer after the SBOE has determined that excess tax was collected and has refunded that tax to the retailer.

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Class Action Cases

► In *Yabsley v. Cingular Wireless, LLC*, (CA 8/19/09)

- Held: The court found that the provisions of the California Code of Regulations, title 18, section 1585 (Regulation 1585) requiring tax to be computed on the retail selling price of the phone and permitting the retailer to collect that amount from the customer provided a “safe harbor” from such claims. The complaint was dismissed.
- **The plaintiff/appellant Richard Yabsley here alleged that Cingular engaged in unfair competition in violation of Business and Professions Code section 17200 and misleading advertising in violation of section 17500 by failing to inform the consumer that the tax would be imposed on the full price of the cell phone.**

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Class Action Cases

► *Kean et al. v. Wal-Mart Stores, Inc., et al.*, (Ill Supreme Court 11/19/2009)

- Wal-Mart charged sales tax on shipping charges for items purchased through its website.
- Customers of the retailer filed suit alleging that the retailer had illegally charged sales tax on shipping charges because shipping charges were not part of sales price of goods purchased online.
- Court noted that primary inquiry is whether the parties separately contracted for shipping. If so, and the charges do not exceed the costs of transportation and delivery, then the shipping charges are not part of the retailer’s gross receipts and therefore not subject to tax. If there is no agreement for shipping, the charges must be included in the retailer’s gross receipts for purposes of computing tax liability.
- Court found no separate agreement for shipping, and that the selling price could never be the dollar amount reflected in the subtotal because without shipping, the sale and purchase could not be completed.
 - Plaintiffs did not have the option of buying over the internet and picking up the product at a store.
 - Plaintiffs were required to have product delivered.

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Planes, Trains & Automobiles.....

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Planes, Trains & Automobiles....

- ▶ ***Irwin Industrial Tool Co. v. Illinois Department of Revenue* (Ill. App. Ct. 9/11/2009)**
 - The appellate court determined that there was substantial nexus between the aircraft purchased and hangared out of state and Illinois, such that the Department could tax the company's use of the plane in Illinois based on the entire purchase price of the plane rather than the actual use of the plane in Illinois.
- ▶ ***Fisher & Company, Inc. v. Department of Treasury* (MI Court of Claims 1/29/09)**
 - A Michigan corporation purchased a 25% undivided interest in a small jet airplane.
 - The seller's sister company maintained the plane and coordinated its use, ensuring that the particular plane never entered Michigan. However, as part of the agreement, the buyer was permitted to use other planes in the company's fleet and used them for transportation in Michigan.
 - Because the buyer used an aircraft in Michigan as part of the agreement even if he did not use the actual plane, the transaction entailed a transfer of tangible personal property to which use tax applied due to its use in the state.

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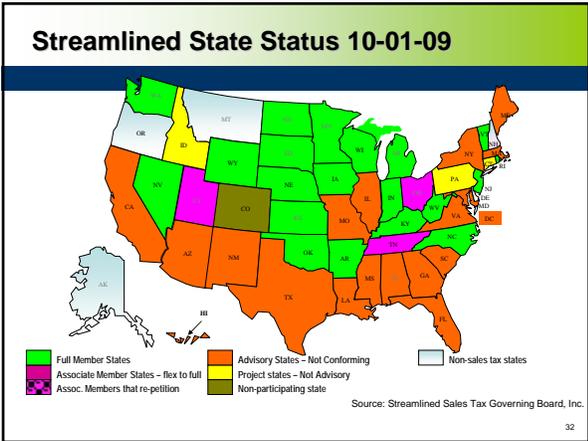
Planes, Trains & Automobiles....

- ▶ ***Belterra Resort Indiana, LLC. v. Indiana Department of State Revenue, Indiana Tax Court, No. 49T19-0605-TA-49, 2/04/09***
 - Parent company took possession of a riverboat casino from an Alabama shipyard
 - No sales/use taxes paid
 - Parent company then transferred title to its subsidiary which used it in Indiana
 - Court held that because Belterra did not acquire riverboat in a retail transaction but rather through a capital contribution, transfer was not subject to use tax

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Streamlined Sales Tax Effort

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- ### Streamlined Sales Tax
- ▶ **Twenty full-member states**
 - Wisconsin full-member state as of Oct. 1, 2009
 - ▶ **Looking to expand**
 - Sourcing – Utah, Texas, Tennessee, Ohio, Missouri
 - Others – Massachusetts, Virginia, Florida
 - ▶ **Current issues**
 - Exemption Certificate and Good Faith
 - Continuation of associate states and intra-state sourcing
 - Sourcing Services
 - ▶ **What to watch**
 - New states (Texas?);
 - Problem states (Michigan?, Nevada?)
 - Movement on federal legislation

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Streamlined Statistics

- ▶ **Amnesty ended in all full member states except Washington and Wisconsin**
- ▶ **Statistics:**
 - Companies registered – 1,163 as of May 1, 2009
 - 133 are Model 1 and 29 are Model 2
 - Revenue - \$384.6M collected from 10-1-05 to 3-31-09
- ▶ **Amnesty still exists for Ohio, Tennessee and Utah**

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Questions?

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