



349 East Multistate Tax Planning LLC

## State and Local Taxation: Headline News and Trends

September 20, 2022

David Uri Ben Carmel



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### Today's Agenda

#### Today's Presentation

Megatrends – General	2-16
Business Activities Taxes	17-25
Transaction Taxes	26-32
Miscellaneous	33-40

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## Megatrends and Developments

*U.S. Supreme Court*



**Still pending:** *Delaware v. Pennsylvania* and *Arkansas v. Delaware*, Dkt. Nos. 220145 and 220146 (consolidated) Escheat of unclaimed property.

**June 14, 2022 Announcement:** Argument on Special Master Report set for Oct. 3, 2022

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## Megatrends and Developments

*U.S. Supreme Court*



***Cooper Tire & Rubber Co.  
v. McCall (No. 21-926)***

Does mere registration to do business confer general jurisdiction? Last action: Cert Petition considered on April 22, 2022.

*Possibly on hold while the following case proceeds...*

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## Megatrends and Developments

*U.S. Supreme Court*



**Fully briefed:** *Mallory v. Norfolk Southern Railway Co.* (No. 21-1168).  
Fully briefed with oral argument scheduled for November 8, 2022. The U.S. Solicitor General has moved to participate in oral argument in support of *Norfolk*

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## Megatrends and Developments

*U.S. Supreme Court*

### **Personal Jurisdiction Flashback (1):**

*Ford Motor Co. v. Montana Eighth Judicial District Court*, No. 19-368  
(U.S. Mar. 25, 2021).

**All opinions in the case suggest that there might be special personal jurisdiction rules for ecommerce businesses.**



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## Megatrends and Developments

*U.S. Supreme Court*

### Personal Jurisdiction Flashback (2):

For further analysis see “After Ford: Personal Jurisdiction for E-Commerce Vendors”, Tax Notes State, p. 379 (April 26, 2021).

ON THE COVER

VOL. 100 • MONDAY, APRIL 26, 2021



After Ford: Personal Jurisdiction for E-Commerce Vendors

BY DAVID A. FRUCHTMAN

MORE FROM TAX NOTES STATE ▶

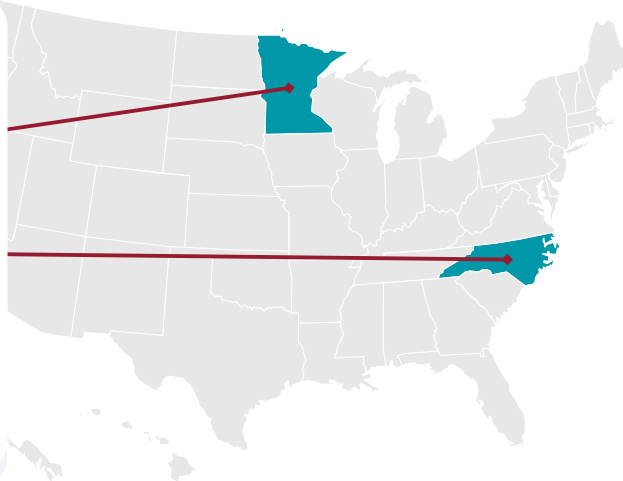
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## Megatrends and Developments

*Federal Conformity*

### State Reactions to Federal Student Loan Forgiveness (1 and 2):

Forgiveness creates taxable income in North Carolina and Minnesota. N.C. DOR press release (August 31, 2022) and Minnesota Tax Law Changes (Department of Revenue August 8, 2022)



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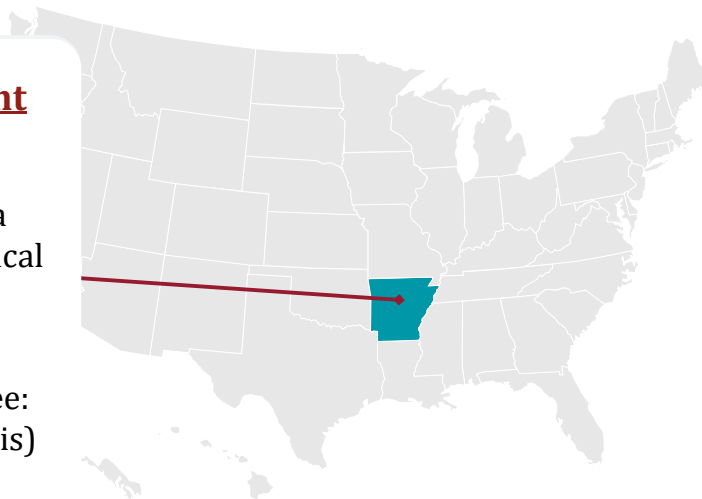
## Megatrends and Developments

### Federal Conformity

#### **State Reactions to Federal Student Loan Forgiveness (3):**

Arkansas Governor calls forgiveness “a misuse of executive power” and is critical of this as a policy choice.

But the state’s Department of Finance and Administration appears to disagree: “It will be inaccurate to report that (this) will be taxable in Arkansas...”

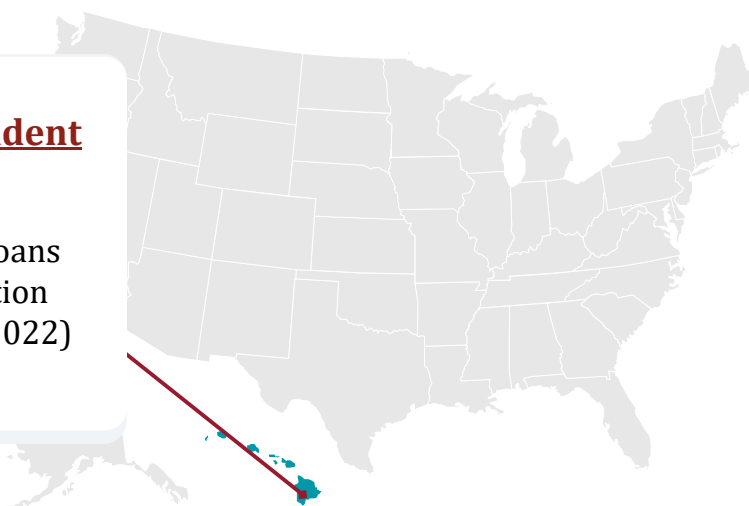


## Megatrends and Developments

### Federal Conformity

#### **State Reactions to Federal Student Loan Forgiveness (4):**

Hawaii. Will not treat forgiven loans as income. Department of Taxation Tax Announcement (August 29, 2022)



## Megatrends and Developments

*Federal Conformity*

### Federal Student Loan Forgiveness Take-away:

**You must check and re-check  
the specific subnational  
jurisdiction's position.**



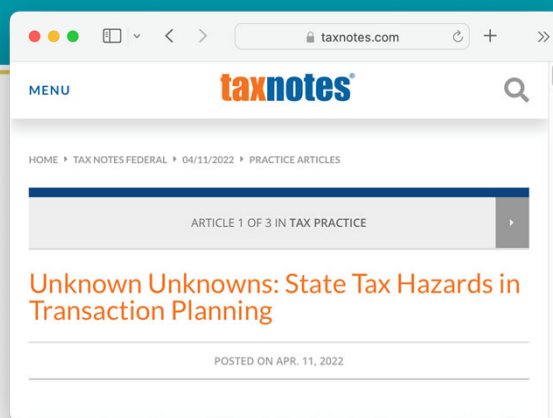
## Megatrends and Developments

*Federal Conformity*

This narrow issue might seem simple to research – but what about conformity with the federal treatments of

- the Paycheck Protection Program,
- Targeted Economic Injury Disaster Loan Advances,
- Restaurant Revitalization grants, and
- Other federal initiatives?

And what if more than one aspect of a taxable income computation is affected? What if more than one subnational tax is implicated? Tip: Others' experiences can be a great teacher.



See e.g., “Unknown Unknowns: State Tax Hazards In Transaction Planning” (Tax Notes Federal, April 11, 2022)

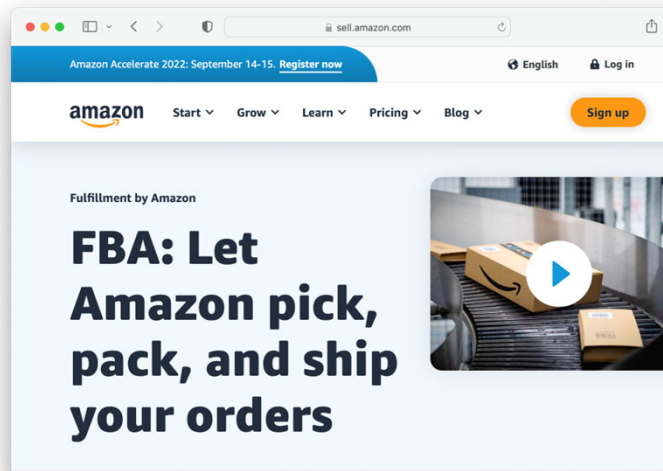


## Megatrends and Developments

Wayfair's Tail

### September 9, 2022 Pennsylvania Commonwealth Court decision:

*Non-Pennsylvania vendors "connected" to the state only via Amazon FBA's inventory storage, etc. are not required to collect the Commonwealth's sales tax or pay the Commonwealth's personal income tax.*



## Megatrends and Developments

Wayfair's Tail

taxnotes®

state

Volume 105, Number 6 ■ August 8, 2022

See also "Tax Planning Catastrophes", Tax Notes State (August 8, 2022) at p. 604 analyzing a Washington State FBA decision:

*"The decision also does not indicate whether these businesses could choose where to store inventory or where inventory must not be stored. [Footnote: If these four businesses could not control where and when Amazon moved their merchandise, it is difficult to accept as correct a tax presence decision that places weight on where the merchandise is located apart from the jurisdiction to which the goods were originally shipped' (citations omitted).]"*

### Tax Planning Catastrophes

by David Uri Ben Carmel

Reprinted from Tax Notes State, August 8, 2022, p. 601

## Megatrends and Developments

### Wayfair's Tail



**Case remanded by Michigan Supreme Court to Michigan Court of Appeals, and by Court of Appeals to the Michigan Tax Tribunal:**

*Use of Detroit mailing address did not establish tax presence for Detroit income tax.*

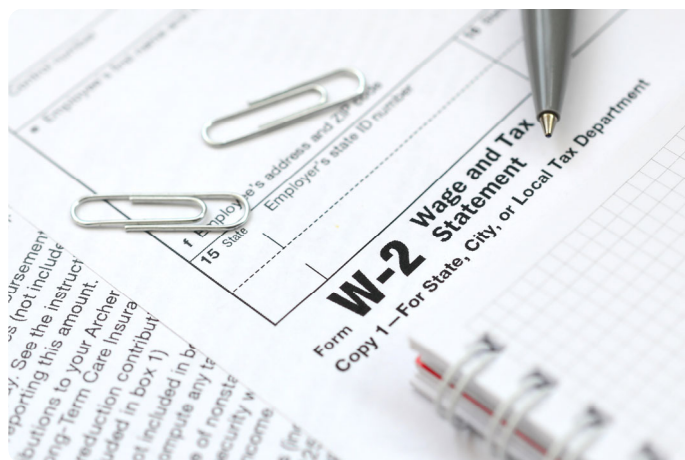
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## Megatrends and Developments

### Remote Workers

Income was “Utah sourced” when earned by a nonresident who worked outside of Utah. Why? Because the W-2 issued by the employer said so, and the employer refused to amend the W-2.

*Much to be said about this – including an unflattering contrast with a statement by the Oregon Tax Court’s in NBCUniversal (below in BAT).*



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## Megatrends and Developments

### *Remote Workers*

#### **Finland -- OECD equivalent article/Par. 5(4(e)) (Permanent establishment).**

Product demos were not taxpayer's core business and there was no proof that promotional activities in Finland resulted in increased sales of the product in Finland. Employees' inability to take legal action, receive orders, negotiate sales price or other terms meant led to only one conclusion and that was that the taxpayer's activities in Finland did not give rise to a PE.



# Business Activities Taxes

## Business Activities Taxes

### Foreign Affiliates

#### Alaska

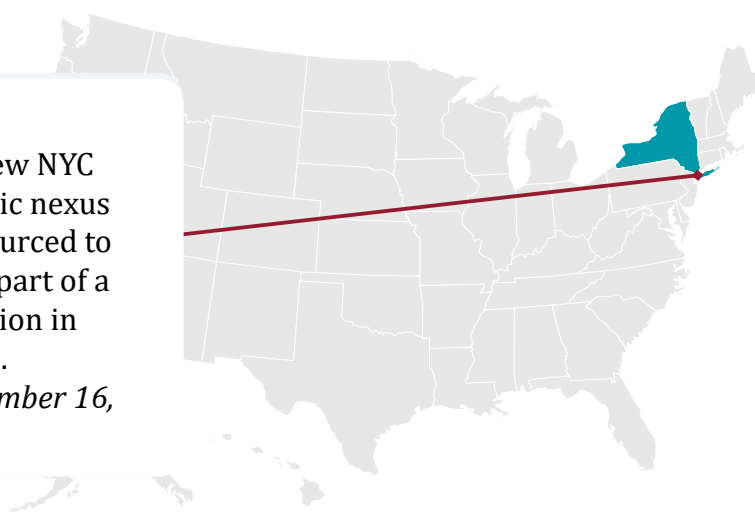
Statute required inclusion of unitary affiliates incorporated or doing business in low-tax countries. Failure to specify whether two tests of inclusion were conjunctive (*i.e., an implied "and"*) or disjunctive (*i.e., an implied "or"*) did not render the statute unconstitutionally vague



## Business Activities Taxes

#### New York City.

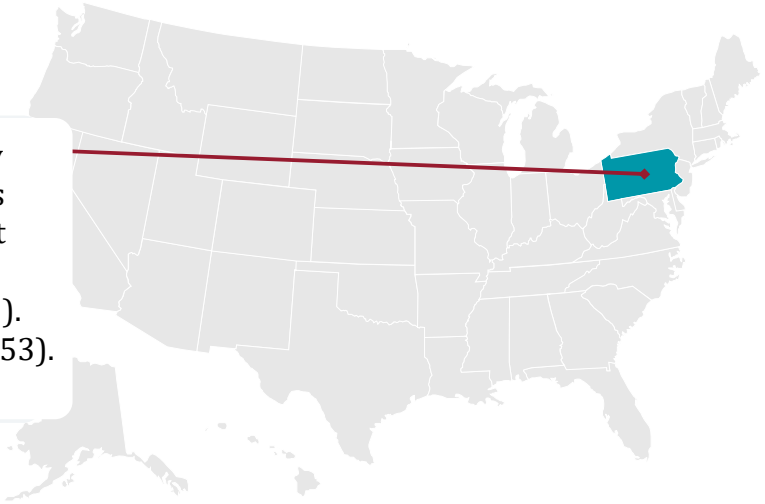
Finance Memorandum explains new NYC Business Corporation Tax economic nexus standard: \$1 million in receipts sourced to NYC or \$10K in such receipts and part of a unitary group with at least \$1 million in combined receipts sourced to NYC. *Finance Memorandum 22-3 (September 16, 2022)*



## Business Activities Taxes

### *Economic Nexus and Market Based Sourcing Rules*

Economic nexus shall be rebuttably presumed if a corporation has sales sourced to the Commonwealth of at least \$500K (effective for tax years beginning after December 31, 2022). Pennsylvania (L.2022, H1342 (Act 53)).



## Business Activities Taxes

### *Market Based Sourcing Rules*



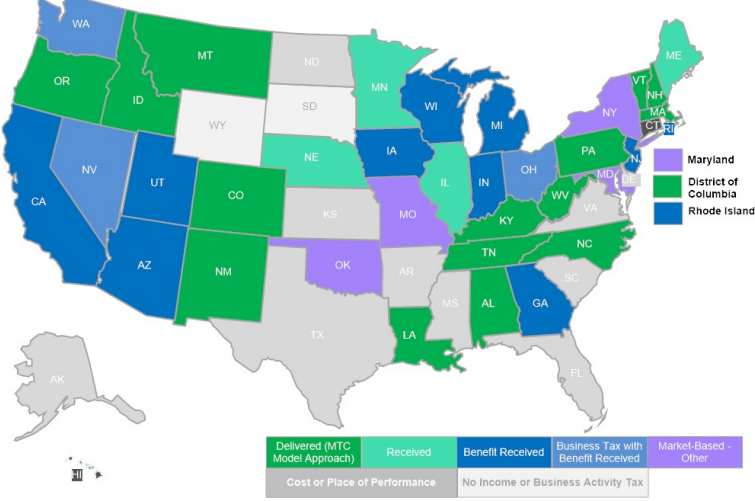
MULTISTATE TAX COMMISSION

Multistate Tax Commission: On August 2, 2022 committed to examining its models receipts (sales) sourcing regulations

# Business Activities Taxes

MTC Map of Market Based Sourcing of Services

States That Have Enacted Market-Based Sourcing for Some or All Services - General Method Used (2022)



# DECEMBER

# 14

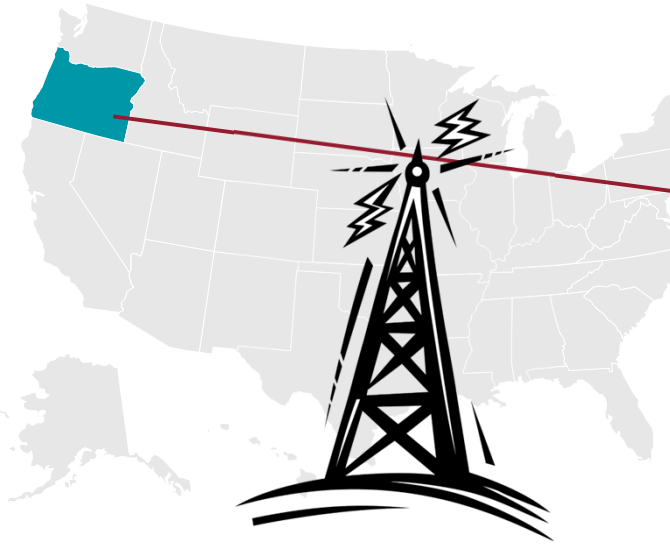
**SAVE THE DATE:**

**Next State and Local Taxation: Headline News and Trends**

**December 14 at 11:00 a.m. Eastern Register at [www.349east.com](http://www.349east.com)**

## Business Activities Taxes

Entity Classification



### Oregon

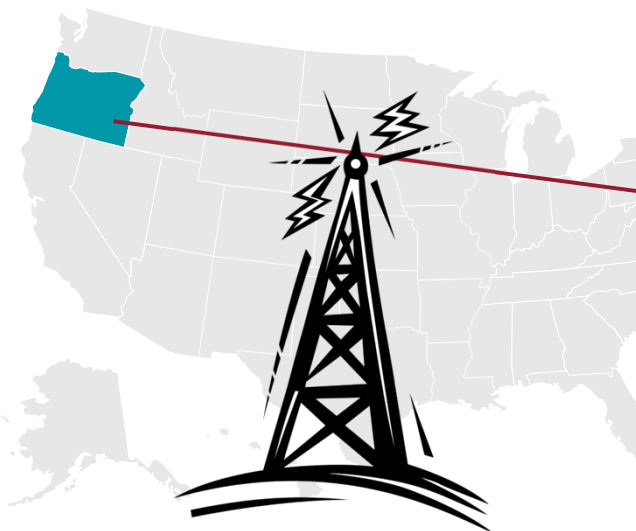
Entity is an interstate broadcaster required to apportion income based on an “audience factor”.

*But see footnote 2: The substantial nexus issue was only partially briefed “and is not ready for a decision at this time.”*

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## Business Activities Taxes

Entity Classification



### Personal Jurisdiction vs. Tax Presence

Lest one wonder whether personal jurisdiction differs from due process tax nexus, this case provides an answer. Hornbook law is that a defendant’s PJ objections must be raised immediately (or thereabouts). Is there a mechanism by which a PJ objection may be deferred until after briefing and a decision on a material substantive issue?

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# Transaction Taxes

## Transaction Taxes

### *Use Tax*

#### **Ohio**

Car purchases were not for resale, even though collector hoped to make a profit if and when he sold the cars. Board of Tax Appeals mentioned “fraud” due to use of entities to create indicia of business purpose, but unclear if statute of limitations was extended based on an allegation of fraud.

*A common fact pattern among art collectors. See also 26 CFR § 1.183-2 and related federal rulings.*





# Transaction Taxes

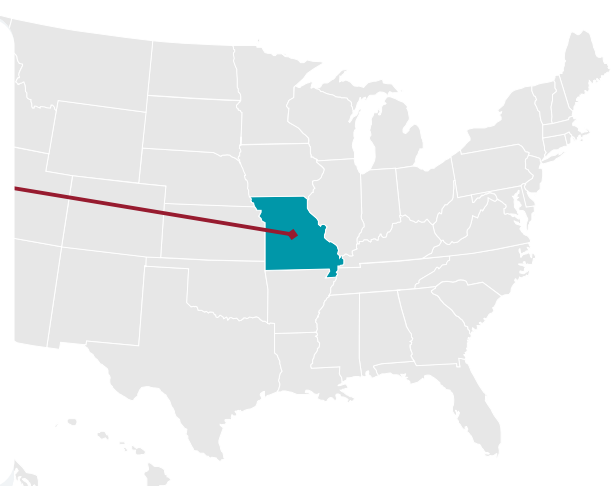
## Sales Tax

### Missouri Out-of-state ticket broker

Good News:  
No taxes due!



Bad News:  
Taxes due!



# Transaction Taxes

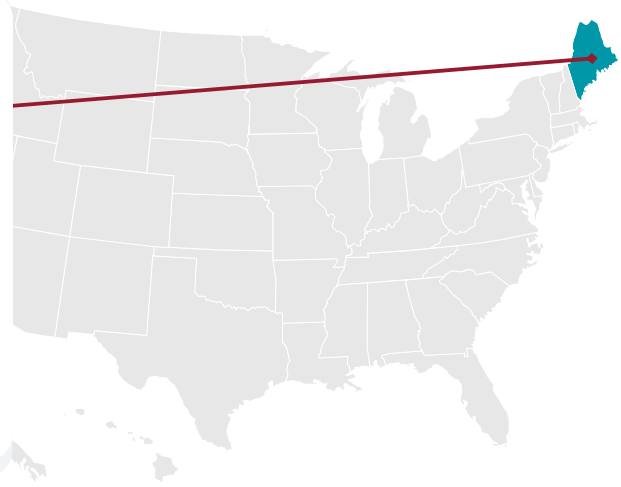
## Wireless Services

### Maine Telecommunication Service

Good News:  
No taxes due!



Bad News:  
Taxes due!

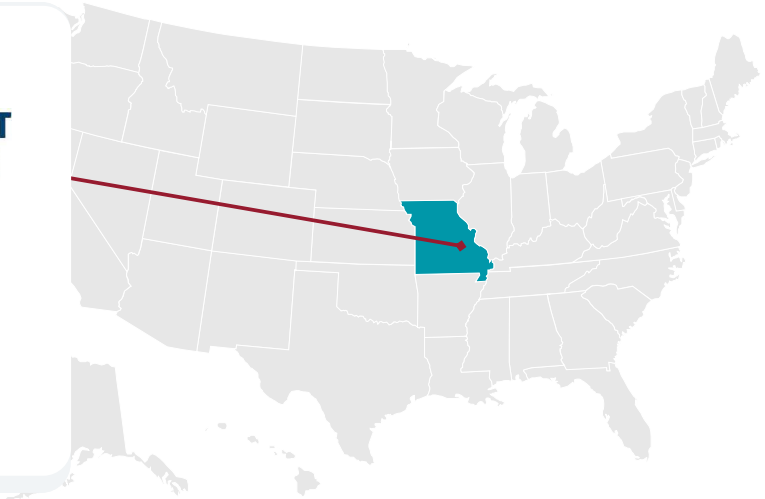


## Transaction Taxes

*Digital Products*



**Minnesota Department of Revenue** updates Sales Tax Fact Sheet 177 to cover Nonfungible tokens (August 2022)



## Transaction Taxes

*Digital Products*



MULTISTATE TAX COMMISSION

Multistate Tax Commission is examining sales taxation of digital products. As of August, 2022, Draft White Paper being scrutinized.

# Transaction Taxes

## Sourcing of Sales

**Texas.**  
Regulation invalidated  
due to failure to follow  
the state's  
administrative  
procedures act.

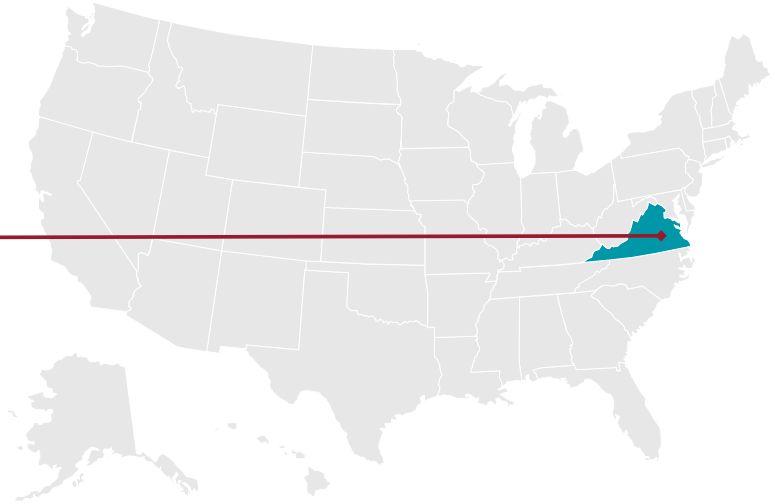


# Miscellaneous

## Miscellaneous

### Local Taxes

**Virginia.** Local tax on internet access services violated the Internet Tax Freedom Act

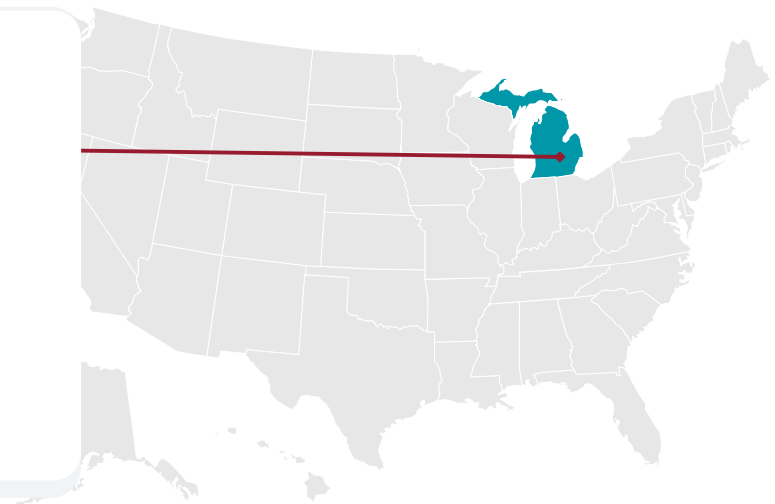


## Miscellaneous

### Digital Currencies



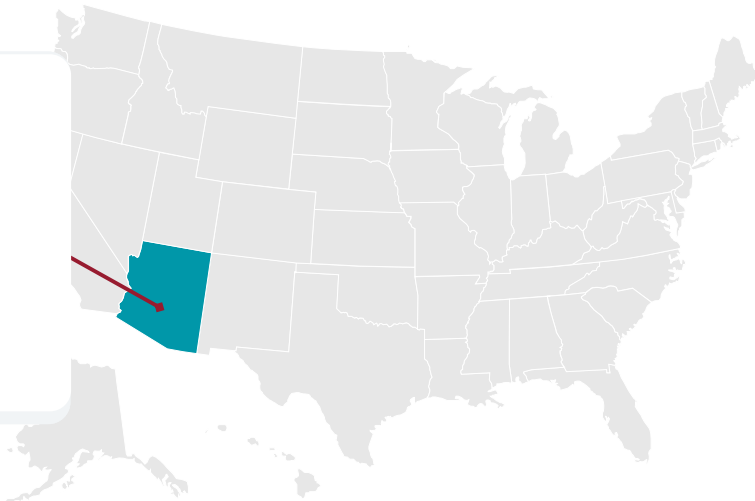
**Michigan Department of Treasury** provides a lengthy presentation of its position on the income taxation of digital currencies. Treasury Update (August 2022)



## Miscellaneous

### Digital Currencies

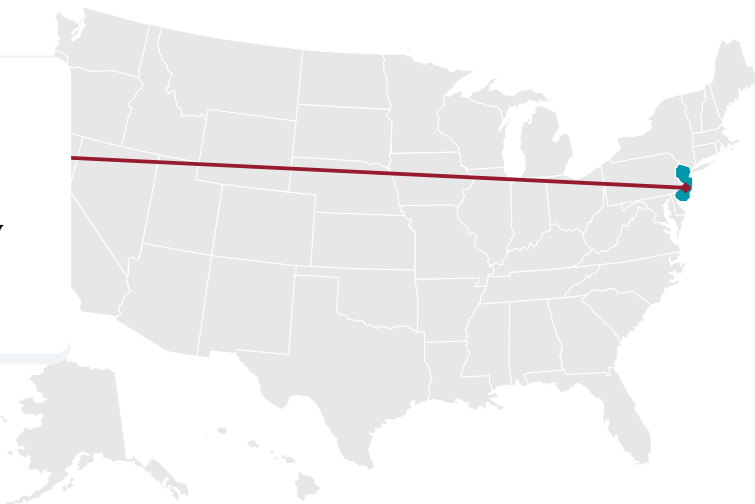
**Arizona.**  
New state law addresses  
the tax treatment of virtual  
currency and NFTs. L.2022,  
H2204 (c. 369)



## Miscellaneous

### Digital Currencies

**New Jersey** addresses the  
state's inheritance tax on  
virtual currencies. New Jersey  
Tax Alert (July 15, 2022)



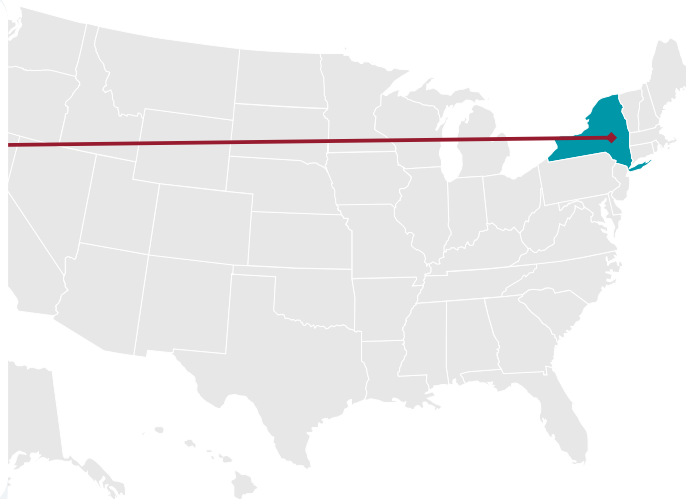
## Miscellaneous

### *Residency*



#### **New York State.**

Vacation home was not a permanent place of abode.



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## Miscellaneous

### *Deference to Administrative Expertise*

Wisconsin Tax Appeals Commission has no expertise in determining whether a letter from the Wisconsin Department of Revenue was an unpromulgated rule. Lower court improperly refused jurisdiction over the issue.

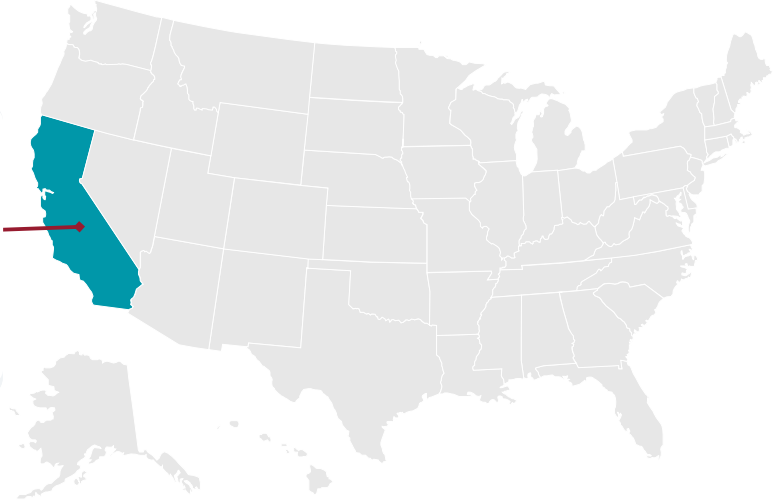


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## Miscellaneous

**California.**  
Nonresident income  
from distribution of a  
partnership interest



## Questions????



## David Uri Ben Carmel



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David Fruchtmann provides state and local tax planning and controversy advice. His representations involve almost all subnational taxes for businesses and individuals, including income, franchise, sales, use, real property transfer, and a variety of other state and local taxes. His clients include public and privately held heavy equipment manufacturers, marketing companies, travel lodging providers, and vehicle rental companies, as well as mid-sized retailers and other businesses.

David's tax planning work includes tax efficient structuring of businesses and transactions, and regularly requires working with tax authorities to obtain favorable guidance, as circumstances require. He advises foreign companies expanding into the United States, and his experience includes assisting an American affiliate of an Israeli company in one of Wall Street's most successful IPOs of 2010.

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## Notes

### SLIDE 8

"DFA Statement Regarding Student Loan Forgiveness" (September 9, 2022)

### SLIDE 12

*On-Line Merchant's Guild v. Hassell*, 179 M.D. 2021, Commonwealth Court of Pennsylvania (September 9, 2022)

### SLIDE 14

*Apex Laboratories International, Inc. v. City of Detroit*, MOAHR Docket No. 16-000724-R (August 19, 2022)

### SLIDE 15

*Taxpayer v. Taxpayer Services Division*, Appeal No. 21-1302 (Utah State Tax Commission July 19, 2022)

## Notes

### SLIDE 16

*Finland - Case 22072/2020*, 3 December 2021 – Court/Chamber Korkein Hallinto-oikeus (Supreme Administrative Court)

### SLIDE 18

*Department of Revenue v. Nabors International Finance, Inc.*, 2022 WL 313636 (August 5, 2022)

### SLIDE 24

*NBCUniversal, Inc. v. Department of Revenue*, TC-MD 170037R and 170278R Oregon Tax Court (August 17, 2022)

## Notes

### SLIDE 27

*Auto Place LLC v. McClain*, Dkt No. 2015-474, 475, and 479 (Ohio Board of Tax Appeals July 25, 2022)

### SLIDE 28

Missouri Department of Revenue Letter Ruling LR 8196 (June 2, 2022)

## Notes

### SLIDE 27

*State Tax Assessor v Tracfone Wireless*, Docket No. BCD-21-135 (Supreme Judicial Court of Maine June 23, 2022).

### SLIDE 30

*City of Coppell v. Hegar*, Cause No. D-1-GN-21-003198 (Texas Dist Ct Travis County August 10, 2022) and *City of Round Rock v. Hegar*, Cause No. D-1-GN-21-003203 (Texas Dist Ct Travis County August 10, 2022)

### SLIDE 34

*Coxcom, LLC v. Fairfax County*, Docket No. 210568 (Supreme Court of Virginia) (July 14, 2022)

## Notes

### SLIDE 38

*Obus v. New York State Tax Appeals Tribunal*, Case No. 533310 (App. Div. June 30, 2022)

### SLIDE 39

*Wisconsin Property Tax Consultants, Inc. v. Department of Revenue*, Docket No. 2020AP485 (Supreme Court of Wisconsin June 30, 2022)

### SLIDE 40

FTB Legal Ruling 2022-02 (July 14, 2022)