



State and Local Taxation: Headline News and Trends

June 22, 2022

David Uri Ben Carmel



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Today's Agenda

Today's Presentation

Megatrends – General	2 - 15
Business Activities Taxes	16 - 34
Transaction Taxes	35 - 42
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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

Megatrends and Developments

U.S. Supreme Court



Cert. Denied on April 4, 2022.

Ferrellgas Partners, LP v. Director, Division of Taxation (No. 21-641)
Is a local levy subject to the Commerce Clause's internal consistency test?

Megatrends and Developments

U.S. Supreme Court

Cert denied May 2, 2022.

*City of Cincinnati, Ohio, et al.,
v. Lamar Advantage GP
Company, LLC, et al., (21-900)*

**Whether a municipal excise tax on
the business privilege of charging for
the use of billboard space abridges
freedom of speech or press.**

Megatrends and Developments

U.S. Supreme Court

Cert denied May 2, 2022.

*Clear Channel Outdoor, Inc. v.
Director, Department of Finance of
Baltimore City, (No. 21-219)*

**Whether an outdoor advertising
tax is unconstitutional.**

Megatrends and Developments

U.S. Supreme Court

**Cert Petition scheduled for conference
on April 22, 2022**

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

**Does mere registration to
do business confer
general jurisdiction?**

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Megatrends and Developments

U.S. Supreme Court

Flashback: Personal Jurisdiction (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 e-commerce businesses.**



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Megatrends and Developments

U.S. Supreme Court

Flashback : Personal Jurisdiction (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 ▶

Megatrends and Developments

U.S. Supreme Court



Cert Denied (June 13, 2022)

Washington Bankers Association v. Washington et al. (No. 21-1066)

Does banking surtax affecting out-of-state institutions almost exclusively violate the Commerce Clause?

Megatrends and Developments

U.S. Supreme Court



Cert Petition filed.

Ooma, Inc. v. Department of Revenue, State of Oregon (No. 21-1488 May 23, 2022).
Under the Commerce Clause, are “virtual contacts” required for *Wayfair* nexus?

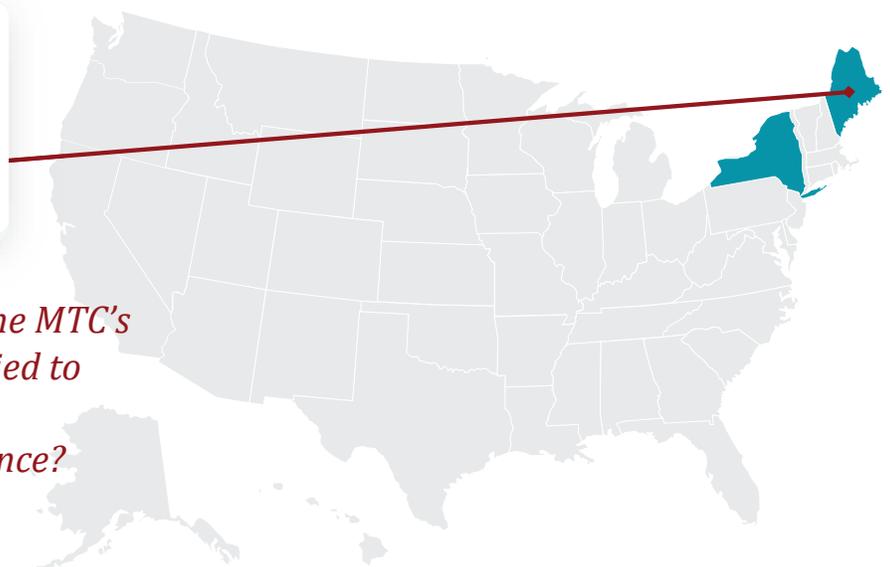
Megatrends and Developments

Tax Presence

Maine.

Regulation amended to incorporate nexus thresholds effective January 1, 2022. 18-125 CMR 808.

Q. *Does anyone believe that the MTC's receipts factor test as applied to sales of other than TPP is a legitimate test of tax presence?*



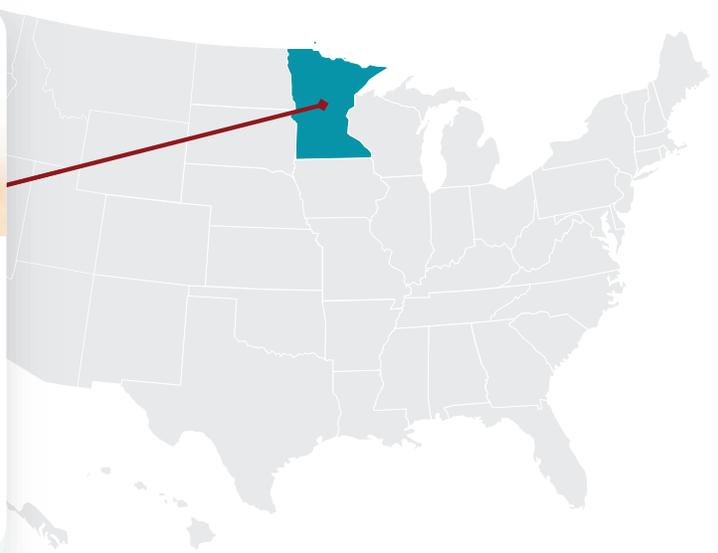
Megatrends and Developments

Tax Presence



Minnesota.

Wayfair 200 delivery/\$100K thresholds apply to tobacco retailers. Trailing nexus continues for at least 12 months. Rev. Notice 22-02 (May 9, 2022, effective December 31, 2021)



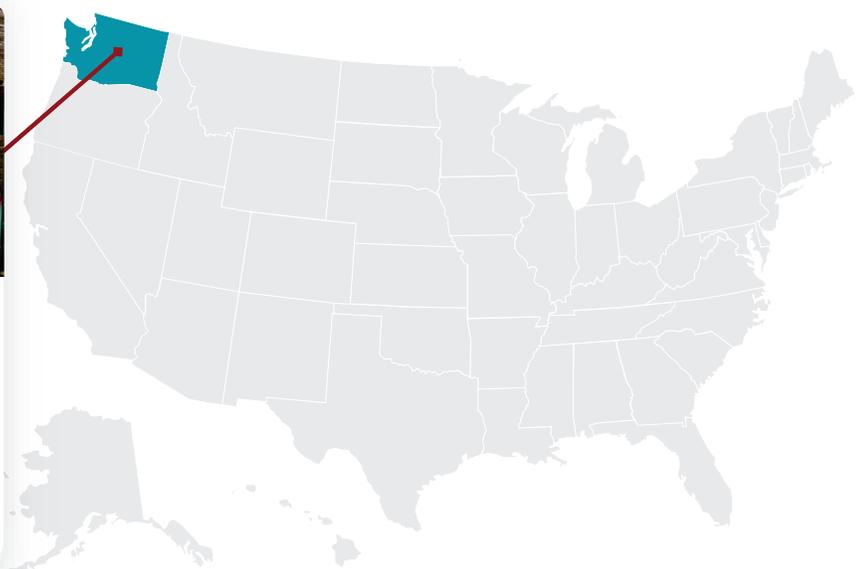
Megatrends and Developments

Tax Presence



Washington.

Tax presence (B&O and sales tax) dating back to 2010 found due to participation in “fulfillment by Amazon” program.



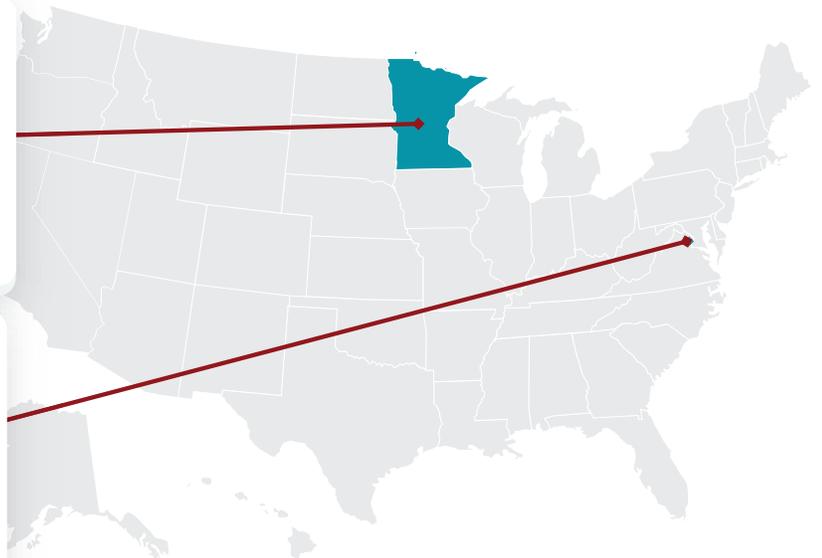
Megatrends and Developments

Tax Presence

Minnesota extended its C19 nexus policy “through June 30, 2022”. *Does this mean that the policy expires on July 1, 2022?*

District of Columbia.

C19 nexus policy expires July 16, 2022. D.C. Rev. Notice 2022-06 (June 6, 2022)



Megatrends and Developments

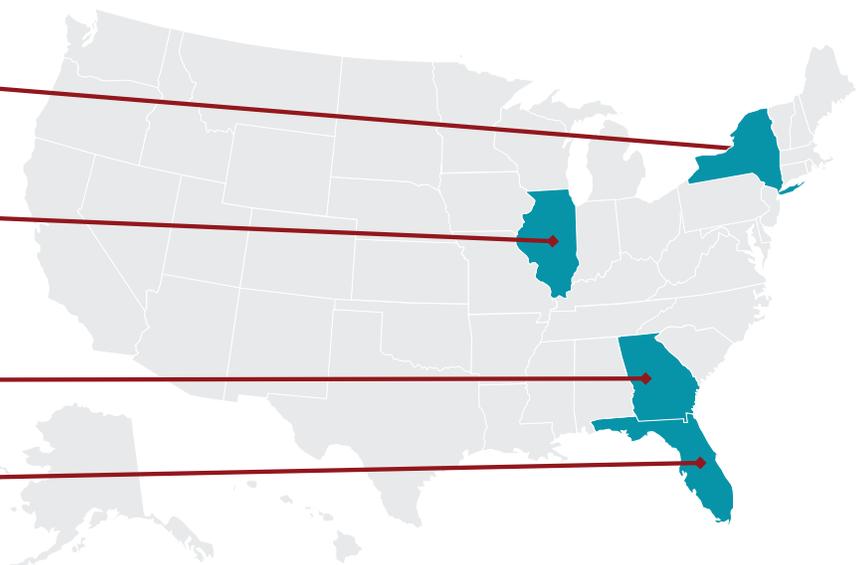
Tax Relief

New York State
Motor Fuel taxes

Illinois
Grocery taxes

Georgia
Motor Fuel Excise taxes

Florida
Transaction taxes



Business Activities Taxes

Business Activities Taxes

Taxation of gain

Massachusetts.

Under state law, a nondomiciliary corp's gain on the sale of its non-unitary interest in an LLC operating in Massachusetts was not taxable in Massachusetts.



Q. *Why did the court reach the Constitutional issue – and devote 20 pages to its analysis?*

Business Activities Taxes

Situsing Services

Texas.

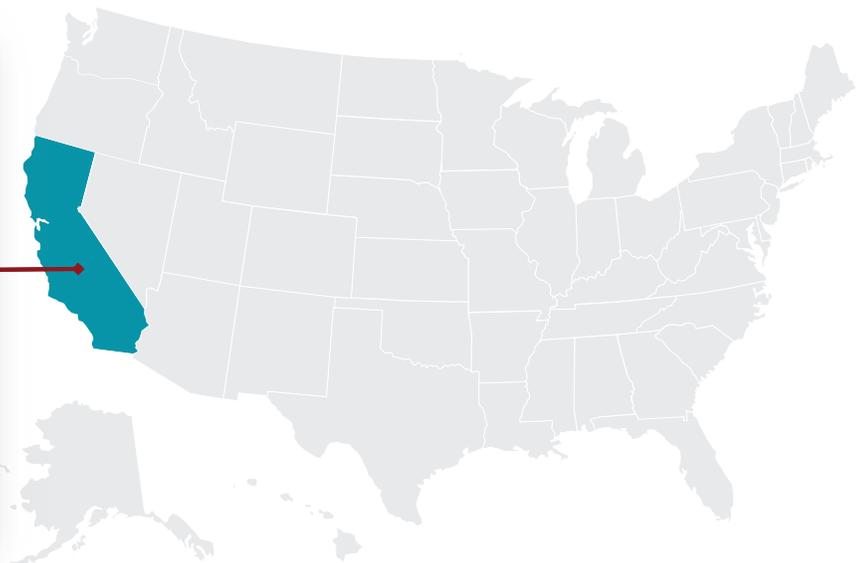
Service is “performed in this state” only if the people or equipment performing the service are physically located in Texas.



Business Activities Taxes

Situsing Services

California ruling considers “Numerator Assignment of Gross Receipts from Sales of Services to Business Entities”. Thus, “While third-parties may benefit from a...service, it is only the customer’s benefit that is relevant to the analysis...”



Business Activities Taxes

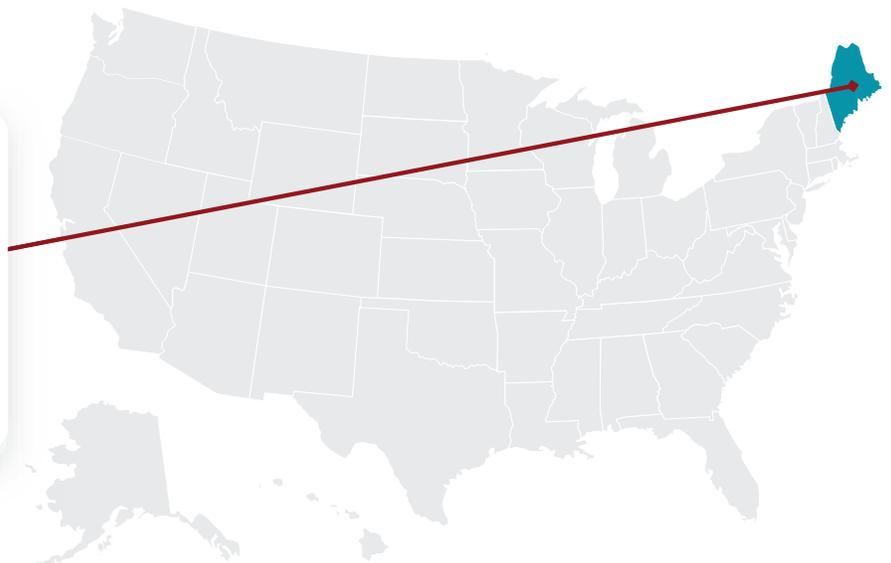
Situsing services

Suggestion: Someone trying to understand the issues arising in layered service transactions might well begin by reading (and following forward) *Bellsouth Advert. v. Chumley*, 308 SW3d 350 (Tenn. Ct. App. 2009).



Business Activities Taxes

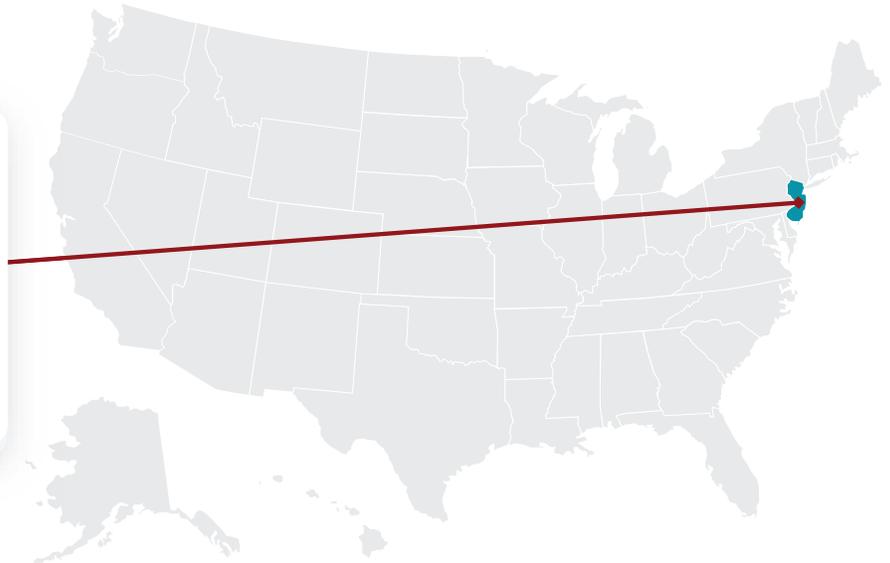
Maine Apportionment and Unitary Regs updated effective April 20, 2022. 18-125 CMR 801 and 810



Business Activities Taxes

P.L. 86-272 and Joyce

New Jersey. Retroactive to tax year 2019, “86-272 protection for a member (of a combined group) will be determined on an entity-by-entity basis”



Business Activities Taxes

MORE COMMENTARY ON FINNIGAN

POSTED ON JUL. 29, 1991

By

 FERRE VOGELENZANG

To the Editor:

There recently appeared in Tax Notes a special report authored by Jerome A. Hellerstein and Walter Hellerstein, entitled "The Finnigan Case: A Reply to Vogelenzang's 'Second Stage Apportionment of Unitary Income,'" reacting to a prior article by myself which had also appeared as a special report.^{1/1}

The Hellerstein article charges that the arguments contained in my prior article reflect "the basic confusion of jurisdiction to tax and the apportionment of income that underlies Vogelenzang's attack on the Finnigan case."^{2/2} I am not quite sure what to make of this charge. It appears to assume the existence of a clear-cut dichotomy between issues of jurisdiction and issues of apportionment, and then to conclude that the Joyce-Finnigan problem should be pigeonholed under the apportionment label, without regard to jurisdictional issues. By contrast, my earlier article meant to show how the Joyce-Finnigan problem involved an intermeshing of jurisdictional and apportionment issues.

The role of jurisdictional questions in the Joyce-Finnigan controversy becomes readily apparent by focusing on the root cause of that controversy. In a nutshell, the problem arises because, on the one hand, the apportionable base of a combined report group, and accordingly the California net income of such a group, is determined on a groupwide basis, whereas California's jurisdiction to tax is determined on a separate corporation basis. Thus, it can occur that some members of such a group do contribute to the California net income of such group without, however, being subject to California taxing jurisdiction on their share of such California net income.

It should be noted that the Joyce-Finnigan problem would not arise if California's jurisdiction to tax (which ultimately is a matter of federal law, P.L. 86-272, or the U.S. constitution) could be determined on a groupwide basis, so that the California nexus of any single member of the unitary group would suffice to establish California taxing jurisdiction over all other group members. Under such a "unity confers jurisdiction" approach, the Joyce-Finnigan problem would disappear altogether, since each of the group members would then be taxable in California regardless of whether such particular group member has nexus with California in its own right. The Hellerstein article does not appear to advocate the unity-confers-jurisdiction approach, and seems to acknowledge that in the absence of said approach, the question does arise on how to apportion the California net income of a group between: (1) those group members who are subject to California taxing jurisdiction; and (2) those group

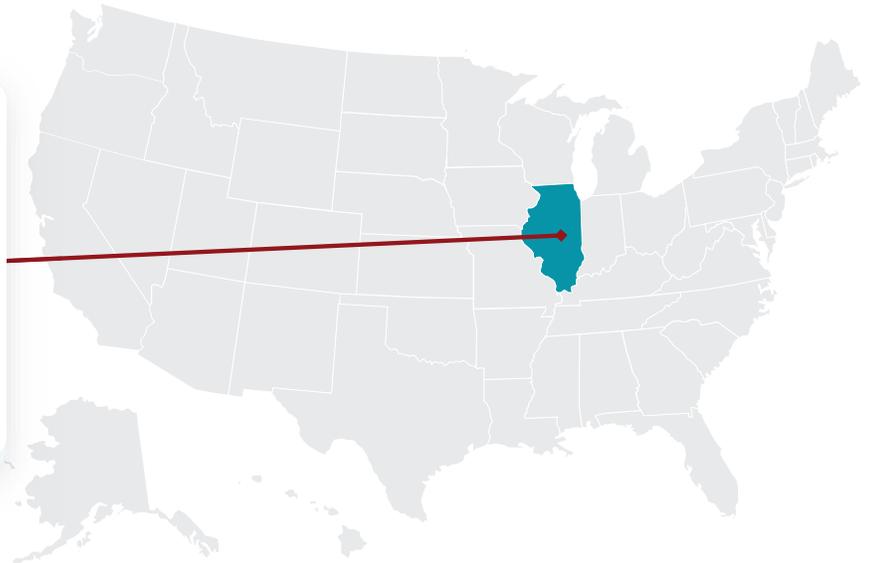
The best piece on this subject is
"More Commentary on Finnigan",
Vogelenzang (Tax Notes, July 29, 1991)

Business Activities Taxes

Throwback and Throwout

Illinois.

Proposed revisions to regulation 100.3200 (published in Illinois Register April 15, 2022)

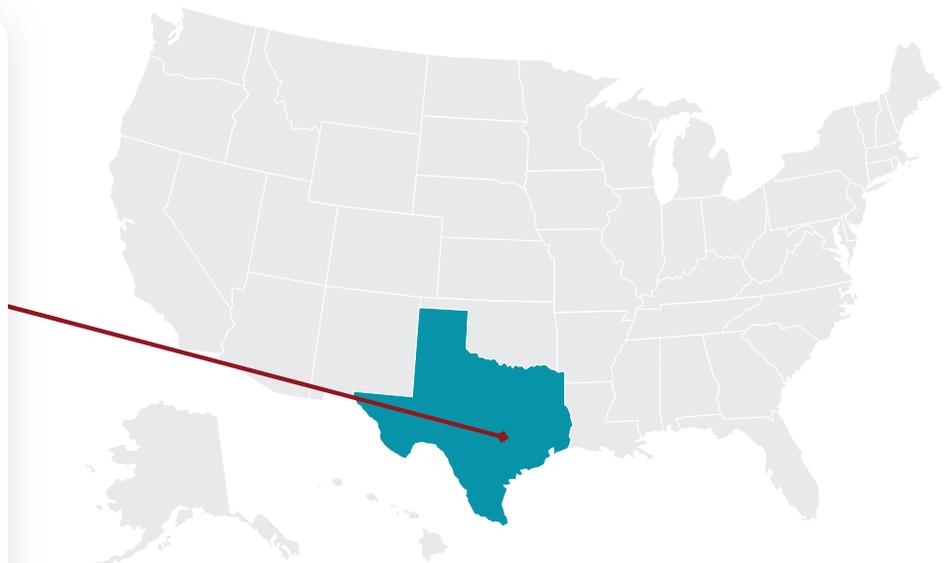


Business Activities Taxes

Combined Reporting

Texas.

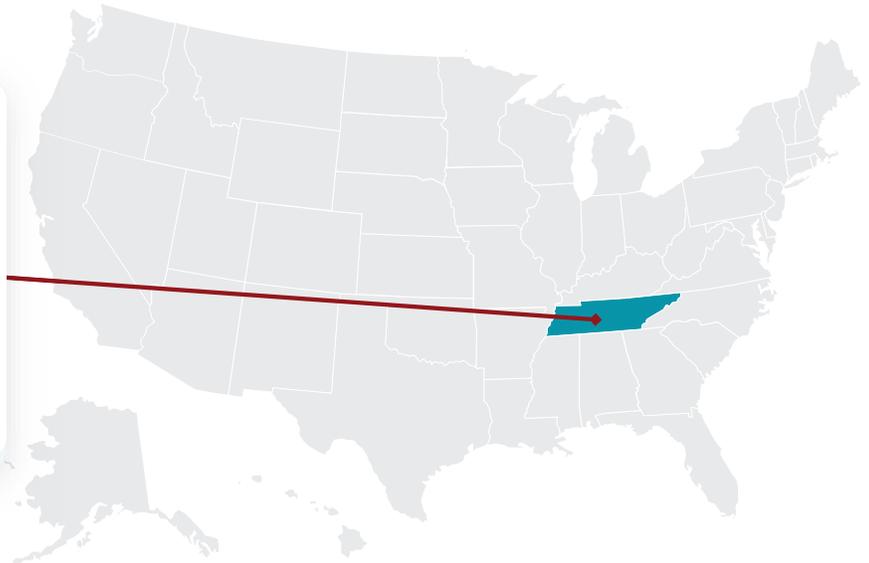
Entity was required to be included in a combined report as the parent owned each of the combined entities and the entities were in the same general line of business, centrally managed, and vertically integrated.



Business Activities Taxes

Tennessee.

Franchise and excise tax manual updates to sections on entity classification, venture capital exemption, and consolidated net worth computation. March, 2022.



SEPTEMBER

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SAVE THE DATE:

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

September 20 at 11:00 a.m. eastern

Business Activities Taxes

Partnerships



Multistate Tax Commission Draft White Paper “State Tax Treatment of Investment Partnerships” (updated May 20, 2022)

Well done! 

Business Activities Taxes

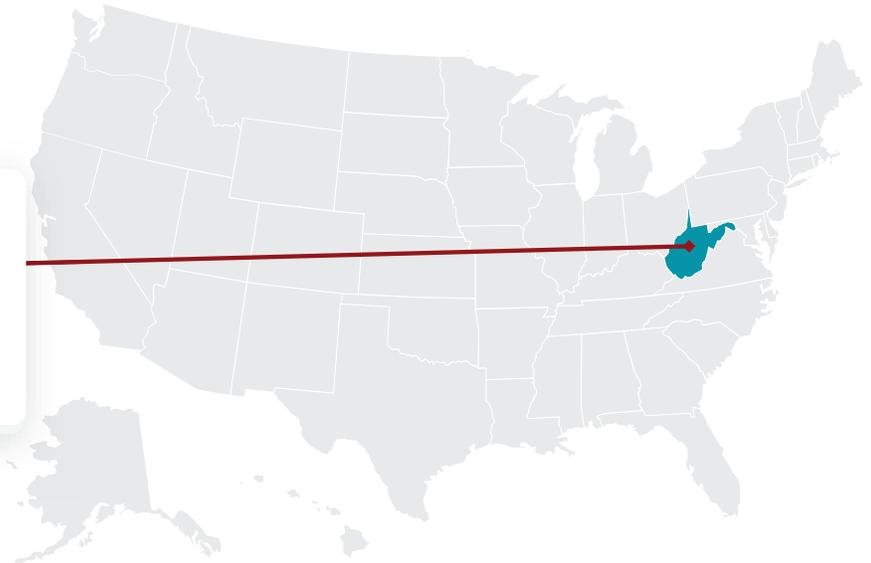


MULTISTATE TAX COMMISSION

Next meeting of Project on State Taxation of Partnerships is
June 27, 2022

Business Activities Taxes

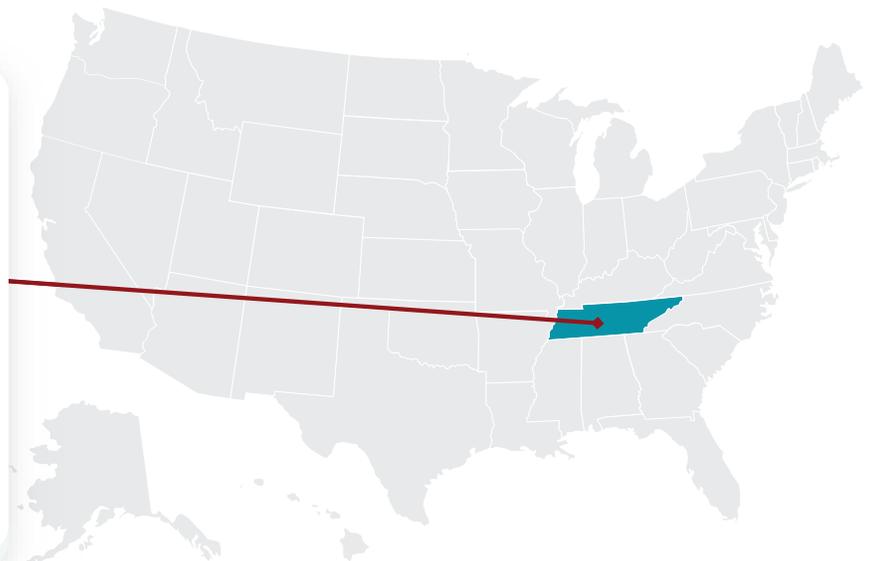
West Virginia Allocation and apportionment for flow through entities



Business Activities Taxes

Add-Back

Tennessee. Short term intercompany trade payables are not required to be added back in determining a taxpayer's net worth. The payables are settled monthly and are not used to disguise equity as debt.



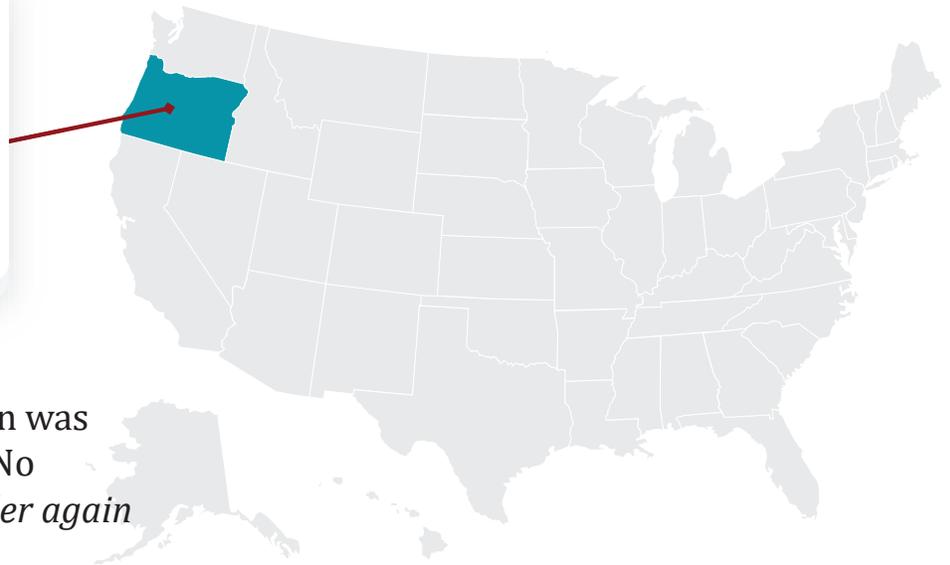
Business Activities Taxes

Oregon.

The cost of performance used to apportion sales of other than TPP did not include amounts paid to an independent third party



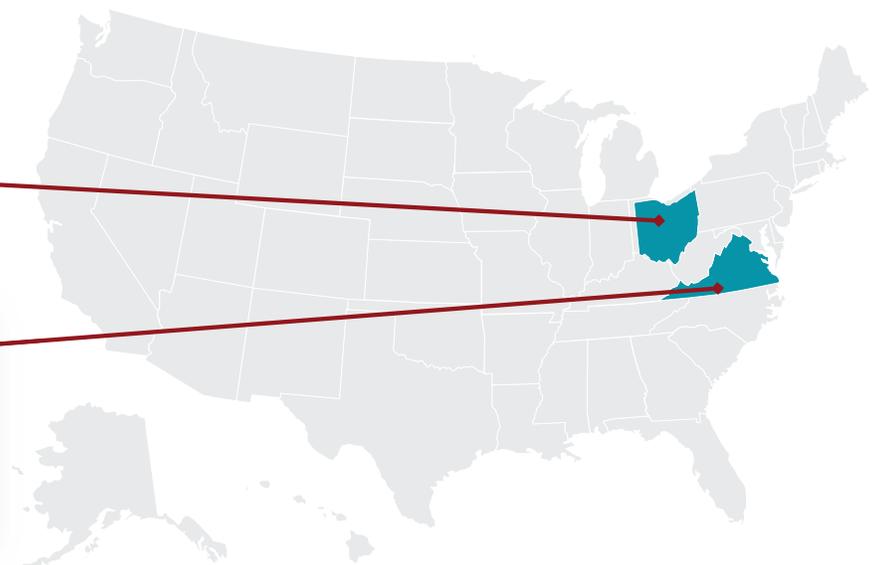
This aspect of the cost of performance examination was reversed by regulation. No statutory change. *Consider again the question on slide 11.*



Business Activities Taxes

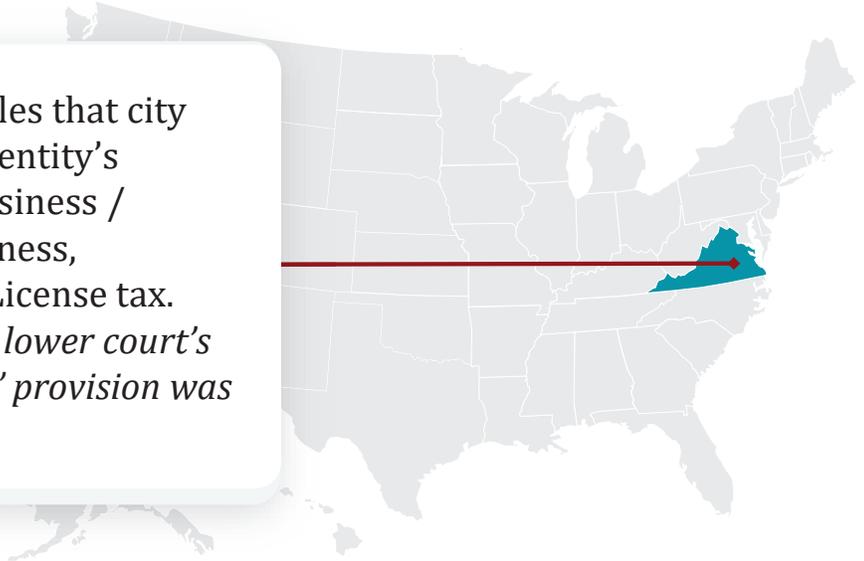
Ohio PTE tax signed into law June 14, 2022. Effective 91 days after filing with Secretary of State.

Virginia PTE tax signed into law April 11, 2022. Effective January 1, 2022.



Business Activities Taxes

Virginia State Supreme Court rules that city may not characterize a licensing entity's activities as a "miscellaneous business / personal service" subject to Business, Professional, Occupational, and License tax.
Note: The Court did not reach the lower court's holding that the "miscellaneous..." provision was unconstitutionally vague.



Transaction Taxes

Transaction Taxes

State Tax Revenue



NCSL

NATIONAL CONFERENCE OF STATE LEGISLATURES

“ In a remarkably fast recession turnaround, tax revenue in nearly half of states has not only recouped its initial losses from the downturn, but also outperformed its pre-pandemic growth trends when receipts from the past two fiscal years are combined.”

Transaction Taxes

Tourism Taxes



NCSL

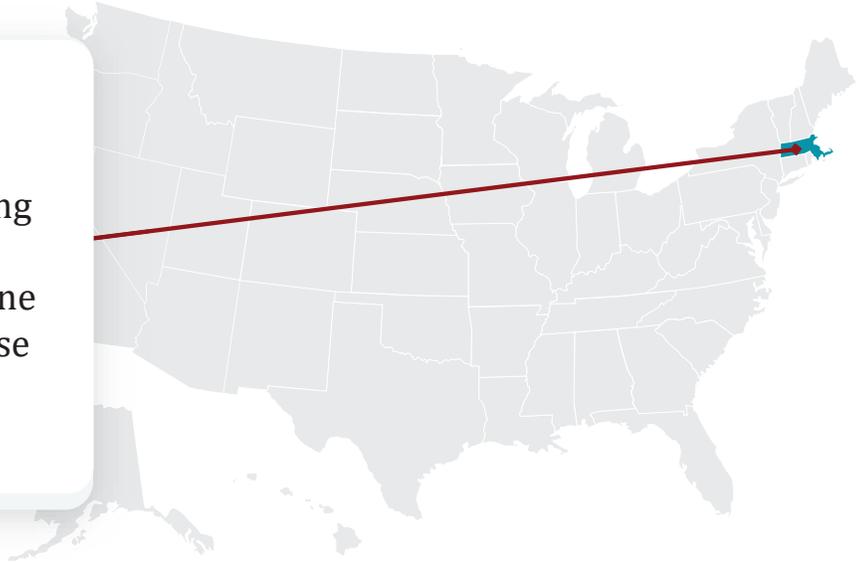
And this

NATIONAL CONFERENCE OF STATE LEGISLATURES

“ The sudden shift to domestic rural travel during the pandemic highlights the need for policymakers to think about the burdens tourists place on state and local resources. [The] director of external affairs at Colorado Counties Inc., reported a lack of sufficient infrastructure to host the number of visitors that came to Colorado.”

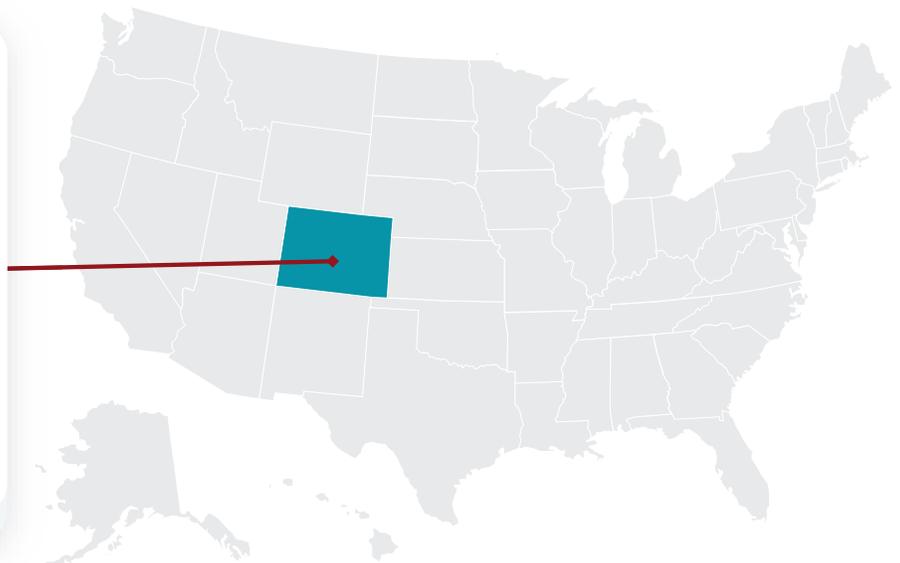
Transaction Taxes

Massachusetts DOR provides guidance on *Oracle* (2021 Mass. supreme court decision permitting sales and use tax apportionment for software used in more than one state). Unaddressed: Will DOR use *Oracle* to increase use tax liabilities?



Transaction Taxes

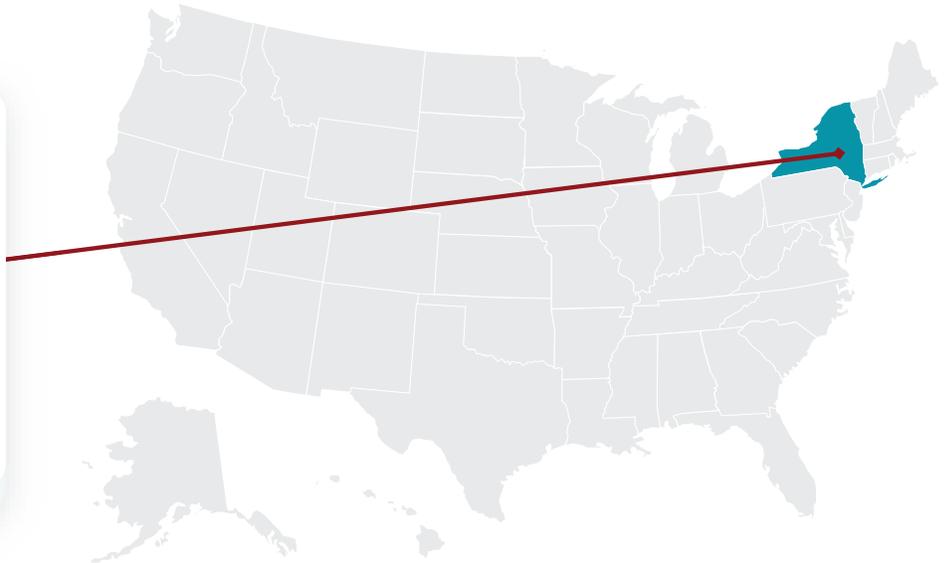
Colorado. Sales and use tax exemption for the transfer of complementary materials out-of-state repealed. L 2022, H1025 (repealing CRS 39-26-713 (1)(b) and (2)(i). Effective January 1, 2023).



Transaction Taxes

New York State.

Company that collected but did not remit \$805K in sales taxes and grossly understated its sales collected required to pay NYS more than \$2.1 million.

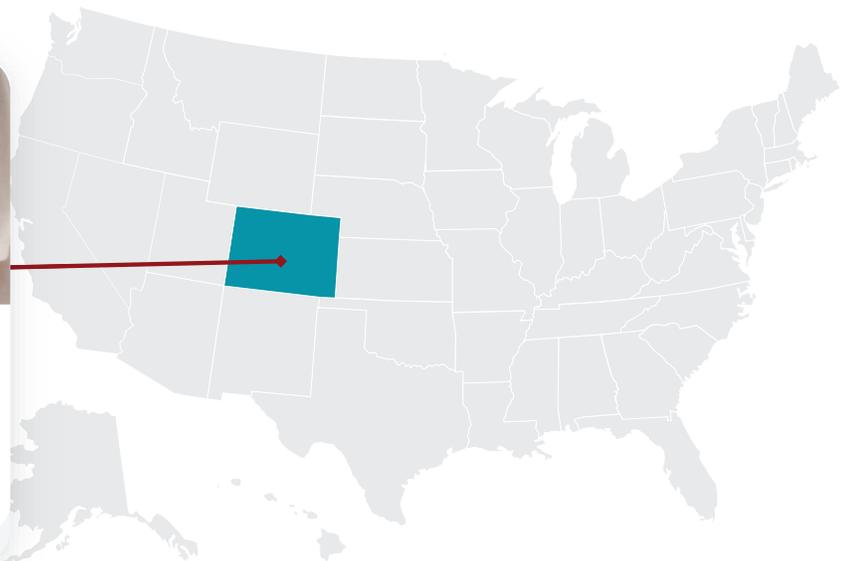


Transaction Taxes



Colorado.

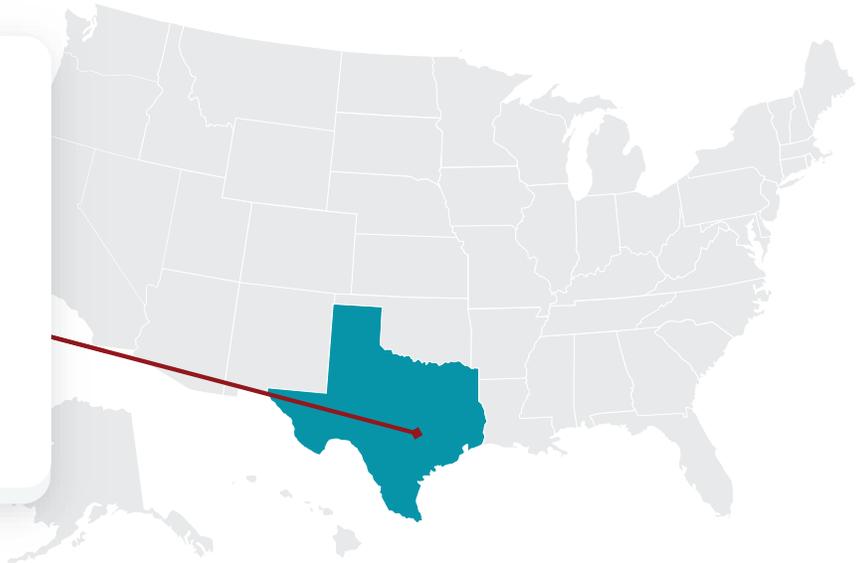
“Retail Delivery Fee” imposed effective July 1, 2022.



Transaction Taxes

Texas.

Mailing list is an information service and its purchase by nationwide retailer is subject to Texas use tax based on the percentage of Texas addresses. *Applicability of multistate exemption is limited to sales tax.*

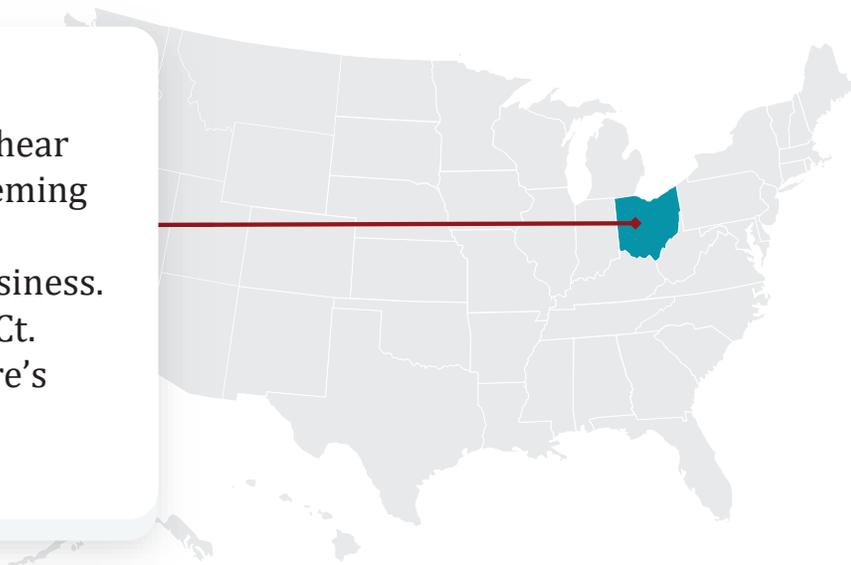


Miscellaneous

Miscellaneous

Ohio.

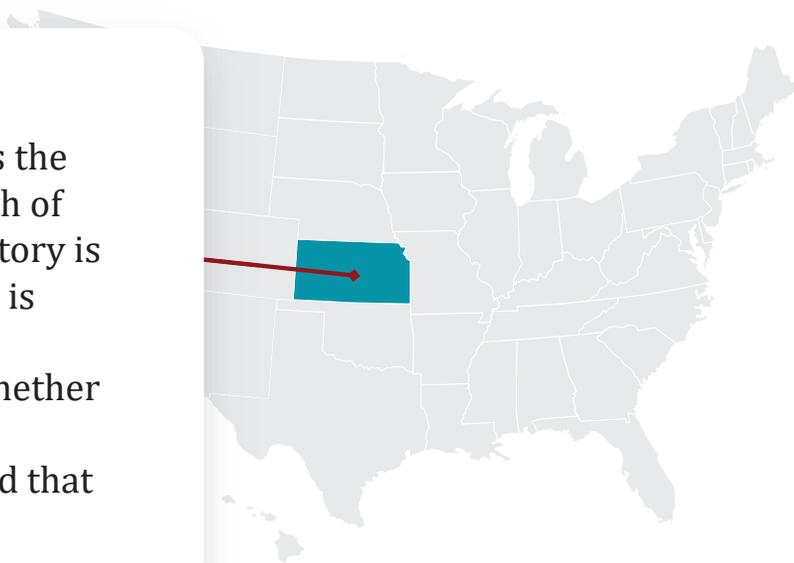
State supreme court declines to hear taxpayers' appeal of C19 law deeming work from home to occur at the employee's principal place of business. (Remember: In 2021, the U.S. S. Ct. refused to accept New Hampshire's suit against Massachusetts on a comparable issue.)



Miscellaneous

Kansas.

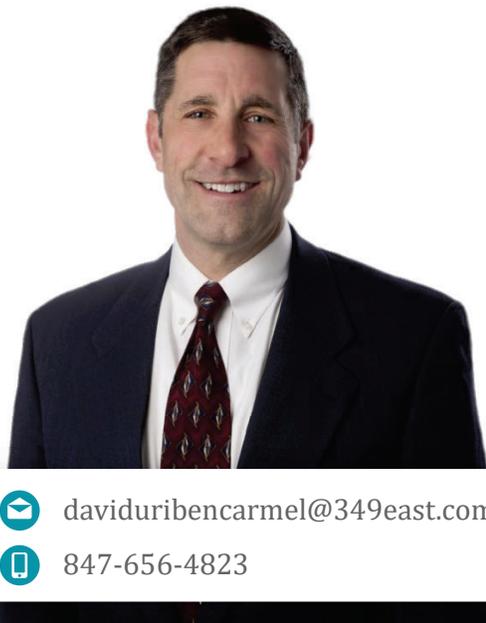
State supreme court: "This appeal is the culmination of over a decade's worth of litigation...While the procedural history is complex and the evidentiary record is enormous, the controlling legal question...(is) relatively simple – whether Gene was a Kansas resident for tax purposes in 2005 and 2006. We hold that Gene was domiciled in Florida..."



Questions????



David Uri Ben Carmel



 daviduribencarmel@349east.com

 847-656-4823

David Uri Ben Carmel (fka David A. Fruchtmann), principal of 349 East Multistate Tax Planning LLC, has advised clients on complex issues in all 50 states and the District of Columbia involving tax planning, disputed audits, and tax controversies before administrative bodies and courts. He was the Partner in charge of state and local taxation at two national law firms and served as a Special Deputy Attorney General to the state of Hawaii. He is admitted to the U.S. Supreme Court and submitted a much-discussed amicus brief in *Wayfair* warning the Supreme Court about the states' intentions to experiment by imposing sales taxes on many multistate services.

Mr. Ben Carmel assists clients on complex issues involving virtually all subnational taxes -- whether business activity taxes, transaction taxes, excise taxes and fees, net worth taxes, unclaimed property, and residency issues. He is a past chairman of the Income and Franchise Taxes Subcommittee of the American Bar Association's state tax committee.

Disclaimer

This presentation and these materials address recent state and local tax developments. Because of the generality of the information provided, the materials and information might not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Neither participation in this presentation nor receipt of these materials establishes a business or attorney-client relationship.

Notes

SLIDE 13

Jensen Online, Inc. et al v. State of Washington Department of Revenue, Board of Tax Appeals Dkt Nos. 19-033, 19-063, 19-066, and 20-136

SLIDE 14

D.C. Rev. Notice 2022-06 (June 6, 2022) and Minnesota DOR <https://www.revenue.state.mn.us/our-response-covid-19> (accessed June 15, 2022).“

SLIDE 15

Florida. Numerous transaction tax 10-day “holidays” are enacted, to effective at specified periods in 2022 and 2023. H.B. 7071

New York State. Important Notice N-22-1 (May 11, 2022)

Georgia. Motor fuel excise tax suspension extended through July 14, 2022.

Ex. Order 05.26.22.02; Department of Revenue Information Bulletin MFT-2022-001

SLIDE 15, cont'd

Illinois. Grocery tax suspension. P.A. 102-7000; FY 2022-23 (May 2022); Suspension of Motor Fuel Taxes beginning June 1, 2022. Important Notice N-22-1 (May 11, 2022).

SLIDE 17

VAS Holdings & Investments LLC v. Commissioner, (Mass. Sup. Jud. Ct., Dkt. No. SJC-13139 May 16, 2022)

SLIDE 18

Sirius XM Radio, Inc. v. Hegar, S. Ct. Texas Dkt. No. 20-0462 (March 25, 2022)

SLIDE 19

FTB Legal Ruling 2022-01 (March 25, 2022)

Notes

SLIDE 22

"Revision to Division Policy on Combined Groups and 86-272" (April 12, 2022)

SLIDE 24

XXXX

SLIDE 25

Texas Comptroller's Decision Nos. 116,854; 117,455; 117,900 (May 3, 2022)

SLIDE 31

Tennessee Department of Revenue Letter Ruling #22-03 (May 4, 2022)

Notes

SLIDE 32

Vesta Corp. v. Department, Oregon Tax Court Dkt No. TC-MD 200019G (March 29, 2022)

SLIDE 33 Virginia Ch. 690 (S.B. 692/H.B. 1121), Laws 2022, adding VA. Code Ann. § 58.1-390.3 and Ohio L. 2022, S. 246.

SLIDE 34

City of Charlottesville v. Regulus Books, LLC, Record No. 210414 (June 9, 2022).

SLIDE 36

NCSL Fiscal Policy Research linking to Pew Charitable Trust Study “Insights from Fiscal 50’s Key Measures of State Fiscal Health” (May 13, 2020) (accessed June 15, 2022)

Notes

SLIDE 37

NCSL Fiscal Brief “Travel is Taxing in More Ways than One” (June, 2022)

SLIDE 38

Technical Information Release No. 22-8 (May 19, 2022).

SLIDE 40

NYS Dept. of Tax. And Fin. press release “Brooklyn puppy seller ordered to pay more than \$2.1 million in sales tax fraud case” (April 15, 2022)

SLIDE 41

Colorado Department of Revenue “Retail Delivery Fee” (<https://tax.colorado.gov/retail-delivery-fee> -- accessed June 15, 2022).

Notes

SLIDE 42

State Office of Administrative Hearings Dkt No. 304-22-0452.26 (STAR system 202204018H)
(April 13, 2022)

SLIDE 44

Buckeye Institute v. Kilgore (March 29, 2022)

SLIDE 45

O. Gene Bicknell et al. v. Kansas Department of Revenue, S. Ct. Kansas Dkt No. 120,935
(May 20, 2022)