

## State and Local Taxation: Headline News and Trends

December 15, 2021

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### Today's Agenda

#### Today's Presentation

<b>Megatrends and Developments: US S.Ct.</b>	<b>2- 6</b>
<b>Megatrends and Developments: Crystal Ball (2022)</b>	<b>7-18</b>
<b>Megatrends and Developments: Remote Workers</b>	<b>19-25</b>
<b>Megatrends and Developments: <i>Ford</i></b>	<b>26-29</b>
<b>Business Activities Taxes</b>	<b>30-41</b>
<b>Transaction Taxes</b>	<b>42-54</b>
<b>Miscellaneous</b>	<b>55-57</b>

## Megatrends and Developments

*US Supreme Court*



**Billboards I.** *Clear Channel Outdoor LLC v. Raymond*,  
Dept. of Fin. Baltimore, No 21-219 (Cert Pet. filed August 16, 2021) Which  
First Amendment test applies to a tax on off-premises billboards?

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## Megatrends and Developments

*Ohio Supreme Court*



**Billboards II.** *Lamar Advantage GP Company, LLC v. Cincinnati*,  
No. 2021-Ohio-3155 (S. Ct. Ohio, Sept 16, 2021)  
Tax on outdoor advertising signs unconstitutional

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## Megatrends and Developments

US Supreme Court



**Billboards III.** *City of Austin v. Reagan National Advertising of Austin*, No 20-1029 Whether the distinction between on- and off-premises signs in the City of Austin’s sign code is a facially unconstitutional content-based regulation of speech. Argued Nov. 10, 2021.

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## Megatrends and Developments

US Supreme Court



### Worth Noting I:

“Equitable apportionment” is applied in a dispute not involving multistate business. *See e.g., Mississippi v. Tennessee*, No. 143 Orig, 595 U.S. \_\_\_ (Nov. 22, 2021) involving the use of water in aquifers.

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## Megatrends and Developments

*US Supreme Court*



### **Worth Noting II:**

Can lessons relevant to multistate taxation be drawn from these and other nontax applications of “equitable apportionment”?

## Megatrends and Developments

*Crystal Ball (2022): Nexus and apportionment I*

Sales-factor market sourcing presence





## Megatrends and Developments

*Crystal Ball (2022): Nexus and apportionment II*



### Illinois Reg. 100.9720(a)

“However, the fact that Article 3 of the IITA requires a non-resident taxpayer to allocate or apportion income to this State does not create a presumption that the taxpayer has nexus.”

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## Megatrends and Developments

*Crystal Ball (2022): Nexus and apportionment III*



1. UDITPA (1957, adopted into the Multistate Tax Compact in 1966). Three-factor apportionment with “cost of performance” for receipts from sales of other than tangible personal property.

2. *Moorman Mfg. Co. v Bair*, 437 US 267, 273 (1978) (“The Iowa statute afforded appellant an opportunity to demonstrate that the single-factor formula produced an arbitrary result in its case. But this record contains no such showing and therefore the Director’s assessment is not subject to challenge under the Due Process Clause.”)

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## Megatrends and Developments

*Crystal Ball (2022): Nexus and Apportionment IV*




3. State movement to heavily-weighted sales factor or even single-factor sales
4. State movement to market sourcing for sales of other than tangible personal property

## Megatrends and Developments

*Crystal Ball (2022): Nexus and Apportionment V*



Alabama  Challenge to factor presence nexus may proceed on an “unconstitutional as applied” basis.

## Megatrends and Developments

*Crystal Ball (2022): Apportionment I*



Expect challenges based on Justice Powell's and Justice Brennan's dissents in *Moorman*.

## Megatrends and Developments

*Crystal Ball (2022): Apportionment II*



Massachusetts' apportionment treatment of "manufacturers" seems like a prime target.

## Megatrends and Developments

*Crystal Ball (2022): Apportionment III*



### A question to ask:

- Is this fair apportionment?

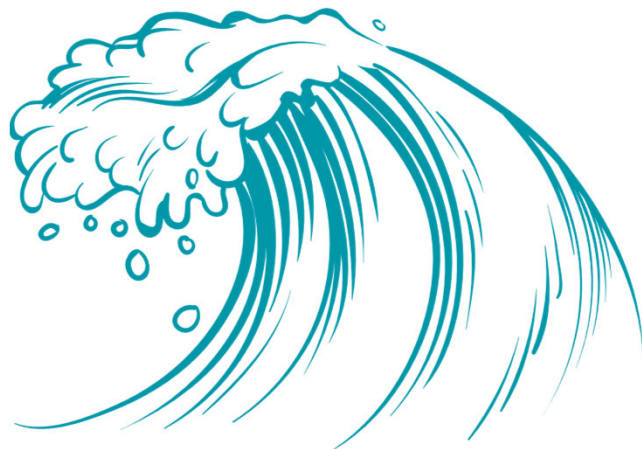
Note: Too often, this is interpreted to mean only “Is this constitutional?”

## Megatrends and Developments

*Crystal Ball (2022): Pike v Bruce Church*

### **The first wave has hit the beach!**

Louisiana tax collection scheme requested to be enjoined due to excessively burdensome compliance requirements. *Halstead Bead, Inc. v. Lewis, Louisiana Sec’y of Revenue*, 2:21-cv-02106 (Nov. 15, 2021)



## Megatrends and Developments

*Crystal Ball (2022): The Smoke of a Distant Fire*

### Financial Transaction Taxes?

- New York State
- New Jersey
- Illinois
- Federal legislation proposed: “Protecting Retirement Savers and Everyday Investors Act” (H.R. 1584 (introduced 3/3/21))



## Megatrends and Developments

*Crystal Ball: (2022): Financial Transaction Taxes*

A federal FTT is also being discussed.



## Megatrends and Developments

*Crystal Ball:(2022): Excise Taxes/Sales Taxes*



- ✓ Franchise Transaction Taxes (above)
- ✓ Gas Taxes (see Headline News and Trends 9/15/2021)
- ✓ Taxation of Social Media

## Megatrends and Developments

*Remote Workers*

Four Silos Affected:

**01**

The employee's individual income tax;

**02**

The employer's withholding obligation;

**03**

The employer's liability for Business Activities Taxes;

**04**

The employer's obligation for Transaction Taxes



# Megatrends and Developments

## Remote Workers

### New York City report on sales tax impact of remote working.



With more City businesses making plans or beginning to call back workers to the workplace, one of the key questions that has emerged is how work patterns have been altered by the pandemic and how this impacts New York City's economy and tax base. The answer to this depends on the extent to which workers will return to a typical five-day workweek on site at their workplace. For now, it seems that most businesses will employ a hybrid work model that involves a mix of work from home and work at the office. Based on recent surveys of City businesses<sup>1</sup>, employees will spend on average three days at the office and two days at home. There is however considerable variance among industries in their willingness to adopt hybrid work models. Generally, tech firms have indicated that they are more accommodating to work from home while Wall Street leaders have expressed a stronger desire that their employees work most days at the office.

Changes in work patterns resulting from hybrid work could have significant and far-reaching impacts on many aspects of the City's economy. Demand for office space could be diminished and transit ridership could remain depressed as a result of workers being at home more often. Some workers may decide to shift residency outside the City as the burden of daily commuting is lowered. These long-term structural changes are difficult to gauge at this time. This analysis focuses on providing a framework to analyze how the typical daily spending of office workers will be impacted and the resulting change in City sales tax revenue.

As workers remain home, the normal day-to-day spending that occurs at the office (lunch, coffee, shopping, drinks after work, etc.) will occur elsewhere or be reduced. The impact on City sales tax revenues varies depending on where future spending occurs compared to present spending. This in turn depends on the numbers of workers who reside outside the City and commute into the City for work, City residents who commute to work outside the City, and City residents who also work in the City.

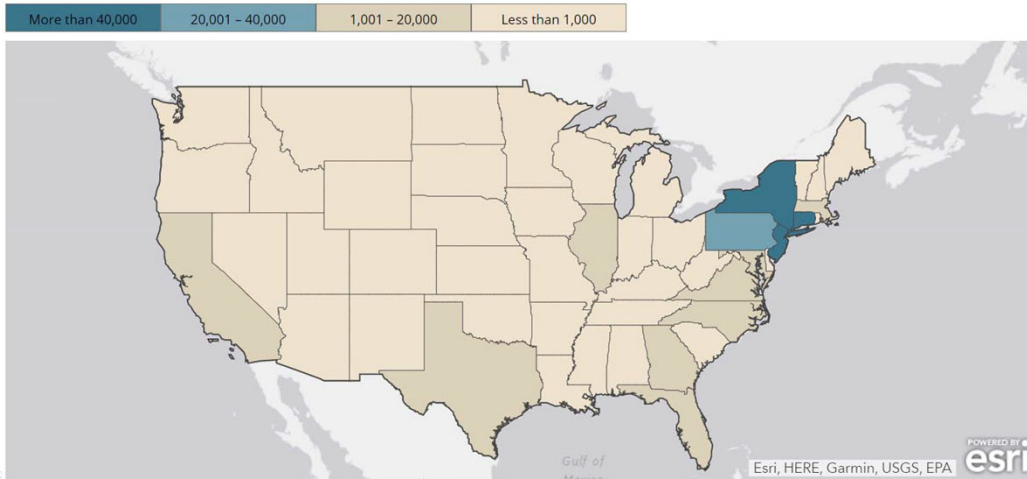
In the case of commuters to the City, some of their daily spending will no longer occur in the City, thereby reducing City sales tax revenue. Conversely, City residents who commuted to workplaces outside the City will now be spending more time and making more purchases in the City. City residents who work in the City would likely replace spending at the office with spending closer to home – perhaps substituting home-prepared food purchased at the grocery store (not subject to sales tax) for meals previously purchased at a restaurant and subject to the sales tax. Consumers

<sup>1</sup> US Remote Work Survey, PwC

# Megatrends and Developments

## Remote Workers

### New York City report: Q: Who is a commuter into New York City?



## Megatrends and Developments

Remote Workers

New York City report:  
**Q: Who is a commuter  
 into New York City?**

Table A.2: Commuters to and from NYC

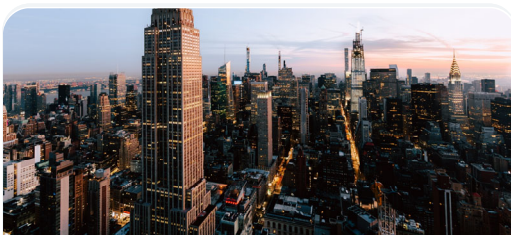
	Commuters to NYC	% total
Maine	330	0.0%
Maryland	1,926	0.2%
Massachusetts	3,042	0.3%
Michigan	946	0.1%
Minnesota	217	0.0%
Mississippi	127	0.0%
Missouri	406	0.0%
Montana	56	0.0%
Nebraska	38	0.0%
Nevada	202	0.0%
New Hampshire	584	0.1%
New Jersey	426,259	41.1%
New Mexico	98	0.0%
New York	511,540	49.3%
North Carolina	1,369	0.1%
North Dakota	11	0.0%

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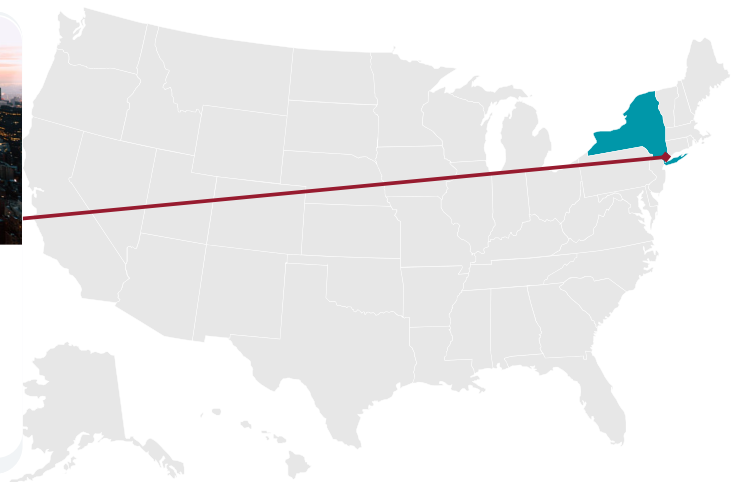
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## Megatrends and Developments

Remote Workers



New York City report:  
 stated consequence:  
**\$111M sales tax loss**



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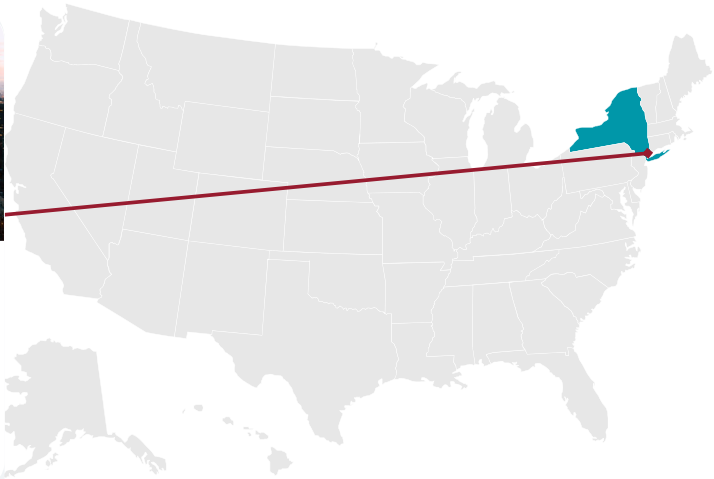
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## Megatrends and Developments

*Remote Workers: Convenience of the employer rule*



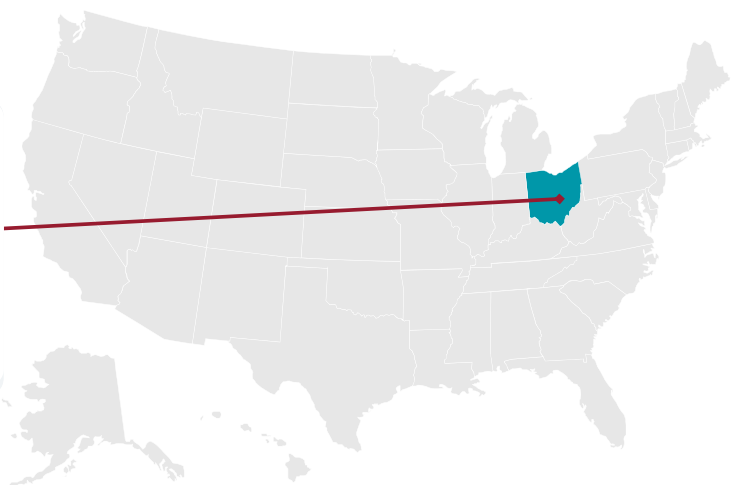
**New York City report:**  
unstated consequence:  
**Convenience of the  
employer rule**



## Megatrends and Developments

*Remote Workers: Convenience of the employer rule (Ohio)*

**Ohio.**  
Ohio Court of Appeals  
upholds Columbus's  
version of the convenience  
of the employer rule



# Megatrends and Developments

*Ford Case 1 (March 2021)*



Cite as: 592 U. S. \_\_\_\_ (2021) 1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

Nos. 19–368 and 19–369

FORD MOTOR COMPANY, PETITIONER  
19–368  
v.  
MONTANA EIGHTH JUDICIAL DISTRICT  
COURT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF MONTANA

FORD MOTOR COMPANY, PETITIONER  
19–369  
v.  
ADAM BANDEMER

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF MINNESOTA  
[March 25, 2021]

JUSTICE KAGAN delivered the opinion of the Court.  
In each of these two cases, a state court held that it had jurisdiction over Ford Motor Company in a products-liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State’s residents. And Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. When a company

# Megatrends and Developments

*Ford Case 2 (April 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 ▶





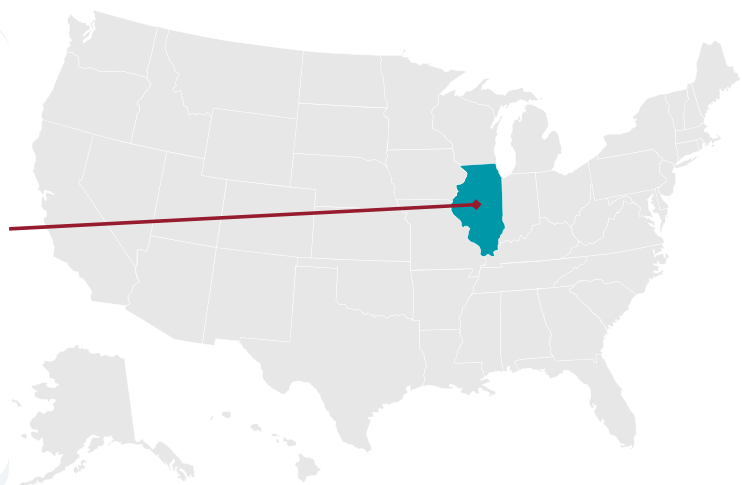
# Business Activities Taxes

## Business Activities Taxes

### *Apportionment - Virtual Currency*

#### **Illinois.**

For apportionment purposes, Bitcoin is intangible personal property. Sale of Bitcoin apparently will be includible in gross receipts without having to meet the “more than 50%” test required of patents, copyrights, and trademarks.



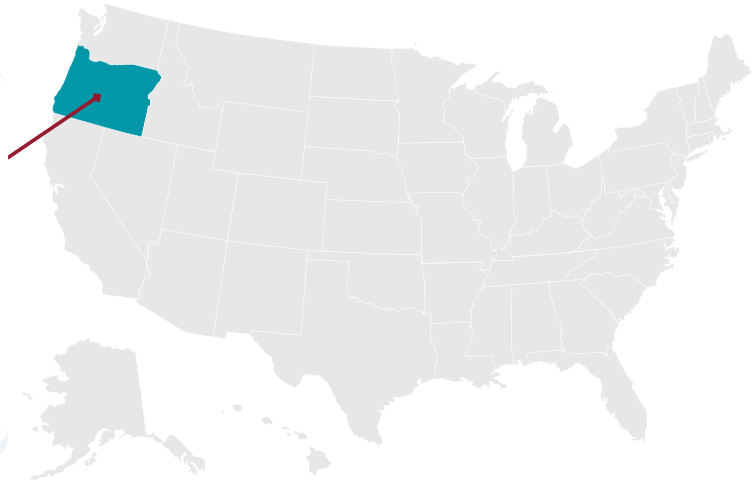


## Business Activities Taxes

### *Apportionment - Virtual Currency*

#### **Oregon.**

Dividends and the unsubtracted 20% portion of subpart F income are generally excluded from the sales factor, but are includible if derived from the taxpayer's primary business activity.

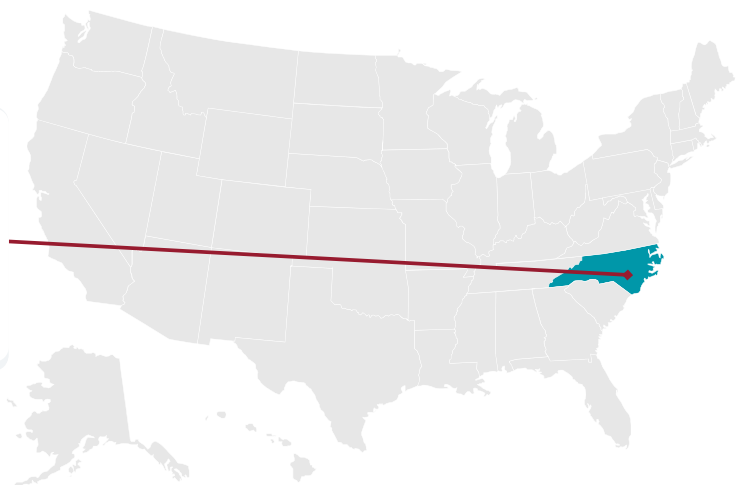


## Business Activities Taxes

### *Corporate Income Tax Repeal*

#### **North Carolina.**

Corporate income tax phased out by 2030 in budget signed November 19, 2021.



## Business Activities Taxes

### Tax Rate Reduction

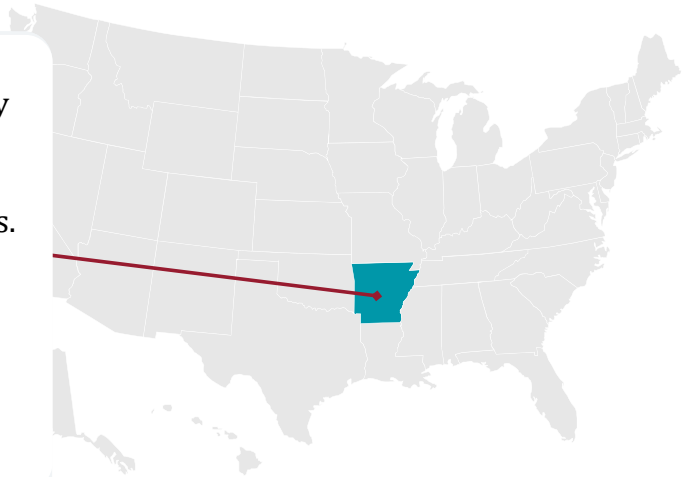
#### Arkansas.

Corporate income tax rate reduced by as much as 10%, over several years.

Also, individual income tax rates reduced by as much as 18%, in phases.



*Beware: rate reductions can be offset by base expansions (via sourcing interpretations and other means).*

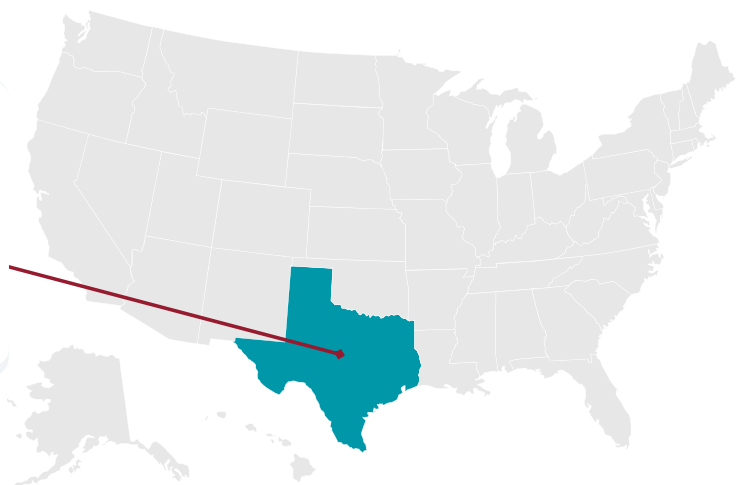


## Business Activities Taxes

### Apportionment

#### Texas.

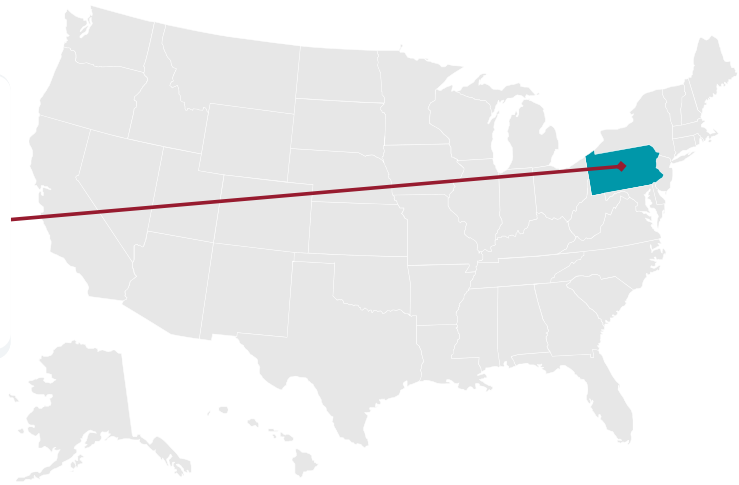
Receipts factor included net (not gross) amounts received from sales of commodities futures and option contracts.



## Business Activities Taxes

*Net Operating Losses*

**Pennsylvania.**  
Court rejects challenge to  
DOR's prospective  
application of decision  
invalidating NOL cap.



\* 36

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**MARCH**

**22**

**Save the Date:**

**“State and Local Taxation:  
Headline News and Trends”**

- *Expanded edition with special guest Jennifer Noel, Director, Delaware Division of Revenue (11:00 a.m. - 12:15 p.m. ET)*

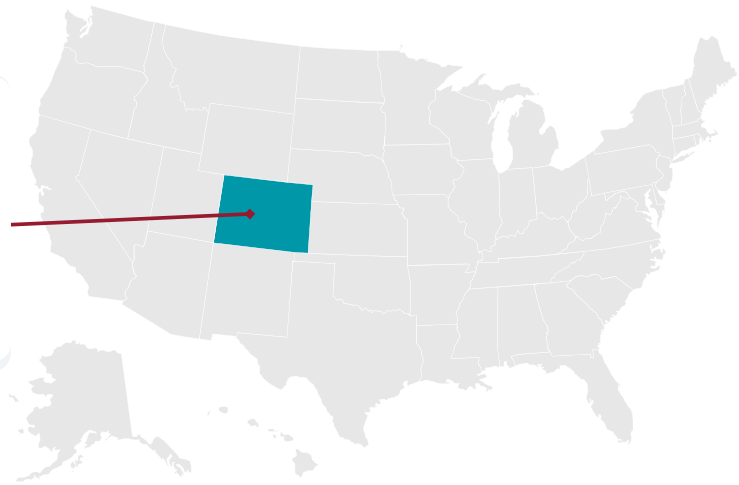
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## Business Activities Taxes

### Apportionment

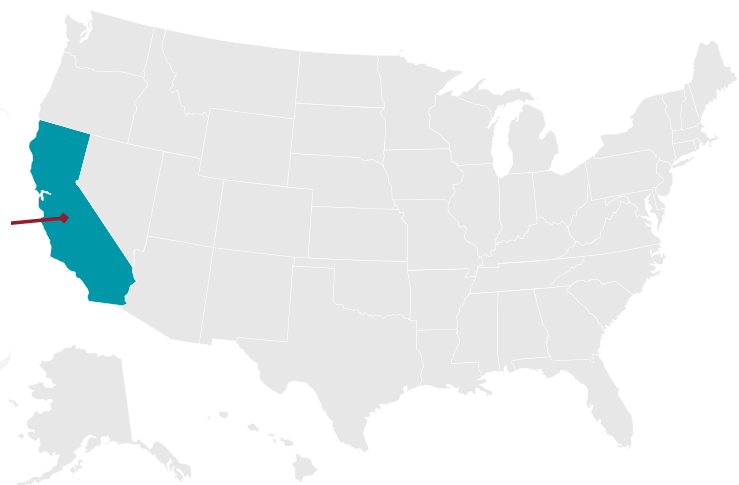
**Colorado** proposes special rule for apportionment of income of electricity producers from “hedging transactions”.  
Special Rule 9A.



## Business Activities Taxes

### Apportionment

**California** FTB begins formal rule making process of proposed market-based sourcing rules (CCR 25136-2) (September 9, 2021).



## Business Activities Taxes

### Apportionment



California: Procedural challenge to sales factor apportionment rejected.

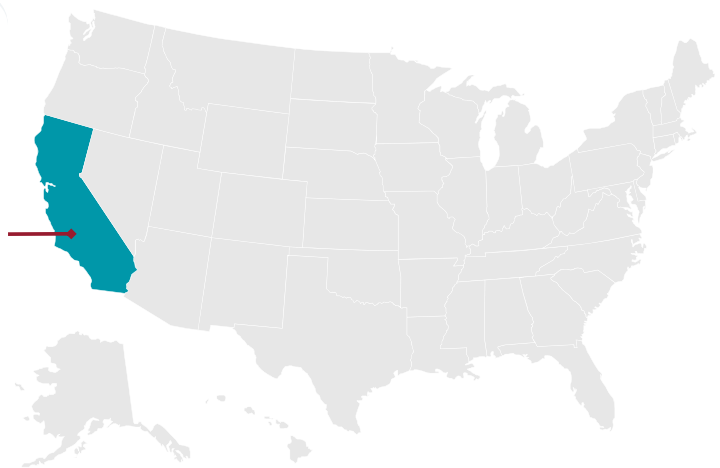
## Business Activities Taxes

### Apportionment

#### California.

FTB issues 11 pages of guidance on the apportionment treatment of pass-through entities:

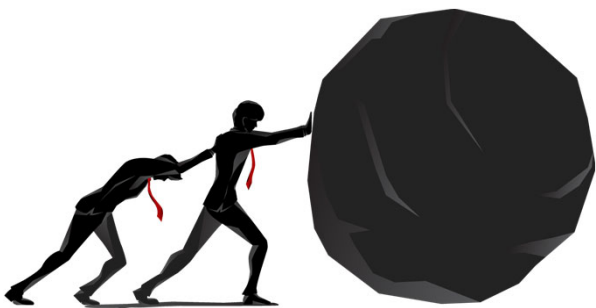
1. Limited and General partnerships;
2. Holding companies and unity;
3. Overlap between 1 and 2 (“expand[s] upon a traditional unitary analysis”).



# Transaction Taxes

## Transaction Taxes

### *Remote Vendors*



Appeal filed on behalf of remote vendors.

**A very difficult task:**

Persuading a court that the states abused their discretion by deciding to pursue tax collection against one type of participant in a transaction instead of another type of participant.



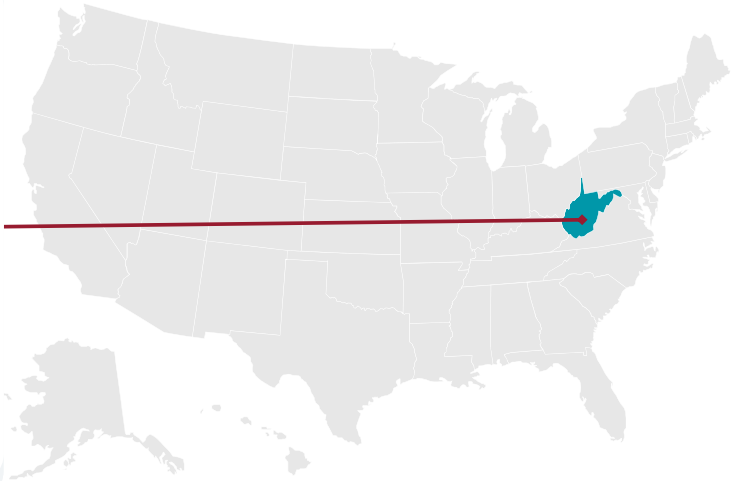
## Transaction Taxes

### Streaming Services

#### West Virginia.

State and local sales tax applies to streaming services sourced to West Virginia.

“Streaming services differ from the sales of digital products. A digital product is a discrete identifiable item...When a consumer purchases streaming services, the consumer has generally bought access to curated entertainment content in the streaming service’s catalog but has not procured a right to any specified digital product.”



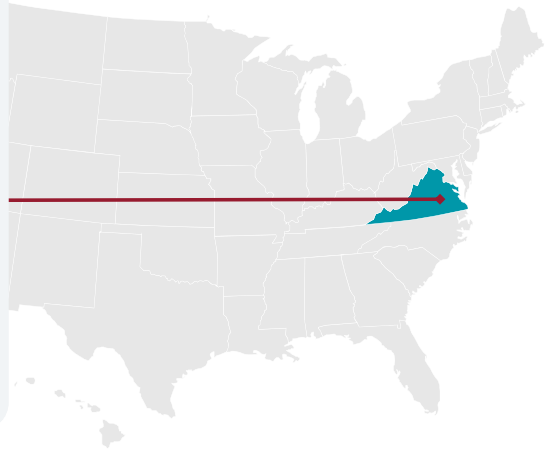
## Transaction Taxes

### Security System Services

#### Virginia.

Gross receipts from security monitoring services were sourced to where the services were performed, directed, or controlled by the Taxpayer, not where sales of the services were initiated.

“Because the monitoring services were not performed, directed, or controlled at a definite place of business in the County the gross receipts derived were not subject to the County’s BPOL tax...”



# A brief interruption public service announcement

## State Tax Hazards in Transaction Planning



- I. Known knows: "We must look at Illinois Replacement tax issues."
- II. Known unknowns: "Do we need to look at Illinois Replacement tax issues?"
- III. Unknown unknowns: "Illinois Replacement tax?"

### Focus on III:

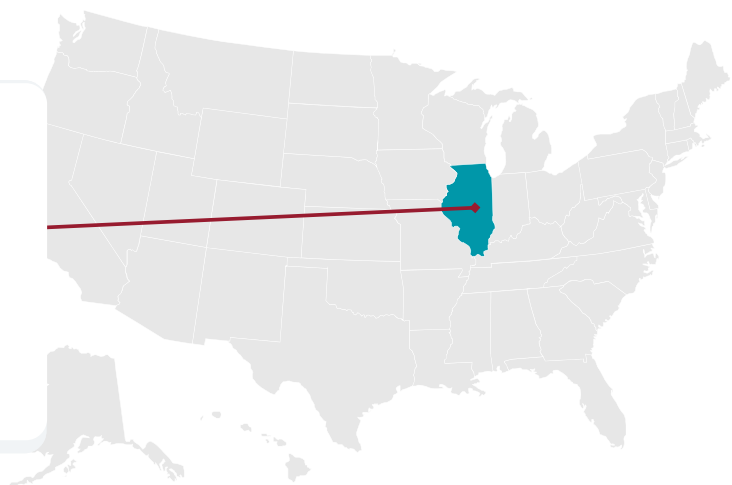
- A classic scenario: *In the Matter of 1018 Morris Park Avenue Realty Inc.*, TAT(E) 14-4(GC), New York City Tax Appeals Tribunal (August 7, 2017)
- Recent Application #1: *Delcon Partners LLC v. Wyoming Department of Revenue*, 2019 WY 106 (October 21, 2019)
- Recent Application #2: DC OTR amends rule 402 to state that sale of an entire segment of a retailer does not qualify as a nontaxable casual and isolated sale (Eff. May 14, 2021)
- Recent Application #3: *Matter of Skidmore, Owings & Merrill, LLP*, TAT (H)17-21 (NYC ALJ, July 30, 2021)

**BACK**  
to the regular program

## Transaction Taxes

### *Remote Vendors*

**Illinois.**  
Drop shipments are not considered in determining whether the drop shipper exceeds the state's *Wayfair* thresholds -- as they are sales for resale. (Proper documentation is required.)



## Transaction Taxes

### False Claims Act



### **New York False Claims Act suit dismissed.**

Incentives paid by manufacturers to retailer were not manufacturers' coupons and not included in the taxable price of goods sold at retail ("The retailer receives a payment from the manufacturer regardless of whether a customer receives a discount.")

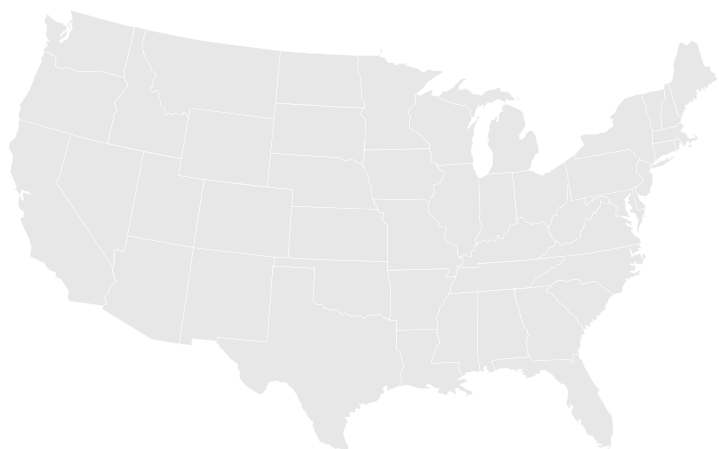
## Transaction Taxes

### Foreign Trade Zones

### **Hawaii.**

Federal Foreign Trade Zones Act of 1934 preempts state and local *ad valorem* taxes but not state or local excise taxes.

Therefore, Hawaii's general excise and use taxes may be applied to transactions in a FTZ.



## Transaction Taxes

*Internet Tax Freedom Act*

### Keep an eye on this:

Active briefing in Texas case involving the constitutionality of the ITFA's preemption provision.



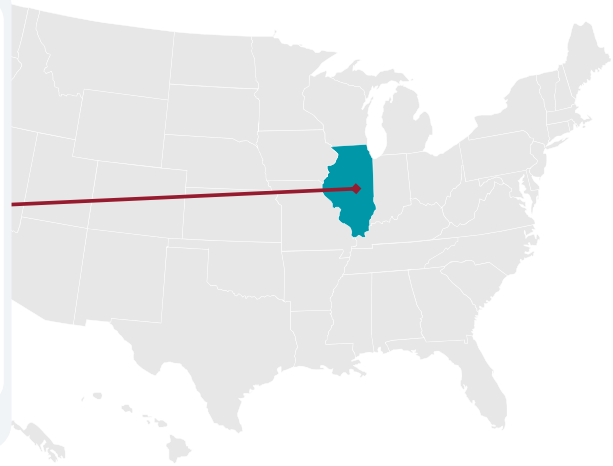
## Transaction Taxes

*Taxes on Fundamental Rights*

### Cook County taxes

on purchases of firearms and ammunition violated the Illinois Constitution's Uniformity Clause because the taxes collected were not used for a purpose related to the asserted justification for the tax (i.e., reducing gun violence).

*Note: The court did not reach the taxpayer's Second Amendment argument.*

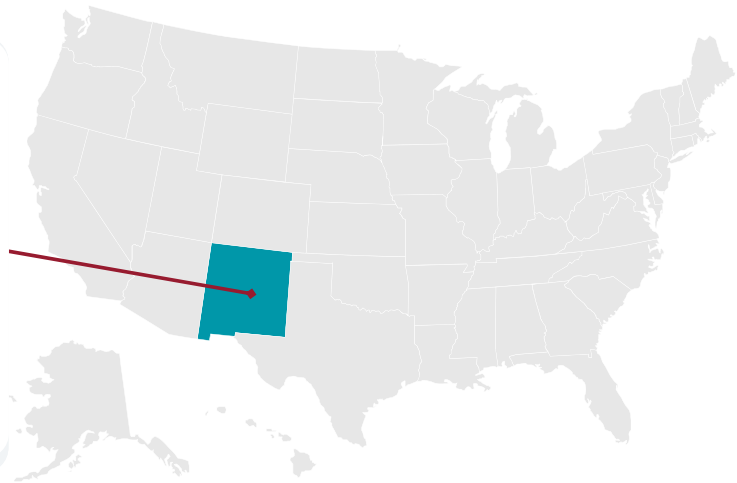


## Transaction Taxes

### Sourcing

#### **New Mexico.**

Effective July 1, 2021 Gross Receipt Tax is generally imposed on where goods or services are delivered. Exception for “professional services” (defined as those requiring a license from the state or a master’s degree or higher).



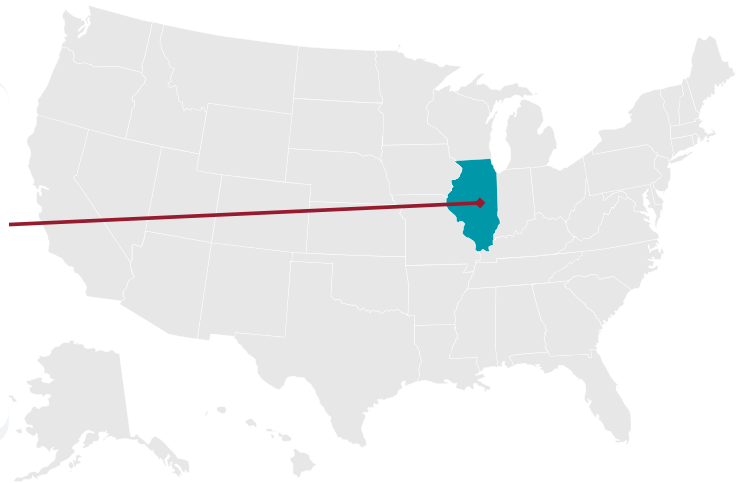
# Miscellaneous



## Miscellaneous

### *Virtual Currency*

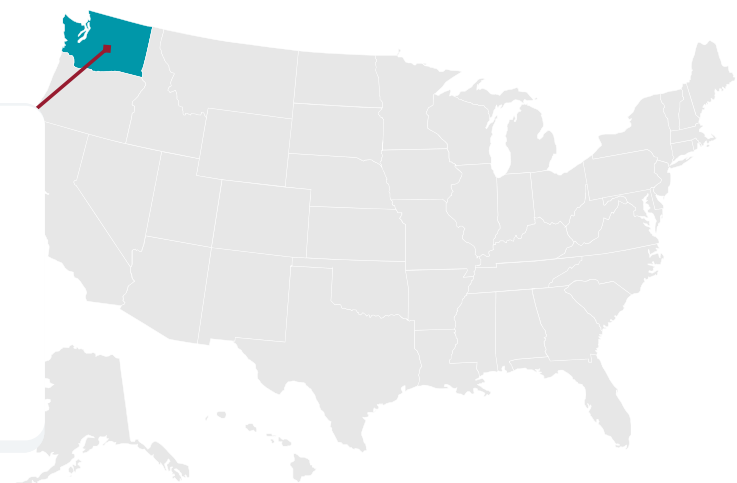
**Illinois** provides \$1.28 million in tax subsidies to cryptocurrency operator. Quid pro quo includes Chicago headquarters, creating 30 new jobs, and keeping 138 jobs.



## Miscellaneous

### *Capital Gains Tax*

**Washington State.** Taxpayer moves for summary judgement declaring 7% capital gains tax unconstitutional under the federal and state constitutions. (December 6, 2021)



## Questions???



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David Fruchtman 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.

You can read David's full firm biography [here](#).

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## 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 an attorney-client relationship.

## Notes

**SLIDE 1** <sup>1</sup> *Reynolds Brands, Inc. v. Dep't of Revenue*, (Ala. Tax Tribunal Dkt Nos. BIT 19-1160-JP, 1161-JP, and 20-419-JP Oct. 22, 2021)

**SLIDE 20**

*"The Impact of Hybrid Work on Commuters And NYC Sales Tax"*, NYC Department of Finance (October 19, 2021)

**SLIDE 21**

*Id.* at P. 3, citing "American Community Survey data from the U.S. Census Bureau" (available at "American Community Survey Data", <https://www.census.gov/programs-surveys/acs/data.html>)

**SLIDE 25**

*The Buckeye Inst. v. Kilgore*, No. 21-AP-193; 2021-Ohio-4196; C.P.C. No. 20CV-4301(November 30, 2021)

## Notes

### SLIDE 26

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

### SLIDE 27

"After *Ford*: Personal Jurisdiction for E-Commerce Vendors," (*Tax Notes State* (April 26, 2021, p. 379)).

### SLIDE 28

"State and Local Taxation: Headline News and Trends" (September 1, 2015, slide 6)

## Notes

### SLIDE 29

"The Nexus and Personal Jurisdiction Puzzle," Rick Handel *Tax Notes State* (Nov. 29, 2021, p. 933, 939-941)

### SLIDE 31

IT-21-0004 (Ill. DOR August 31, 2021)

### SLIDE 32

*Oracle Corporation and Subsidiaries v. Department of Revenue*, Or. Tax Court, Reg. Div., Dkt No. TC 5340 October 6, 2021.

## Notes

### SLIDE 33

General Assembly of North Carolina Session 2021 S.B. 105

### SLIDE 34

S.B. 1, signed into law December 9, 2021

### SLIDE 35

*Citgo v. Hegar, Comptroller*, No. 03-21-0011-CV (TX Ct. App. October 14, 2021).

### SLIDE 36

*Alcatel-Lucent USA, Inc v. Commonwealth of Pennsylvania*, No. 803 FR. 2017 (September 13, 2021)

## Notes

### SLIDE 38

1 CCR 201-2. Rule 39-22-303.6-1 and Rule 39-22-303.6-7 (proposed Sept. 24, 2021).

### SLIDE 40

*One Technologies, LLC v. Franchise Tax Board*, "Tentative Order" Case No. 21STCV21844 (Ca. Sup. Ct Nov. 10, 2021)

### SLIDE 41

Legal Ruling 2021-01 (October 25, 2021)

## Notes

### SLIDE 43

*Online Merchants Guild v. Maduros, Director of California Department of Tax and Fee Administration*, Case No. 2:20-cv-01952-MCE-DV (November 10, 2021) (appealing to the U.S. Court of Appeals for the Ninth Circuit).

### SLIDE 44

West Virginia State Tax Department, TSD-445 (August 2021).

### SLIDE 45

Virginia Department of Taxation, Ruling of the Commissioner P.D. 21-110 (August 24, 2021)

### SLIDE 49

Illinois Department of Revenue ST-21-0027 (GIL July 29, 2021).

## Notes

### SLIDE 50

*People v. B&H Foto & Electronics Corp.*, Index No. 452106/2019 (Supreme Court of the State of New York, New York County (September 21, 2021).

### SLIDE 51

State of Hawaii Attorney General Opinion (September 22, 2021) (in a letter to Hawaii's Director of Taxation)

### SLIDE 52

*Apple Inc. v. Hegar*, No. D-1-GN-20-004108, District Court for Travis County

### SLIDE 53

*Guns Save Life, Inc. v. Zahra Ali, Dir. Dept of Rev. of Cook County*, 2021 IL 126014 (October 21, 2021)

## Notes

### SLIDE 54

"Reminder", New Mexico Department of Taxation and Revenue (October 18, 2021)

### SLIDE 56

"BitCoin ATM Operator CoinFlip Wins Tax Subsidies From Illinois," Daily Tax Report: State (August 24, 2021)

### SLIDE 57

*Quinn v. Washington DOR*, Case No 21-2-00075-09 and 00087-09 (Sup. Ct. of Washington, for Douglas County)