

## State and Local Taxation: Headline News and Trends

September 1, 2021

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*Chair, Step toe's National State and Local Tax Practice*



## Today's Agenda

### Today's Presentation

<b>Megatrends - General</b>	<b>2-17</b>
<b>Business Activities Taxes</b>	<b>18-27</b>
<b>Transaction Taxes</b>	<b>28-37</b>
<b>Miscellaneous</b>	<b>38-47</b>

## Megatrends

*US Supreme Court*



*Americans for Prosperity Foundation v. Xavier Becerra*,  
Nos. 19-251 and 19-255 (consolidated under 251). California's donor  
disclosure requirement is facially invalid because it unfairly burdens donors'  
First Amendment right of free association. (July 1, 2021)

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## Megatrends

*US Supreme Court*



*Clear Chanel 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

*Marketplace Facilitator*

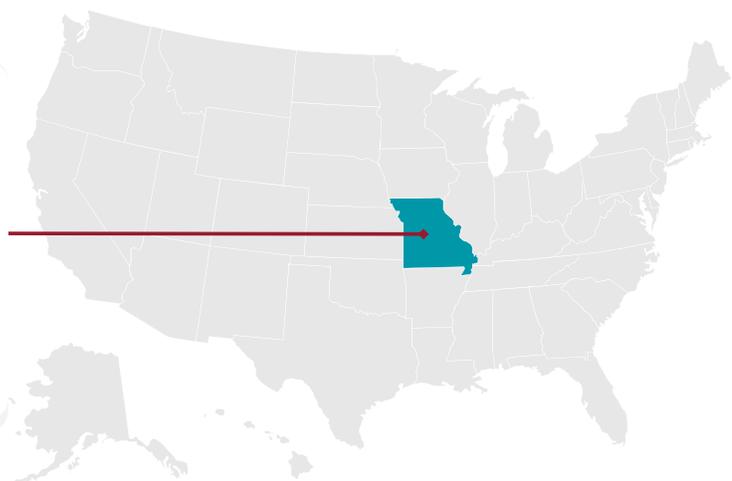


*Amazon Services v. South Carolina DOR,*  
Per an August 19, 2021 article the state appellate court is deciding whether to recommend oral argument or mere briefing. (STN 8/19/21).

## Megatrends

*Marketplace Facilitator*

**Missouri** enacted a marketplace facilitator law. Missouri S.B. 153, effective Jan. 1, 2023. Now, every state with a sales tax has such a law (but the terms vary by state).



## Megatrends

*E-Commerce Personal Jurisdiction*



MULTISTATE TAX COMMISSION

July 27, 2021 annual meeting presentation listed nexus developments since 4/20/21 and showed the U.S. S. Ct's *Ford* decision 20th, after Mississippi's guidance on peer to peer rentals and Rhode Island's C19 emergency reg.

**What does this attempted burial signal?**

\* 6

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## Megatrends

*SALT Cap Attempted Workaround*



**Idaho and Illinois**  
adoption



**Massachusetts**  
veto



**NYS** guidance issued  
TSB-M-21(1)C, (1)I  
(August 25, 2021)

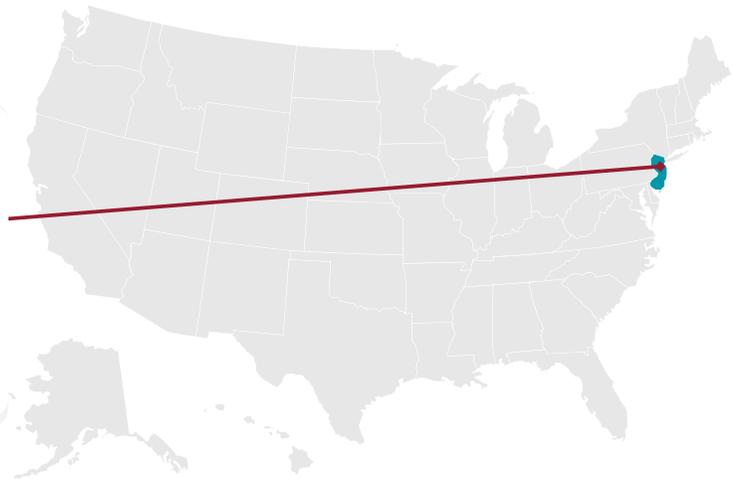
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## Megatrends

### Compliance Disaster #1

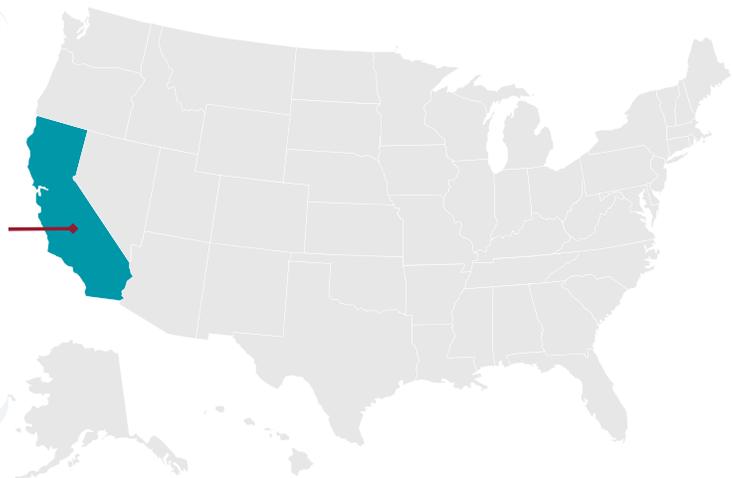
**New Jersey.**  
Worker misclassification  
raid (NJDOL/Treasury press  
release August 10, 2021)



## Megatrends

### Compliance Disaster #2

**California.**  
Restaurant owners  
underreported sales by  
\$11million. Will be jailed and  
owe \$2.1 million in sales and  
income tax restitution. *Calif v.*  
*Lu*, Cal Super. Ct. BA 484238  
(August 20, 2021)

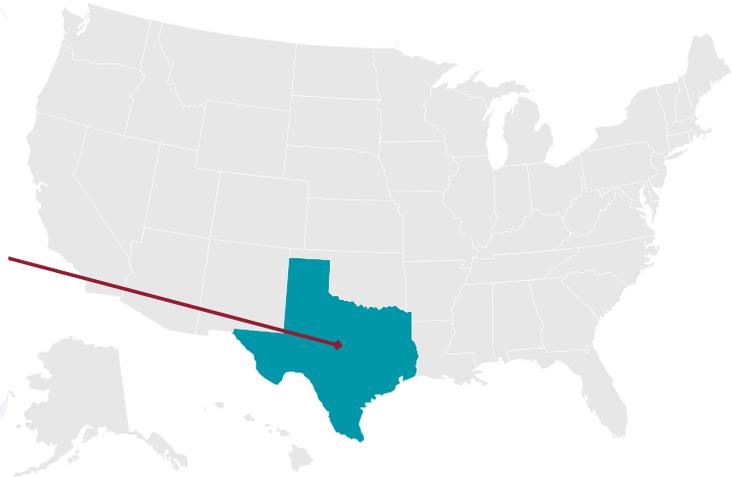


## Megatrends

### Compliance Disaster #3

#### **Texas.**

Convenience store owner failed to maintain accurate records and was subject to 50% penalty, among other problems. Texas STAR System 202107015H (July 16, 2021).



## Megatrends

### Compliance Disaster #4

#### **District of Columbia.**

Car sharing platform agrees to pay \$950K in sales taxes from 9/30/15 - 3/31/20. *Matter of Getaround, Inc.*, Office of the Attorney General (July 22, 2021).

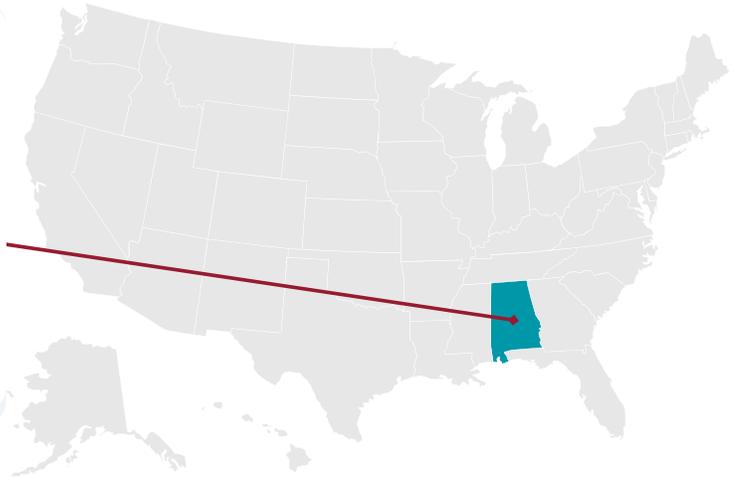


## Megatrends

### Compliance Disaster #5

#### **Alabama.**

Convenience store failed to maintain records and audit demonstrated fraudulent underreporting of sales. Statute of limitations waived for fraud with intent to evade tax. 50% penalty warranted.

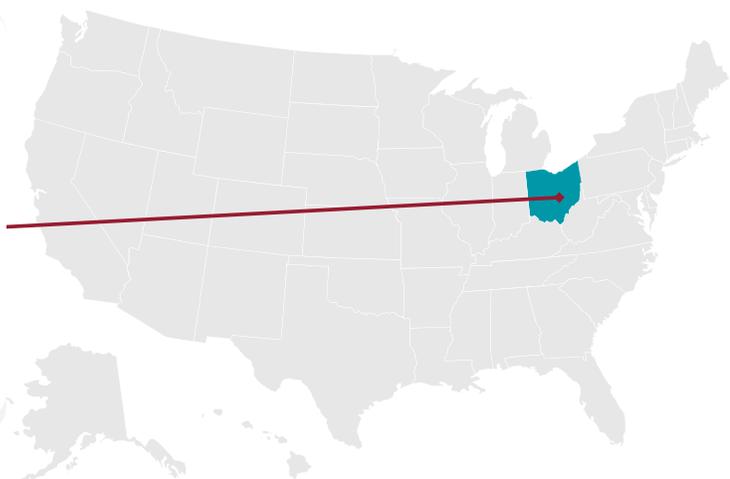


## Megatrends

### Compliance Disaster #6

#### **Ohio.**

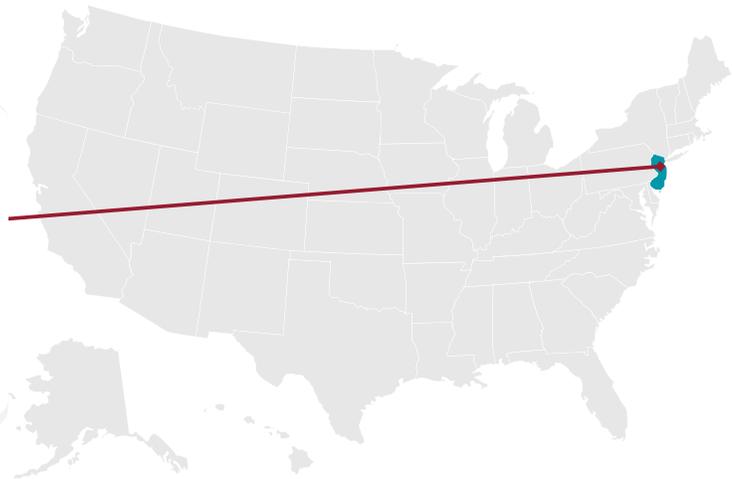
Procedural disaster? Delaware physician was assessed Ohio income tax for 2006 – a year when he stated he lived and worked in Delaware. Key: He did not respond to the notice of assessment.



## Megatrends

### Compliance Disaster #1

**New Jersey.**  
Guilty plea in scam to defraud New Jersey of \$19 million in Motor Fuel Tax. Max penalty of 20 years in prison and fine.



## Megatrends

### Gas Taxes #1



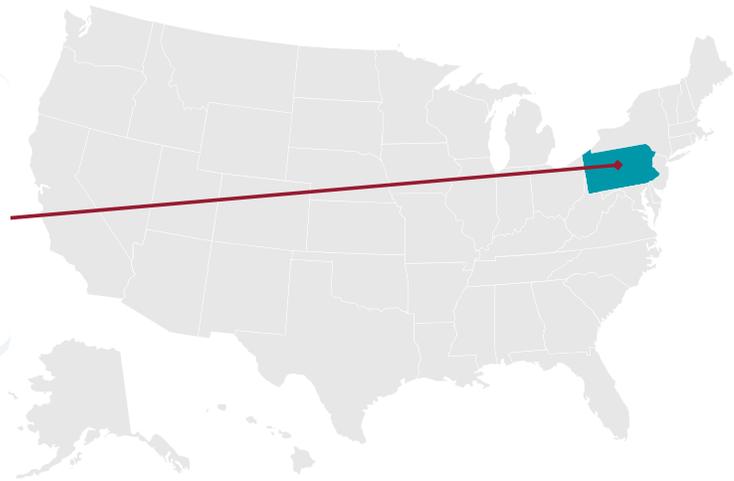
National Conference of State Legislators:  
Hybrids and electric vehicles are slashing fuel tax revenues.

**Who will pay for roads?**

## Megatrends

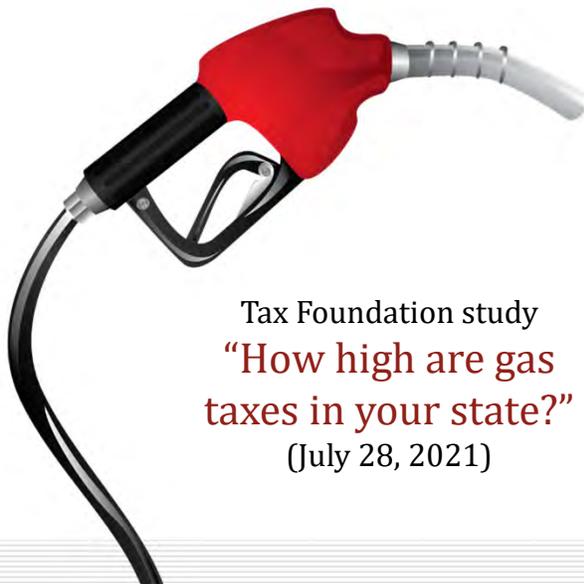
### Gas Taxes #2

**Pennsylvania.**  
Series of changes proposed to replace loss in gas tax revenues.

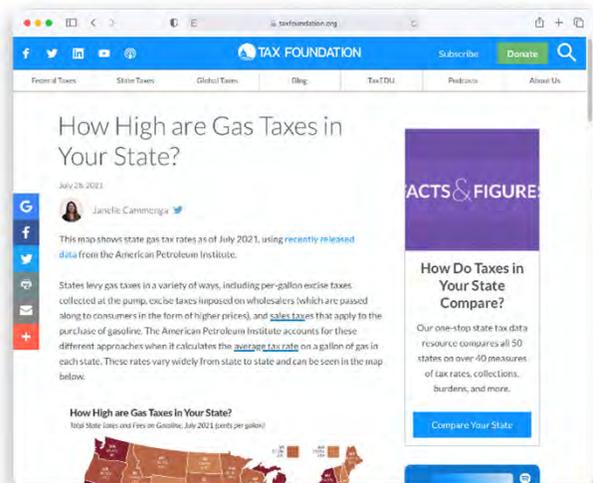


## Megatrends

### Gas Taxes #3



Tax Foundation study  
“How high are gas taxes in your state?”  
(July 28, 2021)



# Business Activities Taxes

## Business Activities Taxes

*PL. 86-272*



MULTISTATE TAX COMMISSION

Controversial 86-272 Guidance adopted August 4, 2021.

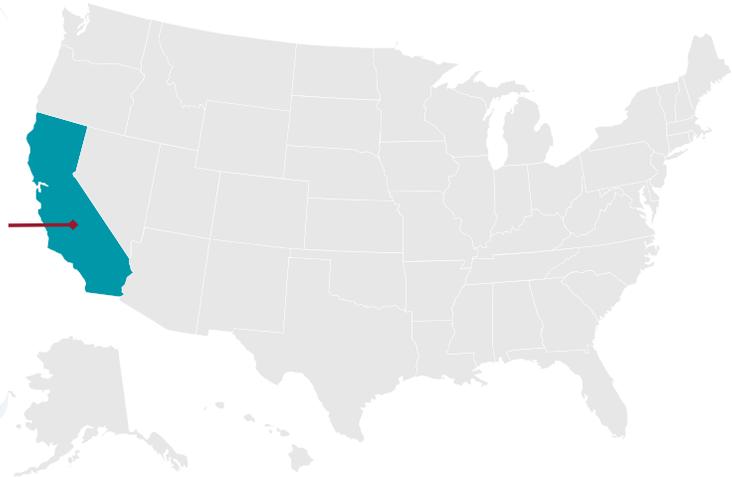
*Now What?*

## Business Activities Taxes

*Substance vs Form*

### California.

Taxpayer denied Section 1031 like-kind exchange treatment. *Matter of the Consolidated Appeal of S. Kwon*, OTA Case Nos. 18011810-13 (April 14, 2021).



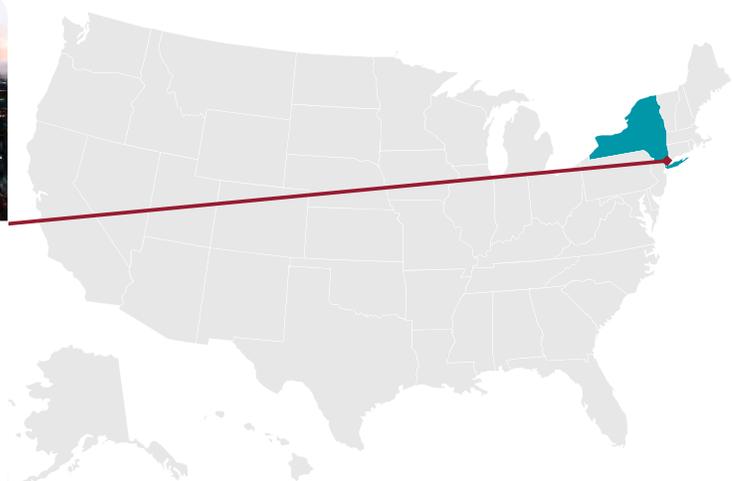
## Business Activities Taxes

*Substance vs Form*



### New York City.

Unincorporated Business Tax deductions were denied for payment to DISCs whose shareholders were partners in the payor.

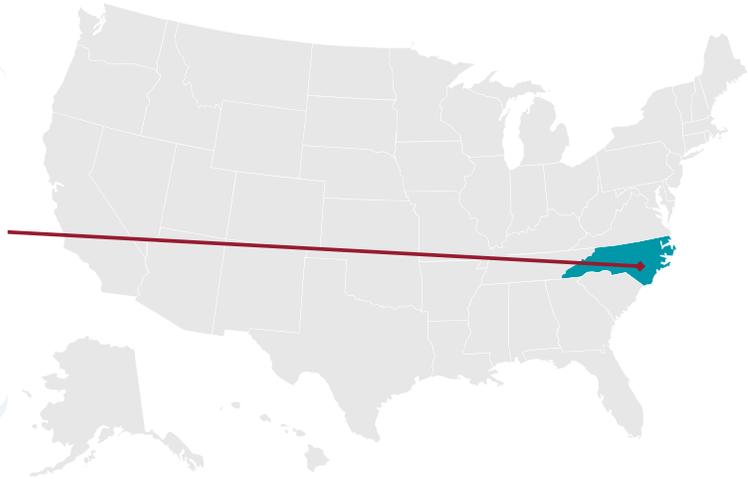


## Business Activities Taxes

### *Sourcing of Receipts*

#### **North Carolina.**

Asset management fees are sourced to where the business customer principally manages the contract [or, for individuals, to the state of the primary residence or billing address].



## Business Activities Taxes

### *Refund Action Adequate Remedy*

**Los Angeles** business tax, Disputed classification and tax rate should be challenged in a refund action.



## Business Activities Taxes

*Reverse Preemption*



**VS.**



US Department of Justice and Delaware  
Department of Insurance battle over access  
to information relating to tax shelters.  
*Actively being briefed.*

**DECEMBER**

**15**

**Save the Date:**

**“State and Local Taxation:  
Headline News and Trends”**  
December 15, 2021.

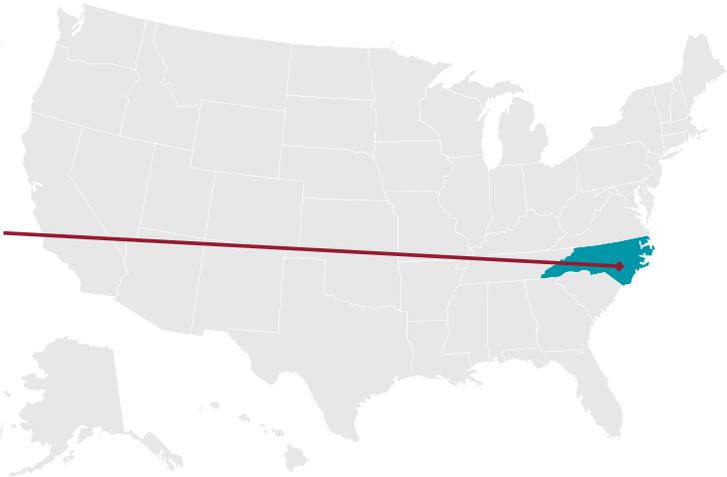
## Business Activities Taxes

*Repeal of CIT?*



### **North Carolina.**

Phased repeal of corporate income tax passes state senate.

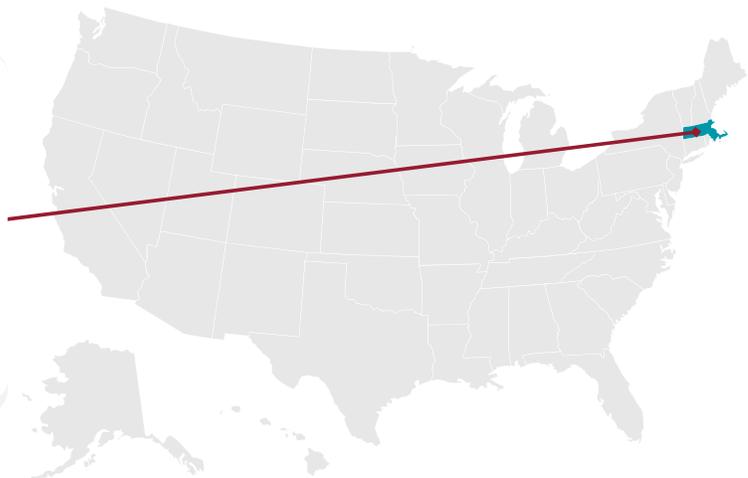


## Business Activities Taxes

*Pass-Through Complications*

### **Massachusetts.**

May the state tax a nonresident S corporation on its gains from the sale of an LLC that held property in the state?

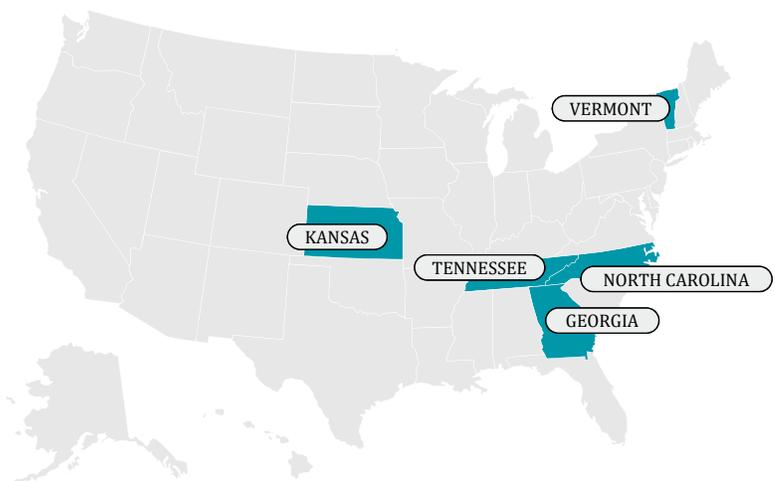


# Transaction Taxes

## Transaction Taxes

*SSTGB*

**Streamlined Sales Tax  
Governing Board:**  
Georgia, Kansas, North  
Carolina, Tennessee and  
Vermont at risk of falling out  
of compliance with SSUTA



## Transaction Taxes

SSTGB

### Annual meeting October 4-6.

*“The Governing Board will discuss ...federal legislation that may affect states’ remote seller-collection authority, continued implementation of [Wayfair], amendments to the [SSUTA] related to disclosed practices, definition of prepared food...”*

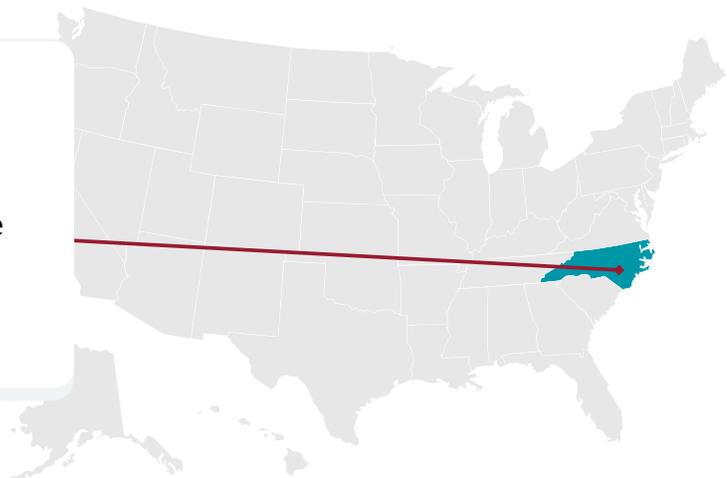


## Transaction Taxes

Transactional Nexus

### North Carolina.

Title to printed goods passed to customers at taxpayer’s out-of-state shipping dock. Therefore, the sale of the printed items lacked transactional nexus with North Carolina.

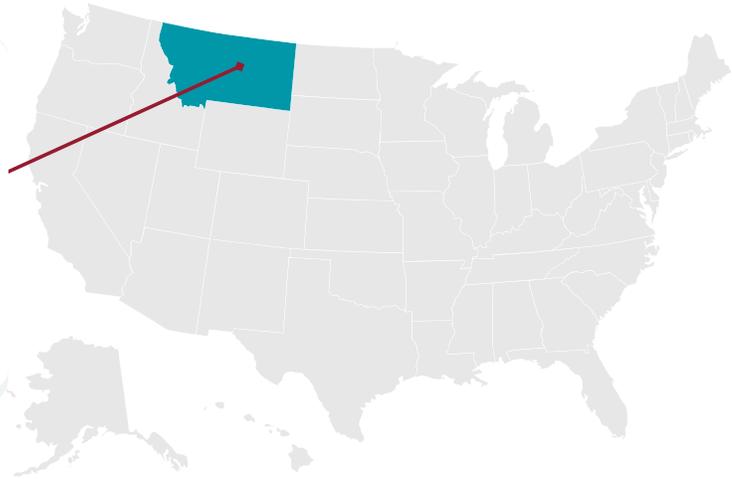


## Transaction Taxes

### *Fees and Forfeited Deposits*

#### **Montana.**

Resort service fee is not subject to Lodging Facilities but is subject to sales tax. Forfeited deposits are not subject to sales or use tax.



## Transaction Taxes

### *Fees and Forfeited Deposits*

#### **District of Columbia.**

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.

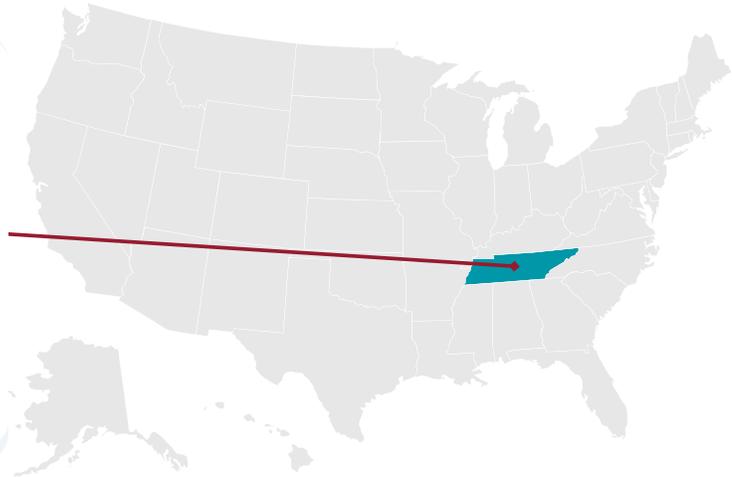


## Transaction Taxes

### *Rates*

#### **Tennessee.**

When products, digital items, or services of differing taxability or rates are sold as a unit the general tax rate must be charged. Sales originating out of state are subject to special sourcing rules.

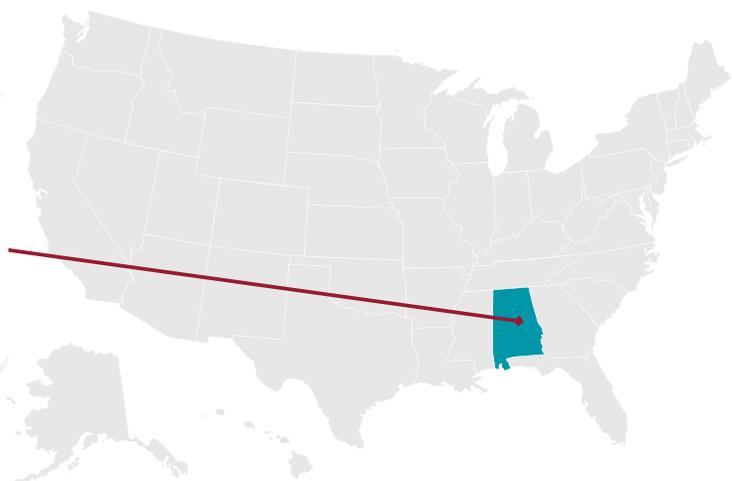


## Transaction Taxes

### *Technology Support Services*

#### **Alabama.**

No sales tax is due on foreign (alien) company's sale of technology support telephone services.



## Transaction Taxes

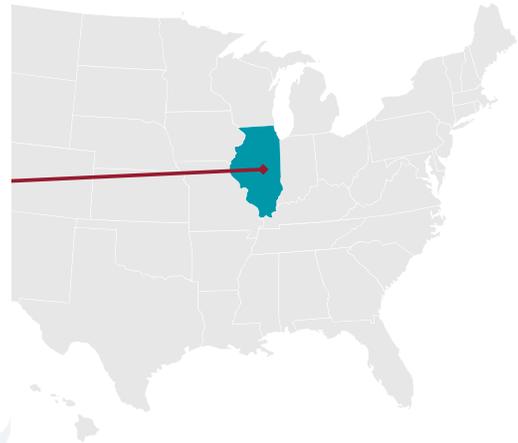
### *Wild Times In Illinois*

#### **Illinois.**

Emergency Regulations relating to “Leveling the Playing Among Retailers”

- Proposed July 13,
- Withdrawn August 18, and
- Effective in the interim.

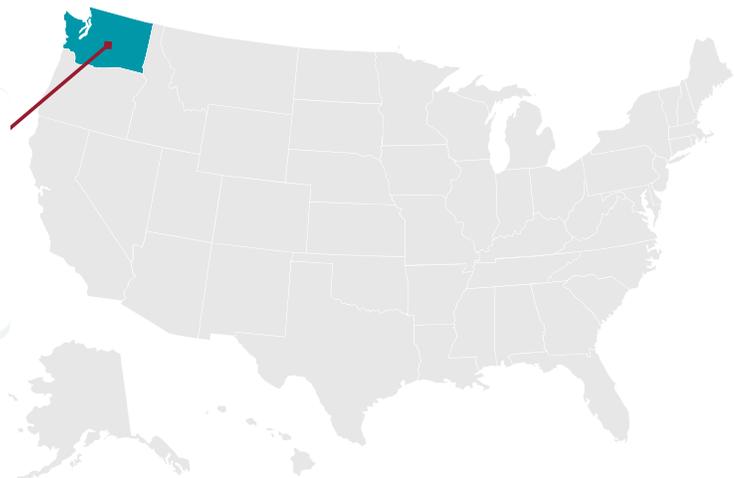
The relevant General Assembly committee (JCAR) doubted the propriety of emergency treatment (which eliminates public comment) and raised other objections.



## Transaction Taxes

### *International Service Activities*

**Washington State.**  
Posted an “International Service Activities B&O Tax Credit Q&A” (undated)



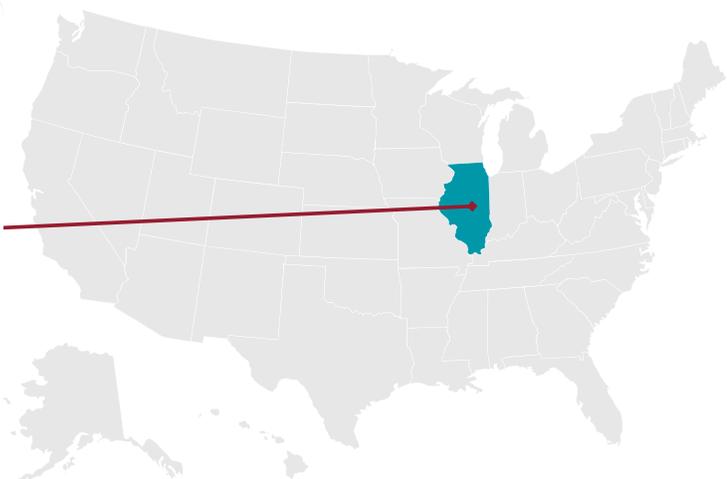
# Miscellaneous

## Miscellaneous

### *Unclaimed Property*

#### **Illinois.**

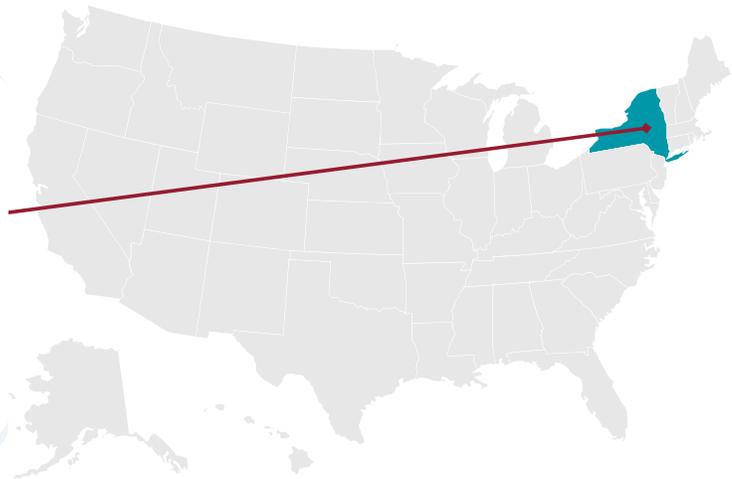
New law includes “cryptocurrency” within definition of escheatable ‘virtual currency’ -- escheatable “5 years after the last indication of interest in the property”



## Miscellaneous

### Personal Income Tax

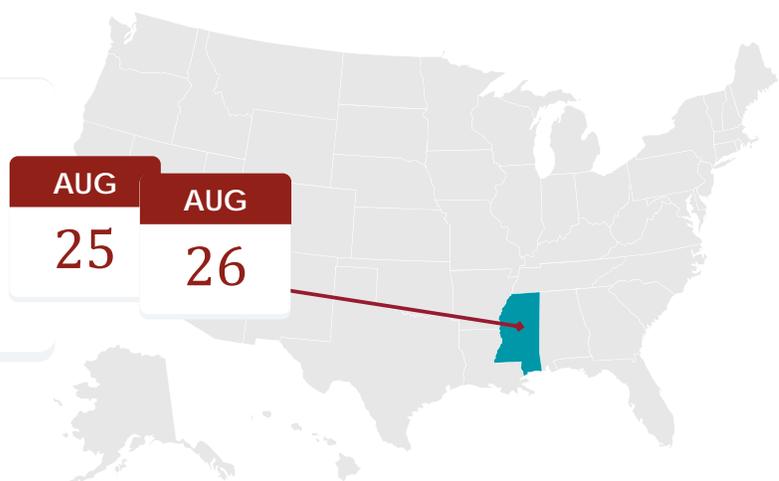
**New York State** is looking for taxpayers who have not changed their domicile (or who do not satisfy the convenience of the employer test?). *Inquiry letters sent by NYS DTF.*



## Miscellaneous

### Eliminating Income Taxes

**Mississippi** Senate Finance Committee held hearings on August 25 and 26 regarding elimination of the state's individual income tax.

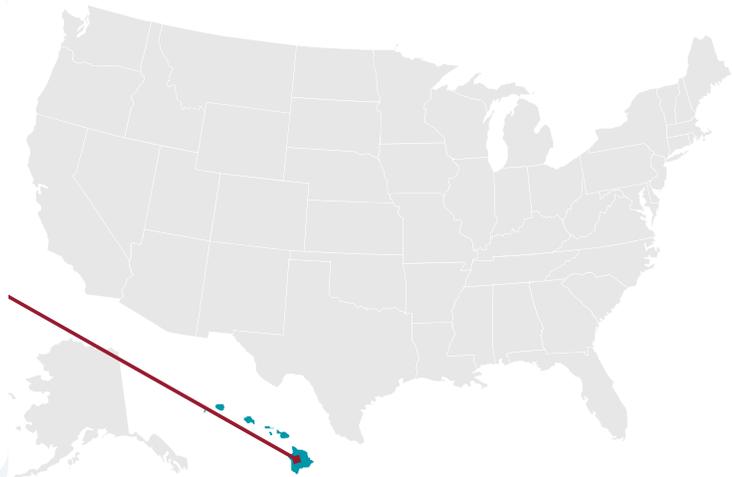


## Miscellaneous

### Nonresident/Income Sourcing

#### Hawaii.

Nonresident treated as being in the state for a temporary or transitory purpose during C19 despite being in the state for more than 200 days. However, because the state does not use a convenience of the employer test, income earned for services performed in Hawaii is subject to Hawaii income tax.



## Miscellaneous

### C19 Waivers

**New Jersey, Pennsylvania, South Carolina, Massachusetts.** C19 nexus waivers ending. Taxes, circumstances, and dates vary by state. But see changes accommodating to remote work in **Louisiana.**



## Miscellaneous

### *Convenience of the Employer Test*

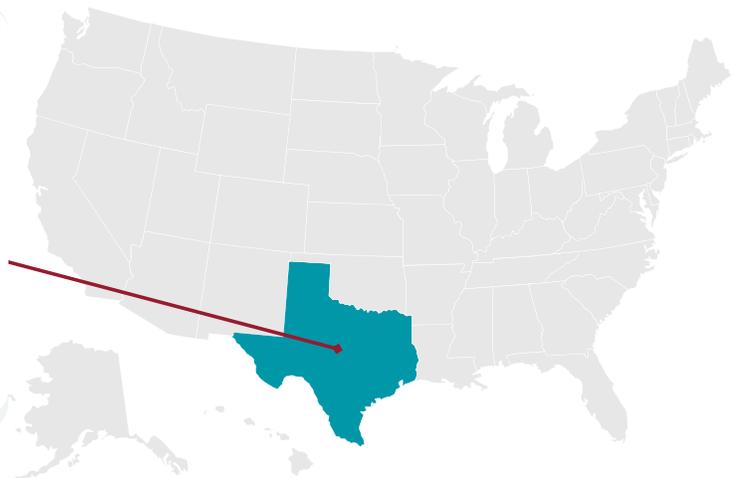
Cleveland's taxation of Pennsylvania resident's income alleged to be federally unconstitutional.



## Miscellaneous

### *Strategic Lawsuit Against Public Participation*

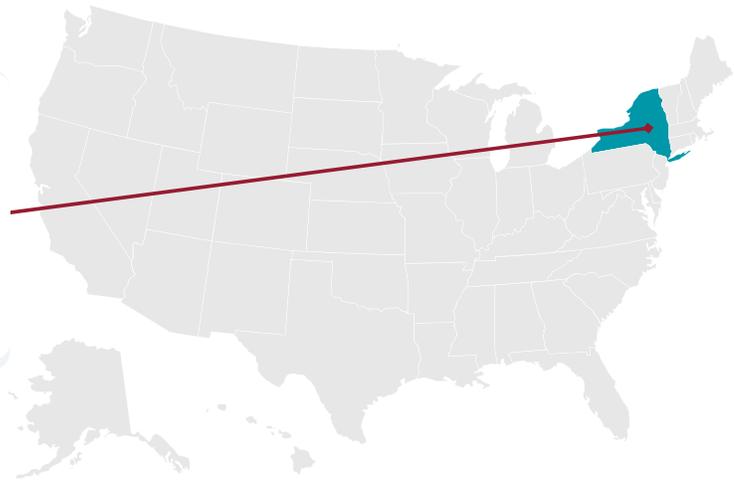
**Texas.**  
Battle over value of mineral interests and the state's version of SLAPP lawsuit protection. Narrow question was whether suits based on statutory fraud claims are exempt from the SLAPP statute.



## Miscellaneous

### *Whistleblower Legislation*

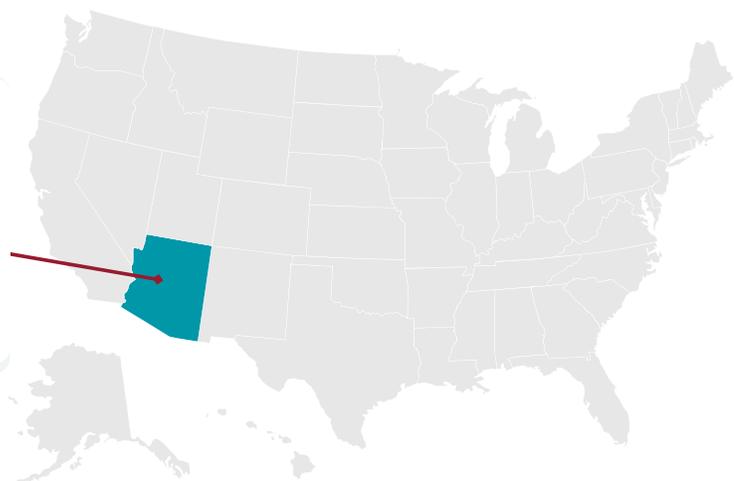
**New York State.**  
Lobbying group urges  
governor to approve of bill  
expanding tax  
whistleblower law.



## Miscellaneous

### *State Constitution*

**Arizona.**  
Ballot initiative violated  
spending limits mandated  
by the state constitution



## 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](#).

## 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 6

For background see “Personal Jurisdiction Case Should Help States, MTC Official Says” (STN July 28, 2021) which, for a prior view very much to the contrary, cites my article “After *Ford*: Personal Jurisdiction for E-Commerce Vendors” STN April 26, 2021.

### SLIDE 12

*Opal Management, Inc. v. Alabama*, Dkt No. S. 19-465-JP, Ala. Tax Tribunal (August 18, 2021).

### SLIDE 13

*Ohio v. Edward Senu-Oke*, App. Case No. 29045 (August 6, 2021).

### SLIDE 14

Press Release US Attorney’s Office District of New Jersey (August 10, 2021).

## Notes

### SLIDE 16

Penn. Transportation Revenue Options Commission Report (July 30, 2021).

### SLIDE 21

*Matter of Skidmore, Ownings & Merrill, LLP*, TAT (H)17-21 (ALJ Determ. July 30, 2021).

### SLIDE 22

CPLR 2021-01 (June 7, 2021).

### SLIDE 23

*Outfront Media, LLC. V City of Los Angeles*, B304025 c/w B306624 (Ca. Ct. App. Aug. 13, 2021)

### SLIDE 24

*U.S. v. Delaware Dept of Insurance*, U.S. Dist. Ct. For Dist. Of Delaware (Case No. 1:20-cv-00829-MN-CJB).

## Notes

### SLIDE 26

H.B. 334 (passed by North Carolina Senate June 10, 2021).

### SLIDE 27

*VAS Holdings & Investments LLC v. Commissioner*, No. SJC-13139 (Mass. Supreme Court).

### SLIDE 29

Public Comment Period 2021 Streamlined States Annual Compliance Review – 1st Group of States (Aug. 13, 2021); Public Comment Period 2021 Streamlined States Annual Compliance Review - 2nd Group of States (Aug. 20, 2021).

### SLIDE 31

*Quad Graphics, Inc. v. North Carolina Department of Revenue*, 2021 NCBC 37 (June 23, 2021), (appealed to N.C. S. Ct. July 22, 2021).

## Notes

### SLIDE 32

*Boyne USA, Inc. v. Department of Revenue of the State of Montana*,  
2021 MT 155 (June 29, 2021).

### SLIDE 33

D.C. Register Vol. 68 – No. 20 (May 14, 2021).

### SLIDE 34

Tennessee Department of Revenue Letter Ruling 21-04 (April 28, 2021).

### SLIDE 35

Alabama Department of Revenue Ruling 2021-001 (February 23, 2021).

### SLIDE 39

P.A. 102-0288. See 765 ILCS 1026/15-102(32) and 765 ILCS 1026/15-201(6.5).

## Notes

### SLIDE 42

Hawaii Department of Revenue Letter Ruling No. 2021-01 (July 26, 2021).

### SLIDE 43

E.g., Announcement of New Jersey Division of Taxation (August 3, 2021).  
Louisiana Senate Bill 31 (Act 387).

### SLIDE 44

*Morsy v. Dumas*, CV 21 946057 (Cuyahoga County Court of Common Pleas)

### SLIDE 45

*Kinder Morgan SACROC L.P., et al. v. Scurry County, et al.*, No. 11-20-00009-CV  
(Court of Appeals of Texas, August 19, 2021).

## Notes

### SLIDE 46

Taxpayers Against Fraud letter to Governor Hochul (August 25, 2021) (re: S. 4730/A.2543)

### SLIDE 47

*Fann v. Arizona*, No CV-21-0058-T /AP (AZ S. Ct August 25, 2021)