# State and Local Tax Technology Checklist

Guidance from the fourth quarter of 2023

To make recent state and local tax developments related to technology more accessible to our clients, Washington National Tax–SALT has compiled a technology checklist (Techlist) that summarizes state guidance issued during the fourth quarter of 2023. Topics covered include access to web-based content, data center exemptions, taxability of software, and telecommunications services. Highlights include:

**Florida:** In a Technical Assistance Advisement, the Florida Department of Revenue determined that a customized digital video messaging service was subject to the Communications Service Tax (CST). The taxpayer's service offered customers the ability to customize and transmit messages pre-recorded by entertainers, musicians, athletes, or other social media personalities. In the Department's view, the services involved the "transmission of video, audio, or other programming services to a purchaser," which are included in the definition of taxable video services.

**Missouri:** The Missouri Supreme Court ruled that a retailer's subsidiary was exempt from use tax for its purchase and use of IT equipment which was intended to be resold to other subsidiaries. The Missouri Department of Revenue argued that the subsidiary's actions of installing, testing, and repackaging the equipment indicated it was not solely for resale. The court disagreed, holding that the subsidiary's exchange of ownership of the equipment within its regular business qualified as a "sale" and "resale" for purposes of the tax exemption.

**New Mexico:** The New Mexico Taxation and Revenue Department finalized amendments to regulations regarding the application of Gross Receipts Tax to digital advertising services. The amendments provide definitions and specify that the "receipts of a provider of a digital platform that displays digital advertising services, whose digital platform may be accessed or viewed within New Mexico, from the sale of advertising services to advertisers within and without New Mexico are subject to the gross receipts tax."

**Utah:** A Utah State Tax Commission judge ruled that a taxpayer must pay sales tax on subscription fees for streaming services. Although streaming services are not taxable in Utah, the bundling of the streaming services with an offline download feature made the entire service taxable as a bundled transaction.

We will continue to publish the Techlist on a quarterly basis to help keep clients apprised of important developments. If you have any questions about the Techlist, please contact Audra Mitchell or Reid Okimoto.

| State | Category | Development | Authority |
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| Florida | Access to Web-Based Content, Services or Software | In a Technical Assistance Advisement, the Florida Department of Revenue determined that a customized digital video messaging service was subject to the Communications Service Tax (CST). The taxpayer offered customers the ability to customize messages pre-recorded by entertainers, musicians, athletes, or other social media personalities. The messages were viewed, downloaded, or streamed through the taxpayer's website or mobile application using the customer's internet access; the messages were not transmitted to the public or other customers. The taxpayer posited that it was providing a personal or information service, not a taxable video service, because the messages were customized, and customers were not paying for access to digital content. The taxpayer also asserted that, if it was required to collect CST, the measure of tax should only be the amount the taxpayer retained, not the portion of the cost paid to the talent. The Department disagreed, concluding that the taxpayer's charges were subject to CST on the total amount of the sales price collected from the customer. In the Department's view, the services involved the "transmission of video, audio, or other programming services to a purchaser," which are included in the definition of taxable video services. Consistent with other rulings, the Department noted that, if a service was a taxable video service, it could not also be an information service. | TAA 23A19-001 |
| Florida | Access to Web-Based Content, Services or Software | In a Technical Assistance Advisement, the Florida Department of Revenue determined that a bar exam preparation service was subject to the Communications Service Tax (CST). The taxpayer provided bar exam preparation services that were delivered through the taxpayer's web-based learning platform. In addition to outlines and practice bar exams and essays, bar exam students had access to pre-recorded lectures that could be viewed on-demand from the taxpayer's website or app. One issue presented in the TAA was whether the provision of on-demand video lectures subjected the entire price of tuition to CST. In the Department's view, the taxpayer was providing digital video services because its online courses "included the transmission of video programming services to a purchaser and the purchaser's interaction, if any, required for the selection or use of a programming service." The Department concluded that when the taxpayer received consideration from students to access its online courses, which included video services subject to CST, the taxpayer was engaged in the sale of communications services. As such, CST should be charged on sales to customers with a Florida service address. | TAA 23A-009 |
| New Mexico | Access to Web-Based Content, Services or Software | The New Mexico Taxation and Revenue Department finalized amendments to regulations regarding the application of Gross Receipts Tax to digital advertising services. The amendments provide definitions and specify that the "receipts of a provider of a digital platform that displays digital advertising services, whose digital platform may be accessed or viewed within New Mexico, from the sale of advertising services to advertisers within and without New Mexico are subject to the gross receipts tax." The amendments also provide an example illustrating that a digital advertising service provider's reporting location is based on the service provider's location from which the product of the digital advertising service was transmitted to the purchaser. | Press Release – Digital Advertising Services |

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| Utah | Access to Web-Based Content, Services or Software | An Administrative Law Judge for the Utah State Tax Commission concluded that a taxpayer owed sales tax on monthly subscription fees charged to customers for access to streaming services. During the audit period, the taxpayer's platform included both online streaming as well as the ability to download programming for viewing offline. Although streaming services are not taxable in Utah, the Commission concluded that the taxpayer was selling a bundled transaction that consisted of the streaming services and the offline download feature, which is taxable as a "product transferred electronically." Because one product in the bundle was subject to sales tax, the entire bundled transaction was subject to sales tax. | Commission Decision 22-1274 |
| Washington | Access to Web-Based Content, Services or Software | The Washington State Department of Revenue notified digital entertainment providers that they must collect and remit retail sales tax and pay business and occupation (B&O) tax under the retailing classification for their sales of digital entertainment subscription fees. A provider is subject to tax if they have both a physical presence in Washington and subscribers located in the state. In an example provided, Company A, although located outside of Washington, has a physical presence in the state and offers an online subscription for digital entertainment to Washington customers. The Department explains that Company A's subscription sales represent the sale of digital goods – specifically, digital audiovisual works. Therefore, Company A must collect and remit retail sales tax and pay retailing B&O tax on its subscription income received from Washington customers. | Digital Entertainment \| Washington Department of Revenue |
| Georgia | Data Center Exemption | The Georgia Department of Revenue recently amended its regulation concerning the sales and use tax exemption for high-technology data center equipment. Notably, the Department added a definition for the term "data center owner," revised existing definitions for clarity, provided more details on the contract requirements for high-technology data center customers, clarified the scope of the exemption, specified the minimum investment threshold, outlined the procedures for revoking a data center owner's certificate of exemption, detailed the annual reporting requirements, and added a previously omitted section on qualifying aggregate expenditures. | Rule 560-12-2-.117. High-Technology Data Center Equipment |
| Michigan | Data Center Exemption | The Michigan Department of Treasury reminded all data center operators who claimed a sales or use tax exemption for the sale or purchase of data center equipment to submit Form 5726 by January 31st. Public Acts 29 and 30 of 2020 establish reporting obligations for data center operators claiming these exemptions. Accordingly, data center operators must annually report the sale or purchase price of equipment sold to or purchased by them each calendar year in which the operators claimed the exemptions. Note, the purpose of submitting Form 5726 is to fulfill the data center operator's reporting requirements and is not a means for claiming an exemption. The form is not required if data center equipment was not sold or purchased, or the operator did not claim an exemption in a particular year. | Michigan Department of Treasury Update |

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| Texas | Data Center Exemption | The Texas Comptroller of Public Accounts determined in a private letter ruling that jobs located at an existing data center but assigned to an under-construction data center in Texas are qualifying jobs for purposes of satisfying the data center sales and use tax exemption requirements. The taxpayer at issue was constructing a new data center in Texas while owning an existing data center in the same county. The taxpayer proposed to hire new employees and code them to the new data center while having them physically work at the existing data center. The question was whether these jobs would qualify as new jobs under Texas law.<br><br>The Comptroller stated that these jobs would qualify if the new employees were hired on or after the new data center's certification date and are located in the county where the project is located. Because the law does not prohibit jobs from being physically located at a different location in the county while the data center is under construction, the jobs coded to the new data center but physically located at the existing data center are qualifying jobs for purposes of the new data center sales tax exemption. | Private Letter Ruling No. PLR2023022 7091823 |
| Washington | Digital Equivalent | The Washington State Department of Revenue issued a special notice reminding taxpayers that beginning January 1, 2024, businesses primarily engaged in printing or publishing newspapers or eligible digital content are exempt from business and occupation (B&O) tax. "Eligible digital content" means a publication that is published at least once per month, features written content that identifies the author or the original source of the material, and is made available to readers exclusively in an electronic format. The exemption must be reduced by an amount equal to the value of any "expenditure" made by the business during the reporting period. An "expenditure" is defined by regulation to include payments made for the purpose of assisting public officials or candidates, or assisting in furthering or opposing any election campaign. Businesses are not required to report income that qualifies for the exemption, but they must electronically file an Annual Tax Performance Report by May 31 of each year following a calendar year when they claim an exemption. If businesses fail to file the required annual report, the Department will disallow 35 percent of the preference claimed for the first time and 50 percent for any additional years. | Newspaper Publishers B&O Tax Exemption Special Notice |
| Iowa | Other | Effective January 1, 2024, Iowa's sales and use tax exemption for purchasing computers and computer peripherals used in processing or storing data or information by an insurance company, financial institution, or commercial enterprise will be eliminated per legislation enacted in June 2022 (S.F. 2367). | Section 41 of 2022 Iowa Acts, Senate File 2367 |
| Washington | Other | The Washington State Department of Revenue recently issued guidance on the taxability of termination fees that consumers are required to pay when they decide to end a contract or agreement prior to the agreed-upon date. The Department confirmed that the amount a vendor bills a customer for the early termination of a contract is generally taxable under the same B&O tax classification used for reporting the payments made under the contract. For sales tax purposes, if the original contract was considered a retail sale, then the termination fees are subject to retail sales tax. The Department provided several examples, including an example involving a cell phone service plan, and an example involving an agreement for cloud-based digital storage. | Termination fees \| Washington Department of Revenue |

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| Missouri | Taxability of Software | The Supreme Court of Missouri upheld an Administrative Hearing Commission's decision that a retailer's subsidiary was exempt from use tax on its purchase and use of information technology equipment. The taxpayer purchased the IT equipment to ultimately resell it to other subsidiaries of its parent company, claimed a resale exemption, and did not pay Missouri use tax on the IT equipment. However, during audit, the Missouri Department of Revenue assessed use tax, interest, and additional fees against the taxpayer. The Department argued that the taxpayer's actions of installing, testing, and repackaging the IT equipment for delivery, prior to reselling to other subsidiaries, indicated that it did not hold the IT equipment *solely* for resale. The Court disagreed with this argument, stating that the undisputed facts showed the taxpayer exchanged ownership of the IT equipment in exchange for consideration in its regular course of business, which qualified as a "sale" and "resale" for the resale tax exemption. | Case Number SC99998 |
| Tennessee | Taxability of Software | The Tennessee Department of Revenue determined in a letter ruling that costs incurred for providing custom functions in the taxpayer's software were subject to sales and use tax, while costs for non-customizing functions and other elements of the software implementation process were not. The taxpayer engaged a project team to transition its enterprise resource planning (ERP) system to a new cloud-based ERP and customer relationship management system. The Department explained that computer software, including custom software and the customized modification or enhancement of computer software, is subject to sales and use tax. Configuration services, which involve using the existing functionality within the software to meet the requirements set by the user, are not subject to tax. In contrast to configuration, customization involves developing and testing new software code to provide functionality that is not otherwise available, and is subject to sales and use tax. Here, the Department found that provisions within the taxpayer's implementation contract were separate and divisible according to the intention of the parties, and were therefore analyzed separately for taxability. Subsequently, the Department determined that the costs incurred for providing custom functions in the taxpayer's new system were subject to sales and use tax. | Letter Ruling 23-10 |
| Missouri | Telecommunications Services | The Missouri Department of Revenue determined in a letter ruling that the taxpayer's purchases of gravel-faced reinforced concrete huts (GFRC huts) and HVAC units were not exempt from Missouri's sales and use tax. The taxpayer, a telecommunications provider, uses GFRC huts to house equipment that receives and regenerates telecommunications signals. This equipment within the GFRC huts requires a specific temperature and humidity range in order to operate, and the taxpayer maintains these conditions using HVAC units that are attached to the GFRC huts. Missouri's integrated plant doctrine is used to determine whether machinery, equipment, or parts are used directly in manufacturing, and the test considers whether disputed machinery and equipment operate harmoniously with admittedly exempt machinery to form an integrated and synchronized system. Here, the Department determined that while the GFRC huts and HVAC units were necessary for the taxpayer's operations, the huts and units were not directly involved in producing and transmitting telecommunications services, but rather provided necessary environmental conditions. Consequently, the Department determined the taxpayer's purchases of both the huts and units to be subject to Missouri sales and use tax. | Letter Rulings – LR 8270 |

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| North Carolina | Telecommunications Services | The North Carolina Department of Revenue determined that a taxpayer's services were telecommunications services subject to sales and use tax. The taxpayer provided wireless data communication services via a hosted software platform. The services included sending text messages and voice broadcasts through SMS, MMS, and IVR technologies. The taxpayer requested confirmation whether such services could be classified as a nontaxable information service.<br><br>The Department concluded that the taxpayer's services met the definition of a telecommunications service because the services involved the electronic transmission, conveyance, or routing of messages using a computer processing application. The taxpayer's services did not meet the definition of an information service, as the primary purpose was not to obtain processed data or information but to transmit messages. Therefore, the taxpayer's gross receipts, including fixed fee or per message fee charges, were subject to sales and use tax when sourced to North Carolina. | Private Letter Ruling No. SUPLR 2023-0001 |
| Ohio | Telecommunications Services | The 2023-2024 Ohio budget introduces a new Next Generation (NG) 911 system, replacing the current 25 cent monthly wireless 9-1-1 charge with a 40-cent monthly NG 911 access fee from January 2, 2024 to September 30, 2025, then reverting to 25 cents. The NG 911 access fee applies to each communication service capable of making a 911 call, including wireless, multiline telephone systems, and VoIP devices. For wireless and VoIP services, each number or voice channel incurs a separate fee, up to a maximum of 100 channels. For multiline systems, each line incurs a separate fee, up to 100 lines per building. If a service shares a number, the fee won't exceed 40 cents per month per line. The fee will be listed as a separate line item on each subscriber's monthly bill or point of sale invoice, and the fee is not collected if a customer's monthly bill is under five dollars. | NG2023 Replacement of the Wireless 9-1-1 Fee |