State and Local Tax Technology Checklist

Guidance from the third 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 third quarter of 2023. Topics covered include data center exemptions, web-based services, web-based training, and software. Highlights include:

California: California Governor Gavin Newsom signed a budget bill that includes tax breaks for semiconductor companies. Senate Bill 131 modifies the new employment tax credit to attract semiconductor factories, responding to federal incentives aimed at strengthening the microprocessor supply chain.

Tennessee: The Tennessee Department of Revenue ruled that a technology company providing staff augmentation and payment processing services through a digital platform was not subject to sales and use tax. The Department explained that staff augmentation and payment processing services are not taxable services, and the use of the app to access the platform was merely incidental to the non-taxable services.

Texas: The Texas Comptroller released updated guidance on the taxability of electronic games and associated content. Electronic games, subscriptions, and membership fees for electronic games and game communities are taxable as amusement services. Purchases of associated content for electronic games, such as virtual goods, additional game content, gameplay enhancements, and aesthetic enhancements, are also taxable as amusement services.

Virginia: The Virginia Tax Commissioner ruled that a taxpayer was eligible for a data center exemption for sales and use tax purposes. Initially, the taxpayer's refund request was partially denied by the Department of Revenue because the taxpayer's equipment was delivered to a storage facility instead of directly to the data center. Based on a previous ruling, the Commissioner found that the data center exemption applied to the taxpayer's equipment regardless of the delivery location.

Vermont: The Vermont Department of Taxes updated its sales tax guidance for prewritten software accessed remotely. Specifically, charges for software as a service (SaaS), infrastructure as a service (IaaS), and platform as a service (PaaS) are not taxable for Vermont sales tax purposes.

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.

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State	Category	Development	Authority
Illinois	Access to Web-Based Content, Services or Software	The Illinois Legislature enacted House Bill 3808, which excludes streaming services from certain local taxes. The bill, which takes effect on January 1, 2024, effectively limits the ability of a locality to impose fees on streaming services provided by a business authorized to offer cable or video services in Illinois. Illinois permits localities to impose a service provider fee on a business offering cable service or video services within the locality. House Bill 3808 narrowed the definition of video services to specifically exclude "direct-to-home satellite services" and "Internet streaming content." House Bill 3808 also specifically excludes from gross revenue "any revenue received from video programming accessed via a service that enables users to access content, information, electronic mail, or other services offered over the Internet, including Internet streaming content."	Illinois H.B. 3808
Massachusetts	Access to Web-Based Content, Services or Software	The Massachusetts Department of Revenue issued guidance on the proper tax treatment of software developers. In TIR 23-8, the Department concluded that the determination as to whether a corporation is selling services or standardized software will depend on the facts and circumstances of each case. A corporation that develops and sells access to software is engaged in the manufacture and sale of tangible personal property if the software allows customers to input their information, manipulate the software, and run reports without interaction with the software provider or its employees. Such corporations will be treated as manufacturing corporations for purposes of property and sales tax benefits and are required to use single sales factor apportionment for corporate excise tax purposes. This guidance was released in response to the state's Appellate Tax Board decision in 2021 in *Akamai Technologies*.	Massachusetts TIR 23-8
Missouri	Access to Web-Based Content, Services or Software	In a letter ruling, the Missouri Department of Revenue determined that the taxpayer's software as a service (SaaS) agreement did not result in the sale of taxable tangible personal property. The limited facts presented in the letter ruling simply stated that the applicant represented that it was an out-of-state SaaS provider. The Department explained that under current law, sales and use tax is imposed on taxpayers engaged in the business of selling tangible personal property or rendering retail taxable services. However, the sale of SaaS is not a sale of tangible personal property and therefore not subject to state sales tax.	Missouri Letter Ruling 8250
Tennessee	Access to Web-Based Content, Services or Software	The Tennessee Department of Revenue provided guidance on the taxability of staff augmentation services and payment processing services provided through a digital platform. The taxpayer used its proprietary digital platform to match customers with workers and charged customers a fee based on a percentage of what workers were paid, as well as cancellation or hiring fees. The Department ruled that the taxpayer's fees were not subject to Tennessee sales and use tax because staff augmentation and payment processing services are not taxable services. The use of the app to access the platform may have been subject to sales and use tax, but the app was merely incidental to the non-taxable services. The true object of the transaction was the provision of non-taxable services. The Department explained that the taxpayer's platform was analogous to a labor hall, hiring hall, or employment agency, whose service sales were generally not subject to sales and use tax.	Tennessee Letter Ruling 23-05

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Virginia	Data Center Exemption	The Virginia Tax Commissioner determined that a taxpayer was eligible for a data center exemption for sales and use tax purposes. The taxpayer purchased equipment to establish a data center in Virginia in 2014 and contended that sales tax paid to vendors on the purchase of the equipment qualified for the data center exemption. The taxpayer filed a refund request with the Department but was partially denied because the equipment was delivered to a storage facility in Virginia rather than directly to the taxpayer's data center. However, the data center exemption applies to equipment used in a qualifying data center, regardless of whether it is delivered to a storage facility first. The Department had previously ruled that batteries delivered to a storage facility for later use in a data center could be purchased exempt from sales and use tax because prohibiting data centers from purchasing items intended for future use could diminish the incentive provided by the exemption. The Tax Commissioner concluded that the taxpayer's equipment qualified for the exemption, and that the Department would review the taxpayer's refund claim.	Virginia Letter Ruling 23-67
Maryland	Digital Equivalent	The Maryland Supreme Court explained its rationale for overturning a circuit court ruling that the state's digital advertising tax was unconstitutional in the case *Comptroller v. Comcast*. The Court stated that companies challenging the digital advertising tax must first exhaust administrative remedies before challenging the tax in court. Absent the exhaustion of administrative remedies, the circuit court lacked jurisdiction over the matter.	*Comptroller v. Comcast*
Texas	Digital Equivalent	The Texas Comptroller released updated guidance on the taxability of electronic games and associated content. In Texas, taxable amusement services are defined to include the provision of amusement, entertainment, or recreation. Amusement services also include membership in a private club or organization that provides entertainment, recreation, sports, dining, or social facilities. The updated private letter ruling explains that purchasing electronic games, subscriptions, and membership fees for electronic games and game communities are taxable as amusement services. Electronic games may be operated on or through a personal computer, game console, mobile telephone, or other device by which gameplay is accomplished through a connection to the Internet. Electronic games do not include video games received entirely on physical media, free-to-play video games, or Internet access services. Purchases of associated content for electronic games, such as virtual goods for use within a game, additional game content, gameplay enhancements, and aesthetic enhancements within a game, are also taxable as amusement services. The guidance further notes that purchases of electronic games and associated content through the use of redeemable physical cards are taxable as amusement services. Finally, the previous version of the guidance did not directly address the taxability of virtual currencies that may be used in an electronic game; the updated guidance clarifies that purchases of such virtual currencies are taxable as amusement services.	Texas Private Letter Ruling 202309029L

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Missouri	Digital Equivalent	The Missouri Department of Revenue determined in a letter ruling that digital music and digital signature subscription services are not taxable under the state's sales and use tax. Missouri law specifically excludes amounts paid for access to interactive computer services from the sales tax imposed upon telecommunication services. In addition, the interactive digital subscriptions at issue were also deemed to be excluded from the sales tax imposed on telecommunications services.	Missouri Letter Ruling 8248
California	Other	The governor of California approved a budget bill that includes tax breaks for semiconductor companies. For taxable years beginning on or after January 1, 2023, and before January 1, 2026, Senate Bill 131 modifies the new employment tax credit to attract semiconductor factories, responding to federal incentives aimed at strengthening the microprocessor supply chain. The changes remove geographic hiring restrictions and apply to other industries like lithium mining and electric aviation. The credit is worth 35 percent of qualifying new employee wages. The budget also allocates $120 million to the California Competes grant program to encourage semiconductor companies to invest in the state.	California S.B. 131
Indiana	Other	The Indiana Department of Revenue published Tax Bulletin 14 which outlines the tax implications of retail sales and purchases made by advertising agencies. The bulletin covers a range of topics, and notes that photography, videography, and related services are generally not considered retail transactions subject to sales tax as long as the charges for tangible personal property do not exceed 10% of the total service. Further, the bulletin clarifies that Indiana sales tax is imposed on electronically transferred products only if they meet the definition of specified digital products – such as digital audio works and digital audiovisual works – or prewritten computer software.	Indiana Bulletin #14
Missouri	Other	Missouri enacted Senate Bill 25 which allows companies to subtract federal grant money received to provide broadband internet to areas previously without it when calculating a taxpayer's Missouri adjusted gross income (AGI), to the extent the grant money was included in the taxpayer's federal AGI.	Missouri S.B. 25

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Michigan	Taxability of Software	The Michigan Department of Treasury issued updated guidance on the taxability of software and digital goods. Revenue Administrative Bulletin 2023-10 replaces RAB 1999-5 and is retroactive to all tax periods open under the statute of limitations. Generally, prewritten computer software is subject to Michigan sales or use tax as a sale or use of tangible personal property. Although some products can be easily identified as "prewritten computer software," other types of products (particularly those characterized as cloud computing) may require a fact-intensive review of the product and its delivery method to determine whether it qualifies. Notably, the Department will examine whether there is some delivery of the software in Michigan and, if so, will apply the incidental-to-services test to determine whether the transaction is taxable. If the transfer of software is incidental to nontaxable services provided, the transaction is nontaxable. RAB 2023-10 also addresses the taxation of digital goods, including NFTs and micro-transactions. To the extent that an item or product constitutes a "digital good" that does not fall within the definition of "prewritten computer software," it is not subject to sales tax or use tax regardless of whether it is downloaded, streamed, or accessed through a subscription service. Products that appear to be "digital goods" but actually constitute taxable "prewritten computer software" will be taxable. Micro-transactions, commonly referred to as in-app or in-game purchases, are charges for prewritten computer software if the underlying application or game constitutes prewritten computer software.	Revenue Administrative Bulletin 2023-10
Mississippi	Taxability of Software	In a notice, the Mississippi Department of Revenue announced that effective July 1, 2023, customers charged for computer software and/or computer software services that include both taxable and nontaxable items may reasonably allocate the payment to each separately identifiable item or service if properly supported by the books and records of the seller, service provider, user, or consumer. In addition, purchasers of computer software and/or computer software services may apply for a "computer software direct pay permit". The permit will allow the customer to remit the correct sales and use tax directly to the Department rather than paying it to the seller.	Mississippi Notice 72-23-12
Vermont	Taxability of Software	The Vermont Department of Taxes updated its sales tax guidance for prewritten software accessed remotely. For purposes of Vermont sales tax, charges for remote access to prewritten software solely through the Internet or cloud platforms are not taxable. Vermont defines "Infrastructure as a Service" (IaaS) as access to a computer infrastructure where the customer does not own the infrastructure and pays an IT contractor to operate it on the customer's behalf. Vermont defines "Platform as a Service" (PaaS) as a service that provides customers with hardware and software tools, all accessed via the internet, that customers can use to develop, run, and manage their applications and software. Vermont generally imposes sales tax on retail sales of tangible personal property, which is defined to include prewritten computer software; however, prewritten software solely accessed remotely through the internet or cloud platforms such as IaaS and PaaS do not fall within the definition of tangible personal property and therefore are not taxable.	Prewritten Software Accessed Remotely (vermont.gov)

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Rhode Island	Web-Based Training	The Rhode Island Department of Revenue determined in a ruling request that a taxpayer's online educational courses were subject to sales and use tax. The taxpayer developed online educational courses for customers stored on cloud servers and accessed via the internet without software downloads. Rhode Island sales tax is imposed on the sale of certain digital products and services, as well as on the sale of prewritten computer software delivered electronically or through vendor-hosted servers. The Department concluded that the online educational courses at issue were tangible personal property subject to sales tax, noting that infrastructure as a service (IaaS), platform as a service (PaaS), and software as a service (SaaS) are taxable if there is a charge to a customer for the use of the virtual infrastructure, platform, or for software accessible through the internet or on a vendor-hosted server.	Rhode Island Ruling Request No. 2023-02
Tennessee	Web-Based Training	In a letter ruling, the Tennessee Department of Revenue discussed the taxability of a taxpayer's online training courses. The taxpayer offered online real estate licensing courses, exam preparation, and continuing education products, allowing customers access to self-paced lectures, transcripts, and quizzes. The Department determined that the taxpayer's online licensing course, exam guide course, and proposed mortgage loan originating course were subject to sales and use tax. The Department explained that the online licensing and exam guide courses were taxable because the courses were remotely accessed computer software. In contrast, the Department explained that textbooks available in PDF form were exempt from sales and use tax because Tennessee defined textbooks as a "printed book" not primarily published and distributed to the general public. This exemption extended to specified digital goods that would be exempt if sold in tangible form. Finally, the Department analyzed the taxability of the taxpayer's proposed mortgage loan originating course, which consisted of taxable self-paced courses and nontaxable live instruction courses accessed online. The Department explained that taxable and nontaxable items sold in one non-itemized transaction are bundled transactions that render the entire transaction taxable; therefore, the taxpayer's proposed mortgage loan originating course would be subject to tax.	Tennessee Letter Ruling 23-07

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