

SALES & USE TAX ALERT

Vol. XV, No. 5, March 15, 2005

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SALES TAX SEMINAR

The Arkansas Sales and Use Tax School has slated a Beginner's Basic Course for March 24, 2005. An Advanced Course & Case Study will follow on March 25, 2005. Both classes are at the Hot Springs Convention Center in Hot Springs, Ark. Price: \$275 per course. Visit www.salesusetax.com for more information or call (501) 922-4327.

COMING SOON

- Alabama rental tax trumps amusement tax on pinball
- Wisconsin targets temp help—fallout hits IT
- Congressional legislation to smooth way for SSTP

■ NEW TECHNOLOGIES, OLD ISSUES

In wake of ITNA, trend of states targeting VOIP begins under broad telecom definitions

A spate of states publishing official positions on taxation of Voice Over Internet Protocol service has recently begun, with state tax officials deeming the new technology to be taxable as telecommunications service. Experts note that the trend started shortly after Congress passed legislation that specifically excluded the technology from the same protection from taxation afforded to Internet access. And states' broad definitions of telecommunications services play into state tax officials' hand, offering little for taxpayers to refute, some experts add.

Yet the interstate nature of VOIP service brings up age-old questions of nexus, sourcing and bundling.

Tip of the iceberg

Illinois, New Jersey, Pennsylvania and Wisconsin have published official guidance that declares VOIP service to be taxable as telecommunications service. Expect a flurry of similar pronouncements from other states to follow, experts predict.

"I think in all those instances the states have broad definitions of what constitutes telecommunications," says **David Shipley**, special counsel for **McCarter & English** in Philadelphia. "It isn't difficult to conclude that Voice Over Internet Protocol falls under each of those states' definitions of telecommunications."

Barbara Timek, senior manager with **Yetter Consulting Services** in Flanders, N.J. agrees that, in particular, the Illinois and New Jersey definitions were written broadly.

"I'm comfortable that these things fall under the umbrella," Timek says. "It's an interesting evolution. When these statutes were written, what we have was never envisioned."

Impetus

President Bush last year signed the Internet Tax Nondiscrimination Act and Sen. Con. Res. 146. The legislation effectively continued the ban on taxing Internet access through Nov. 1, 2007, which was first authorized under the Internet Tax Freedom Act, adopted in 1998.

The more recent ITNA, however, did not ban taxes on VOIP.

Once the federal government made its position on VOIP clear, individual states were then free to clarify how VOIP would be taxed within their respective jurisdictions. The transition of VOIP from a boutique application for tech gurus to a viable product for individual consumers and the growing sales of VOIP services during 2004 further prompted the states to act, notes Shipley.

Plus, states were motivated to protect tax revenue that would be lost when traditional telephone service providers lose business to the new technology, Shipley notes. While the state's posture on taxing VOIP may come as no surprise to providers of the service, who are large, sophisticated taxpayers, clarification may be welcome, Timek notes.

Emerging issues, old and new

Shipley points to three issues emerging in taxation of VOIP:

1. Out-of-state VOIP service providers do not have to collect tax.

VOIP sellers will not be liable to collect sales or use tax in states where they do not have a physical presence. The issue of nexus reappears, much like remote mail-order and Internet sellers who are not legally obligated to collect where they lack a physical presence.

"They (the state) can impose the tax, but they can't force Vonage to collect," says **Kyle Sollie**, an attorney with **Dechert LLP** in Philadelphia.

"Getting the provider to collect is their goal, but it remains to be seen whether they get their goal.

"Anyone with a computer anywhere in the world can originate one of these calls. I think there's some significant technological issues that have to be resolved before the tax can be collected."

2. Sourcing VOIP transactions will be much more difficult than in traditional telephony.

Sourcing a call is a much easier question for a local telecommunications provider because that provider knows where each call originates and terminates. States source telephone calls based variously on the origination or termination of the call or the service address. But with VOIP calls the issue becomes stickier. What if, for instance, a person makes a VOIP call from their laptop computer while traveling? The VOIP provider may not know where a call originated or terminated, for that matter.

"That's the next step for these states," Shipley says. "How do you tax Voice Over Internet Protocol given the similarities and differences to 'traditional' telecommunications services?"

3. Bundling becomes an issue for VOIP service provided by Internet access providers.

Internet access providers who also provide VOIP services will have to separately state the nontaxable charges for providing Internet access, and charges for providing VOIP in most states. Keep in mind, however, that a few states

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are grandfathered under ITNA and can tax Internet access.

Illinois

The Illinois Dept. of Revenue's *General Information Letter ST 05-0008-GIL* states that in general, VOIP is telecommunications subject to tax within the meaning of "Telecommunications" and "Gross Charges" pursuant to The Telecommunications Excise Tax, 35 ILCS 630/2; the Telecommunications Infrastructure Maintenance Fee, 35 ILCS 635/10; and the Simplified Municipal Telecommunications Tax Act, 35 ILCS 636/5-7.

Timek points to a passage in the information letter:

Further, the definition of telecommunications under the Act is very broad and encompasses Voice Over Internet Protocol communications. More specifically, the Act states that "Telecommunications," in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile communications service; specialized mobile radio: stationary two-way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities. See 35 ILCS 630(2)(c).

New Jersey

New Jersey's Feb. 23, 2005 *Notice Regarding Voice Over Internet Protocol Services: Sales Tax and Emergency Response Fee (9-1-1)* states that VOIP, whether viewed as voice transmissions by other than traditional means, or as data transmission, falls within the Sales and Use Tax Act's definition of telecommunications. N.J.S.A. 54:32B-3(f) imposes tax on receipts from every sale of interstate or intrastate telecommunications charged to an address in the state.

Telecommunications is broadly defined as the act or privilege of originating or receiving

messages or information through any kind of one-way or two-way communication per N.J.S.A. 54:32B-2(cc).

Tip: Michael Guariglia, a partner with **McCarter & English LLP** in Newark, N.J., detects a possible bright side in that New Jersey's definition of telecommunications service may exempt a broad class of equipment used for VOIP service under the exemption for machinery or equipment used in production of products or services.

Pennsylvania

The Pennsylvania Dept. of Revenue's Jan. 28, 2005 *Sales Tax Bulletin 2005-02* states that VOIP is a telecommunications service subject to state and local sales tax. "VOIP" is defined as real-time audio or data transmitted and/or received in a digital format through the use of Internet protocol data packet transmission, or any similar or successor protocol transmission. Calls may be made between users of the same VOIP service, between VOIP users, and those with landline or mobile telephone service. However, some VOIP services work only over a computer or special VOIP telephone, and others allow use of a traditional telephone with an adapter. As such, VOIP falls within the statutory definition of "telecommunications service."

STB 2005-02 further states that VOIP does not come within the enhanced telecommunications service exclusion from sales and use tax since VOIP uses computer-processing applications solely for the management, control, or operation of a telecommunications system or the management of a telecommunications service. Although VOIP uses Internet protocol that allows the transmission of packeted data across a network or across multiple networks, it does not interact with the information it transmits but merely serves to address and route the information.

Tip: Shipley notes that the state's position that VOIP does not fall under the enhanced telecommunications service exclusion may be debatable. The enhanced service exclusion includes a service that "acts on the format, content, code, protocol or similar aspects of the purchaser's transmitted information."

Part of the information transmitted using VOIP is the intended destination of the voice data, which, similar to the information contained in an e-mail, is acted upon by an Internet service provider to route that data across the Internet and then is acted upon by the VOIP provider to complete the call, he notes.

Wisconsin

Wisconsin's official position can be found in *Tax Releases* in Tax Bulletin 141, January 2005. VOIP services that originate or terminate in Wisconsin and are charged to a service address in Wisconsin are subject to sales and use tax as telecommunications services. If a provider does not know where a service originates or terminates, the provider should charge tax on the basis of the customers' place of primary use, which is the residential or business street address.

See Wis. Stats. (2003-04), §§77.51(17m) and (21m), and 77.52(2)(a)5.a as well as Wis. Adm. Code (November 2002 Register) §Tax 11.66(1)(e) and (4)(a)15.

§77.51(21m) provides in part that "telecommunications services" means:

...sending messages and information transmitted through the use of local, toll and wide-area telephone service...or any other transmission of messages or information by electronic or similar means between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities...

Editor's note: Shipley can be reached at (215) 979-3862; Timek at (973) 347-0107; Sollie at (215) 994-2681; Guariglia at (973) 639-2016. ♦

■ DROPS BROAD DEFINITION FOR LIST

SSTP tries different tack on 'digital equivalent'

The Streamlined Sales Tax Project has ditched its initial approach in drafting a definition for digital equivalents of tangible personal property. Discontinuing an attempt to come up with a broad, simple, one-size-fits-all definition, SSTP officials are instead creating a list of specific items that would be considered digital equivalents of tangible personal property sold over the Internet.

Although the Oct. 1, 2005 target date for getting the SSTP off the ground is rapidly approaching, the digital equivalent definition will likely not be ready at the time. Nonetheless, that should present no problem. A digital equivalent definition could be added as an amendment afterward, experts note.

Elusive uber-definition

"Initially, they worked on a broad, general definition of 'digital equivalent,'" says **Jerry Johnson**,

vice chairman at the **Oklahoma Tax Commission**. "The difficulty encountered was, it brought in things that weren't meant to be brought in."

For instance, a broad definition included anything that was the digital equivalent of something tangible. But this brought up the question of taxing services. If the purchase of a DVD of an action flick is taxable, then shouldn't the digital version be taxed as well? That may be clear on a digital download from a computer, but what about a pay-per-view movie purchased from a cable company?

Many toggle switches

After two years of tweaking a squirming general definition, SSTP members executed an about face, seeking in the past year to instead simply create a list of items considered digital equivalents. One advantage to this approach is that by creating a list, individual states can decide item by item whether to tax or not. This so-called multiple "toggle switch" approach would allow states to replicate their existing tax base within the framework of the SSTP, Johnson maintains.

The SSTP has previously pushed this toggle switch concept on other areas of the agreement. But with so many toggles to switch on or off, won't the simplification agreement be anything but simple—swiss cheese with more holes than cheese?

Johnson points to the project's taxability matrix and says the simplification lies in the fact that there is a one-stop reference where any state's tax scheme can be researched. As it is now, taxpayers have to consult statutes, rules, and court cases for each state to study guidance that varies widely among states. Even retailers without automated tax software could consult the SSTP matrix.

Plus, a hold-harmless clause excuses the taxpayer from any liability if a state has published incorrect information in the agreement, he adds.

Emerging technologies

Meanwhile, new technologies emerge that thwart even the creation of a simple list of items.

"We're trying to draft them in a way that they won't be obsolete in a short period of time," Johnson says.

Some in business appreciate the clarity of a list.

"I think it will work," says **Richard Prem**, director of global indirect taxes for **Amazon.com**, "We're retailers. We want you to tell us what's taxable and what's not."

"The good news is I think we have a frame work that will reach that goal," Prem says.

The categories now are based on what's actually happening, he asserts.

One problem in drafting the language, however, is separating the product from the provider, so an item is taxed the same regardless if received by cable, telephone lines, satellite or the Internet.

And another difficulty exists in an ongoing tug-of-war that occurs as business tends to resist a broader, creeping tax base, which can occur through loose definitions. Meanwhile, typically pushing back against narrow definitions, states fear leaving money on the table six months from now as technology and business models evolve, Prem adds.

Editor's note: Johnson can be reached at (405) 521-3114; Prem at (206) 266-2708. ♦

■ SPECIAL HOTEL TAX

Louisiana TIF struck down

A tax increment financing statute that provided for a special taxing district that imposed a local hotel occupancy tax in lieu of existing hotel occupancy taxes violated the Louisiana Constitution.

The statute exempted a proposed hotel from paying already existing sales taxes imposed by statutes and ordinances and granted to a private entity a special privilege to use the taxes imposed by the statute for private purposes.

The Louisiana Appellate Court, Fourth Circuit, recently in *World Trade Center Taxing District v. All Taxpayers*, Dkt. No. 2005-CA-0048, noted that a classification of certain parties would not render a law special, and therefore unconstitutional, if it was based on a substantial difference between the class created and the subjects excluded. However, there was no reasonable basis for the distinction the special law created in this instance. As such, the TIF law violated a state constitutional prohibition against the Legislature's passage of certain local or special laws.

Pursuant to the TIF statute, patrons of a proposed future World Trade Center hotel would pay hotel occupancy taxes of at least 13%, but the taxes would be collected by the special taxing district to provide funds necessary to finance the WTC hotel project. The TIF statute expressly recognized that, absent legislative action, the hotel patrons would be subject to existing hotel occupancy taxes. ♦

■ MASSACHUSETTS APPELLATE TAX BOARD

No bad debt write-off for furniture vendor creditors

A creditor of retail furniture vendors' customers was not a vendor or an assignee despite making payments to the vendors on bad debts that included sales tax. On the worthless accounts purchased from the vendors, the creditor was not entitled to abatement or reimbursement of the sales tax, the Massachusetts Appellate Tax Board ruled in *Household Retail Services Inc. v. Commissioner of Revenue*, Dkt. Nos. C261368 and C266654.

Various retail vendors sold furniture to their customers and recorded those transactions in merchant agreements between the vendors and the customers' creditor that expressly contemplated the creditor's purchase of the accounts from the vendors. The creditor acquired full legal ownership of the accounts upon purchase. When some of those accounts went into default, the unpaid balances were deemed worthless and charged off by claiming a bad debt deduction for financial accounting and federal income tax purposes. The vendors had previously reported the full sale price on their sales tax returns and had remitted tax on the full amount when the furniture was sold. The creditor paid the vendors the uncollected portion of the accounts, including the sales tax, then sought reimbursement of the pro rata portion of the sales tax charged off as bad debts.

The creditor, however, was not entitled to abatement or reimbursement of the pro rata portion of sales taxes, the tax board ruled. Under the express statutory language, such relief is reserved for vendors. Although the creditor was entitled to receive the installment payments from the customers pursuant to the merchant agreements, the vendors had not expressly assigned to the creditor their rights to seek an abatement or reimbursement of the taxes paid by the vendors. The creditor had not stepped into the shoes of the vendors and made sales at retail, as required for statutory relief. As such, the creditor was not an assignee of the vendors for purposes of any relief the vendors may have been entitled to under the statute.

Also, the creditor was not a "vendor" for purposes of the statute. Under the clear language of the law, the assignee must still make retail sales in its own right in order to be eligible for relief. ♦

STATE UPDATES

ALABAMA

When a community development district is located in a dry municipality or a dry county, the municipality or county is included in the distribution of alcoholic beverage taxes in the same manner as those taxes would be distributed in a wet municipality or county. (*State Attorney General Opinion No. 2005-065*)

ARIZONA

Sales of compound ore purchased from an out-of-state vendor and processed by a taxpayer into a marketable product are subject to transaction privilege tax under the mining classification. (*Private Taxpayer Ruling LR04-009, Dept. of Revenue*)

ARKANSAS

No interest will be allowed on an overpayment of state taxes that is refunded by the director within 90 days after the last date provided for filing the return for the tax, including any extension of time for filing the return, or 90 days after the date the return is filed, whichever occurs later. (*SB254 of 2005, effective 90 days after the adjournment of the 85th General Assembly*)

CALIFORNIA

The State Board of Equalization has issued answers to some frequently asked questions regarding the sales and use tax amnesty program that concludes March 31, 2005. Topics covered include eligibility, application, bankruptcy and amnesty, tax periods covered, and a discussion of the 10-year statute of limitations. (*Sales and Use Tax Amnesty Program Frequently Asked Questions, SBE*)

A regulation regarding the place of sale for purposes of Bradley-Burns uniform local sales and use taxes is updated to incorporate the approval by voters at the March 2, 2004 primary election of the decrease of local tax rates effective July 1, 2004. (*Reg. 1802, State Board of Equalization, effective February 8, 2005*)

FLORIDA

The Dept. of Citrus filed an appeal in the case of *Dept. of Citrus v. Graves Brothers Co.* on Feb. 3, 2005. In *Graves*, the court of appeal held that the citrus fruit excise tax, or "citrus box tax," violated the free speech provisions of the First Amendment to the U.S. Constitution by compelling commercial speech. (*CCH Telephone Conversation, Dept. of Citrus, Feb. 10, 2005*)

GEORGIA

An electrical membership corporation that remitted Georgia sales tax paid by its mem-

bers did not have direct standing as a taxpayer to sue for a refund. The corporation did not bear the burden of the tax. The Georgia Supreme Court determined that granting the corporation associational standing to sue as a representative of its members would violate the principles that sovereign immunity cannot be abrogated by the court and that legislative waivers of sovereign immunity must be strictly construed. The General Assembly had expressly refused to extend the waiver of sovereign immunity in sales tax refund actions to taxpayers acting in a representative capacity for fellow taxpayers; therefore, it was clear that the waiver also did not extend to non-taxpayers seeking to act in such a way. (*Sawnee Electrical Membership Corp. v. Dept. of Revenue, State Supreme Court, Dkt. No. S04G0936*)

IDAHO

Effective July 1, 2005, the occasional sales tax exemption does not include use tax paid on tangible personal property used to improve real property when the property is obtained from someone in the improvement business. (*Chapter 15 (HB12) of 2005*)

Effective July 1, 2005, the deposit required for appeals of sales or use tax decisions by the State Tax Commission is changed and the amount required for appeals to the either the district court or the Board of Tax Appeals is clarified. Decisions may not be appealed to the BTA when the amount "asserted" exceeds \$25,000. Currently, appeals cannot be made when the amount "in dispute at the time the notice of deficiency determination/overassessment is issued" exceeds \$25,000. "Amount asserted" means the total amount due, as stated in the decision of the State Tax Commission. Consequently, amounts asserted over \$25,000 must be appealed to the district court. Also effective July 1, 2005, in order to seek review, taxpayers must deposit 20% of the amount asserted when the STC issues its decision. Currently, taxpayers deposit 20% of the tax penalty and interest due. (*Chap. 15 (HB14) of 2005, effective as noted above*)

ILLINOIS

The service of providing e-mail advertisements was not subject to retailers' occupation tax or use tax because the Dept. of Revenue did not view the service as a taxable transfer of tangible personal property. The service was also not an activity subject to telecommunications excise tax. (*General Information Letter ST 04-0229-GIL, DOR*)

The Dept. of Revenue has issued a bulletin explaining the limitation in the retailers' occupation tax and use tax exemptions for non-residents purchasing motor vehicles or

trailers to be titled in another state. Effective Feb. 1, 2005, the exemptions do not apply if the vehicle will be titled in a state that does not allow a reciprocal exemption for the use of a motor vehicle sold and delivered in that state to an Illinois resident to be titled in Illinois. Tax will be imposed at a rate equal to the other state's rate of tax but will not exceed the tax that would otherwise be imposed in Illinois. The bulletin provides a partial list of states that do not have reciprocal exemptions and contains instructions for dealers reporting transactions on Form ST-556, Sales Tax Transaction Return. (*Informational Bulletin FY 2005-13, DOR, January 2005*)

IOWA

The Dept. of Revenue has issued guidelines for the sales tax holiday on select clothing and footwear that begins at 12:01 a.m. on Aug. 5, 2005, and runs through midnight Aug. 6, 2005. Any business that is open on those days is required to participate. During the holiday, no sales tax, including school and regular local-option sales taxes, will be collected on certain articles of clothing or footwear that have a selling price of less than \$100. The exemption applies to each article priced under \$100 no matter how many items are on the same invoice. (*Release, DOR, February 2005, http://www.state.ia.us/tax/educate/holiday1.html*)

LOUISIANA

The rule requiring taxpayers to remit tax payments by electronic funds transfer for all taxes administered by the Dept. of Revenue is amended. The definition of "other immediately investible funds" is expanded to include credit and debit card payments and electronic checks in addition to cash, money orders, bank drafts, certified checks, teller's checks, and cashier's checks. The rule as amended also provides that the taxpayer is responsible for payment of any fee charged for making payment by means defined as "other immediately investible funds." (*LAC 61:1.4910, DOR, effective Feb. 20, 2005*)

MICHIGAN

Companies that provided limousine, taxi, or bus services were not subject to a local excise tax as entities "engaged in the business of leasing or rental of motor vehicles of which delivery is made in the eligible municipality" because persons hiring the services of a taxi, bus, or limousine did not take "delivery" of the vehicle within the common and approved meaning of the word. Owners or operators of the vehicles did not surrender possession and control to patrons or transfer vehicles in any way. (*State Attorney General Opinion No. 7169*)

STATE UPDATES

MISSOURI

An amusement park was entitled to a refund of sales tax paid by patrons on charges for inner tubes used on water rides. The amusement park had already paid sales or use tax on its purchases of the inner tubes. The Director of Revenue argued that the inner tube rental fees were analogous to bowling shoe rental fees, which the state Supreme Court had previously held were taxable. However, the Administrative Hearing Commission determined that it was required to follow the holdings of cases involving the same amusement park and a golf course because those cases were more similar to the facts of the present case. (*Six Flags Theme Parks Inc. v. Director of Revenue, Administrative Hearing Commission, Dkt. No. 03-1919 RS*)

NEW HAMPSHIRE

As part of the budget presented to lawmakers on Feb. 15, 2005, Gov. John Lynch proposed eliminating the statewide property tax and increasing the cigarette tax to pay for his school funding plan. Under the proposal, the tax on a pack of cigarettes would rise from 52 cents to 80 cents. (*Press Release, Office of the Governor, Feb. 15, 2005*)

NEW JERSEY

Effective Feb. 7, 2005, motor fuel regulations are adopted as new rules without change. Originally scheduled to expire on Feb. 16, 2004, the rules provide motorists, oil companies, and retail dealers of motor fuels with guidance and assistance in the administration of the Motor Fuels Tax Act. (*N.J.A.C. 18:19, Div. of Taxation, effective Feb. 7, 2005*)

NEW YORK

Tool trucks used to carry supplies from within an empire zone to construction sites may qualify for the exemption from sales and use tax provided in §1115(z) of the Tax Law, if 50% of the tool trucks' use is in activities originating or terminating within the empire zone. Construction equipment stored within an empire zone but used on-site in construction activities may also qualify for exemption under §1115(z), if 50% of the equipment's use is on construction sites located in an empire zone. (*TSB-A-05(2)S, Commissioner of Taxation and Finance*)

Commissions paid by a mobile telephone service provider to a seller of mobile telecommunications equipment were not taxable. The commissions were not receipts from a taxable sale of tangible personal property or services. Purchases of mobile telecommunications equipment that was resold at a discount in conjunction with the establishment or renewal of a contract for mobile telephone

service were exempt from sales and use tax as purchases for resale. (*TSB-A-05(4)S, Commissioner of Taxation and Finance*)

NORTH CAROLINA

In his State of the State Address, Gov. Mike Easley called for an increase in the cigarette tax but offered no details other than any increase should be significant in order to reduce teen smoking. (*State of the State Address, Governor Easley, Feb. 21, 2005*)

NORTH DAKOTA

The Senate has rejected a bill that would increase the sales and use and alcoholic beverage gross receipts taxes. The House of Representatives earlier passed this legislation. (*HB1512, defeated by the Senate, March 2, 2005*)

OHIO

The Ohio budget bill, introduced Feb. 15, 2005, would establish a permanent sales and use tax rate of 5.5% that would take effect on July 1, 2005. Under present law, the current rate of 6% is scheduled to be reduced to 5% on July 1, 2005. The legislation would increase tax rates on tobacco and alcohol that would be effective on July 1, 2005. The cigarette excise tax would increase from 55 cents to \$1 per pack. Also, the excise tax on tobacco products other than cigarettes would increase from 17% to 30% of the wholesale price of the tobacco product. Further, the taxes levied on the sale and distribution of wine, mixed beverages, cider, and beer would double. (*HB66, introduced Feb. 15, 2005; Bill Analysis, Legislative Service Commission*)

Dept. of Taxation sales and use tax guidance discussing the definition of a "core charge" was revised. The revised version incorporates the amended statutory definition of the term "price." (*Sales and Use Tax Information Release ST 1995-04, DT*)

Previously issued sales and use tax guidance for cable television companies was revised to incorporate statutory amendments. (*Sales and Use Tax Information Release ST 1995-03, Dept. of Taxation*)

PENNSYLVANIA

A contractor's purchases of qualified building machinery and equipment are exempt from sales and use tax when those purchases are made pursuant to a construction contract with the federal government. "Building machinery and equipment" is defined, for purposes of the exemption, as generation, storage, conditioning, distribution, or termination equipment purchased for one of ten different building systems specified by statute. Construction contractors must provide suppliers with a properly com-

pleted exemption certificate, REV-1220, within 60 days of purchase in order to make tax-free purchases of those components that qualify as building machinery and equipment. (*Legal Letter Ruling SUT-05-002, Dept. of Revenue*)

The owner of abandoned property was not entitled to payment of interest from the Treasury Dept. under the provisions of the unclaimed property law. In addition, the unclaimed property law does not violate the Just Compensation and Due Process Clauses of the U.S. Constitution. A taking occurs when an authorized entity substantially deprives an owner of the use and enjoyment of his property. The delivery of the owner's property to the department did not constitute such a taking. Finally, the unclaimed property does not expressly provide for the payment of interest. (*Smolow v. Hafer, Commonwealth Court, Dkt. No. 208 M.D. 2004*)

SOUTH DAKOTA

Effective July 1, 2005, the sales tax exemption for chemicals used in agriculture is amended so that herbicides, rodenticides, and fumigants are no longer included. The exemption for pesticides is clarified. Exempt products or substances used in conjunction with the application or use of pesticides include, but are not limited to, adjuvants, surfactants, ammonium sulfate, innoculants, drift retardants, water conditioners, seed treatments, foam markers and foam dyes. However, equipment used for the application of pesticides and related products and substances is not exempt. (*HB1153 of 2005*)

VIRGINIA

The budget bill passed by both houses of the Virginia General Assembly would eliminate the accelerated sales and use tax payment requirement for fiscal year 2007 and thereafter and would affect refunds claimed by Internet access providers. For purposes of the accelerated sales and use tax payment required for the month of June 2006, dealers and direct payment permit holders who reported taxable sales and purchases of \$50 million or more (currently, \$1.3 million or more) would be required to make a payment equal to 20% (currently, 90%) of the sales and use tax liability for the previous June. The accelerated sales tax payment requirement would be repealed for fiscal year 2007 and thereafter. For purchases made between July 1, 2004, and June 30, 2006 (currently, between July 1, 2003, and June 30, 2004), the sales and use tax exemption applicable to production, distribution, and other equipment used to provide Internet-access services would be claimed as a refund request. (*HB1500; Conference Committee Reports, Feb. 27, 2005; Telephone Conversation, Virginia Office of Finance, March 1, 2005*)

Sales and use tax incentives—Oklahoma

The following is excerpted from the Business Incentives Guide, a CCH book and online service detailing state-by-state business exemptions, incentives and credits. Unless otherwise indicated, all statutory references are to the Oklahoma Statutes.

MANUFACTURING (TITLE 68, §§1352(2), (9), (10), AND (11), 1356(37), 1357(17), AND 1359(8) AND (12); RULES 710:65-7-6, 710:65-19-60 AND 710:65-19-263)

The following are exempt from sales and use tax:

- the purchase or lease of machinery and equipment for use at a fixed location and used exclusively in the manufacturing, processing, compounding, or producing of any space facility, space propulsion system, or space vehicle, satellite, or station of any kind possessing space flight capacity;
- goods, wares, merchandise, and property that become an integral part of the products for resale that are purchased to be used or consumed in the process of manufacturing, compounding, processing, assembling, or preparing for sale a finished article;
- plating sold to a manufacturer;
- patterns used in the commercial production of iron, steel, or other metal castings; and
- railroad track spikes manufactured and sold for use in Oklahoma in the construction or repair of railroad tracks, switches, sidings, and turnouts.

CONSTRUCTION MATERIAL REFUNDS (TITLE 68, §1359; RULE 710:65-13-153)

Oklahoma refunds sales taxes paid on construction materials for certain new or expanding facilities investing \$5 million or more and creating 75 or more jobs.

COMPUTER SOFTWARE (TITLE 68, §1354; RULES 710:65-19-86 AND 710:65-19-52)

The following are exempt from sales and use tax:

- custom programs created specifically for the user and prepared to the special order of the user;
- electronic data processing services;
- purchase of magnetic tapes encoded with mailing lists prepared to the purchaser's specifications; and
- optional computer maintenance contracts providing only maintenance support services.

ADVERTISING (TITLE 68, §1357(4); RULE 710:65-19-311)

Advertising space in newspapers and periodicals, billboard advertising services, and any advertising through the electronic media, including radio, television, and cable television, as well as the servicing of advertising devices, are exempt.

PACKAGING (TITLE 68, §§1357(8) AND (9) AND 1359(4), (5), AND (11); RULES 710:65-13-15, 710:65-13-60, 710:65-13-150, AND 710:65-19-256)

The following are exempt from sales and use tax:

- one-way utensils, paper napkins, paper cups, disposable hot containers, and other one-way, carry-out materials sold to vendors of meals or beverages;

- transfers of title or possession of empty, partially filled, or filled returnable oil and chemical drums to any person who is not regularly engaged in the business of selling, reselling, or otherwise transferring such containers;
- containers sold to a person regularly engaged in the business of reselling empty or filled containers;
- containers for packaging raw products of farm, garden, or orchard for resale to the consumer or processor;
- returnable containers that contain or will contain water, soft drinks, beer, or light beer for human consumption as well as cartons, crates, pallets, and containers used to transport the reusable containers;
- packaging materials sold to producers of agricultural products and manufacturers of tangible personal property for use in packing, shipping, or delivering tangible personal property for sale;
- packaging materials used by florists and nurseries, including cellophane, tape, bags, florist tissue, flower boxes or pots, gift papers and foil, gummed tape (but not tape dispensers), ribbons, wrapping paper, and tissue; and
- deposits, rent, or other charges made for returnable cartons, crates, pallets, and containers used to transport mushrooms or mushroom products from a farm for resale to the consumer or processor.

EQUIPMENT FOR COMPUTER SERVICES COMPANIES (TITLE 68, §1357(19))

Companies providing certain computer services may themselves purchase machinery and equipment exempt from sales and use tax. Eligible companies are those that provide:

- prepackaged software (Standard Industrial Code Manual No. 7372);
- computer integrated systems design (SIC Manual No. 7373); and
- data processing and preparation (SIC Manual No. 7374).

COMPUTER SERVICES/DATA PROCESSING/TELECOMMUNICATIONS EQUIPMENT (TITLE 68, §§54003 AND 54004)

A sales tax refund is available on the purchase of computers, data processing equipment, related peripherals, telegraph or telecommunications services and equipment.

POLLUTION CONTROL AND CLEANUP EQUIPMENT (TITLE 68, §1359(6); RULE 710:65-13-80)

There is an exemption for machinery, equipment, fuels, and chemicals incorporated into and directly used or consumed in the process of treatment to substantially reduce the volume or harmful properties of hazardous waste at treatment facilities specifically permitted by the Hazardous Waste Management Act.

AIRCRAFT REPAIRS (TITLE 68, §1357)

An exemption applies for sales of aircraft engine repairs, modification, and replacement parts, sales of aircraft frame repairs and modification, aircraft interior modification and paint and sales of services employed in the repair, modification and replacement of parts of aircraft engines, aircraft frames, and interior repair, modification, and paint.