

SALES & USE TAX ALERT

Vol. XV, No. 18, October 15, 2005

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BONUS INSERT

Wondering if your company is up to date with local sales and use tax compliance? Peruse the free Bonus Insert in this issue of *SUTA* for new county, municipal and special district taxes imposed as of Oct. 1, 2005.

COMING SOON

- U.S. Supreme Court to look at *Cuno* incentives

■ FORCED PARTICIPATION REMOTE

SSTP yearlong amnesty underway, likely to benefit large retailers with murky nexus

According to schedule, the full member states of the Streamlined Sales Tax Project took over as the Governing Board on Oct. 1, 2005. Consequently, that date marks the beginning of a year-long amnesty for those states as well as a longer period of amnesty for the states who qualify as associate members. The amnesty is most likely to benefit retailers doing business in a number of states who also have nexus or gray-area issues regarding nexus, experts say. With the amnesty, however, comes the responsibility of registration and collection in all the full-member states, leaving taxpayers to weigh the burden of collection against the benefits of a generous amnesty.

Pros

The SSTP amnesty forgives liabilities for all periods prior to registration—plus penalties and interest.

"A company may find it beneficial to register under the SSTP amnesty if it has established nexus but is not registered in all or most of the SSTP's current participating states," notes **Diane Yetter**, of **Yetter Consulting Services Inc.** in Chicago.

Participation would also be beneficial if a company is already registered in many of the SSTP states with questionable or clear nexus in other SSTP states where it is not registered, Yetter notes.

Bruce Nelson, manager of tax policy for the **Colorado Dept. of Revenue**, agrees.

"I think the key is it's going to be really beneficial for those companies in that nether world where it's not real clear if you've got nexus."

Such uncertainty for taxpayers may stem from the issue of affiliate nexus, for example, with high profile cases being lost by companies like **BarnesandNoble.com** and **Borders Online**, Nelson notes.

"People are stepping back and saying this is not a good sign," he adds, "that, coupled with the fact that there is renewed emphasis on measuring exposure because of Sarbanes-Oxley. Companies could say, 'Here is a nice, clean-cut way to wipe out any potential liability from the past.'"

The amnesty deal the SSTP offers is hard to beat, experts note. Most amnesties or voluntary disclosures offered by individual states will require a settlement or penalties.

Cons

A company might not want to participate in the SSTP amnesty if it clearly has no nexus and therefore no risk of prior period liability—and it does not want to volunteer to collect tax in all the SSTP states, Yetter points out.

A taxpayer must decide whether it is willing to collect in all the full-member states. Currently, there are 13 full members. But that number will increase as associate members become full members.

“The main pitfall is that as new states enact SSTP as full members, a company is required to register and start collecting in these additional states,” Yetter notes.

Another drawback lies in the fact that the amnesty is not equally suitable to all business types.

Nelson says large retailers selling in many states will benefit from the amnesty, but companies on the purchasing side of transactions and many service providers, like construction companies, will likely not be attracted to the amnesty.

“I think with the smaller companies, this probably isn’t such a godsend for them,” Nelson notes.

“It’s designed to fit basically mail-order sellers and online retailers,” says **J. Whitney Compton**, director of **Compton & Associates** in Marietta, Ga., “and that’s about it.”

“SSTP is a great tool for large retailers like Wal-Mart, Target, Dillard’s, etcetera,” says **B.J. Pritchett**, of **Pritchett Sales Tax Consulting** in Hot Springs National Park, Ark. “SSTP is not the dream of all businesses, only those businesses that have nexus in every state, only those businesses who sell the same merchandise in every state that have a different definition in every state.

“We should look at our history before allowing freedoms to be so easily removed, all for the sake of large businesses having to deal with individual state’s definitions of food, clothing, snacks, etc.”

Immediacy of threat

In order for SSTP participation to become mandatory, the U.S. Congress would have to pass legislation that eliminates protections afforded under *Quill* (1992). But how likely is that to occur in the near future? Should that possibility be considered by businesses in deciding whether to volunteer for the amnesty now or lose the chance to do so?

“At this point, I’m guessing that the law overturning *Quill* is at least a few years away,” Yetter says. “I don’t see it as an immediate threat.”

Congress may want to see how many voluntary registrations occur and how much new revenue is gained by the states. Some of the larger states such as California, Illinois, New York and Texas need to come on board or at least move closer before Congress does something, she says.

Nelson says some federal legislators maintain the bill will not pass.

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"Here's my question: If the SSTP brings to the table the simplification they promise, where's the motivation for federal legislation that will increase taxes on their constituents?" he asks. "It

seems to me that in some ways the SSTP doesn't have any leverage."

Editor's note: *Yetter can be reached at (312) 701-1800; Nelson at (303) 866-4328; Compton at (770) 988-8382; Pritchett at (501) 922-4327. ♦*

SSTP AMNESTY DETAILS

Amnesty terms

A Streamlined Sales Tax Project member state is required to provide an amnesty to a seller that registers with it under the Streamlined Sales Tax Agreement, provided the seller was not registered in that state in the 12 months preceding the state's participation in the Agreement and the seller has not been contacted for audit. The amnesty precludes assessment for uncollected or unpaid sales or use tax, together with penalty or interest, for sales made prior to the seller's registration. To qualify for the amnesty, a seller must register with a full member state within 12 months of the state's participation in the Agreement.

An associate member state must provide amnesty from the time it joins as an associate member until 12 months after it becomes a full member. A seller must maintain its registration and continue collecting taxes for at least 36 months in a member state or the amnesty may be voided by that state.

The amnesty is not available to a seller with respect to any matter for which the seller has received notice of an audit or for taxes already collected, paid, or remitted. It does not apply to taxes due from a seller in its capacity as a buyer or to taxes other than sales or use taxes. The information obtained through registration may not be used by the states for determining whether a seller has nexus for any tax.

Registration

Sellers wishing to volunteer to collect under the Agreement and receive amnesty for uncollected or unpaid sales or use tax must register at www.sstregister.org/sellers. They also can update previously submitted registration information at this website. The information provided will be sent to all of the full-member states and to associate members for which the seller chooses to collect.

A registering seller is required to collect tax for full member states. Full-member states are Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, North Dakota, Oklahoma, South Dakota, and West Virginia. A registering seller may collect tax on sales into an associate-member state, but is not required to do so, unless the seller is otherwise legally required to collect in that state. The associate-member states are Arkansas, Ohio, Tennessee, Utah, and Wyoming. On Jan. 1, 2006, Nevada will become an associate-member state.

■ WASHINGTON SUPREME COURT RULING

DOR may issue interpretive rulings

The Washington Supreme Court recently upheld the authority of the Dept. of Revenue to issue non-binding interpretive rules.

In *Association of Washington Business v. Dept. of Revenue*, Dkt. No. 75623-6, the AWB challenged that authority, asserting that three rules relating to sales and use tax and business and occupation tax were invalid because the DOR did not have the statutory authority to adopt them. The AWB specifically alleged that the cited authority, RCW 82.32.300, did not authorize the department to issue the three rules.

Inform and involve public

The court, however, found that while RCW 82.32.300 alone might be insufficient to support the DOR's interpretive rulemaking authority, other statutes did support it. One such statute was RCW 34.05.230(1), which granted agencies the authority to adopt interpretive statements that are advisory only. The statute provides that, to better inform and involve the public, an agency is encouraged to convert longstanding interpretive and policy statements into rules.

The court found that the Legislature clearly intended agencies to adopt interpretive rules or they could not comply with the statute. This view was corroborated by RCW 42.17.250, which requires agencies to publish in the Washington Administrative Code substantive rules of general applicability and statements of general policy or interpretations of general applicability formulated and adopted by the agency.

Further, RCW 82.01.060(2), while part of the enabling legislation that established the DOR, provided authority for the DOR to make interpretive rules.

Differentiating unnecessary

In a discussion of the force and effect of interpretive rules, the court rejected the trial court's conclusion that the DOR lacked authority to adopt

interpretive rules that did not clearly state they were interpretive. Regardless of whether the rules were interpretive or legislative, they represented a position to which the DOR would adhere unless and until the public challenged the rules in court, and the court agreed. Therefore, how rules were labeled did not matter because it did not affect the public's response to them.

Mike Gowrylow, communications manager for the DOR, says the decision was not surprising.

"We felt we've had statutory authority all along to make these rules, and both the trial court and the Supreme Court upheld that," Gowrylow says. "End of story."

"You always hear from business that they want more certainty," he continues. "To limit our ability to make rules would make it harder on taxpayers."

"We're considering whether there is some way to differentiate between interpretive and legislative rules," he adds. "I think sometimes it would be difficult..."

Representatives of the AWB were contacted, but no statements on the case were offered by SUTA's press time.

Editor's note: Gowrylow can be reached at (360) 705-6603. ♦

■ 'LARGE CORPORATE UNDERPAYMENTS'

Virginia ruling on interest rates creates refund opportunity

The following article was submitted by William "Sandy" Rowe, of Hunton & Williams LLP in Richmond, Va. He is a former Chair of the Virginia Chamber of Commerce's Tax Committee. Rowe can be reached at (804) 788-8410 or wrowe@hunton.com.

In a ruling requested by the Virginia Chamber of Commerce, the Virginia state tax commissioner has provided an important clarification of the Dept. of Taxation's position on how the 20% "amnesty penalty" will be applied. The commissioner has also made an important concession on the calculation of interest in audits of large corporate tax delinquencies—a concession that corporate taxpayers may use to obtain refunds on past audit assessments.

Amnesty penalty

As part of Virginia's tax amnesty program conducted during the fall of 2003, Virginia Code

§58.1-1840.1F(1) provided that any tax remaining unpaid after conclusion of the program would be subject to a 20% penalty. This penalty was clearly designed by the General Assembly to encourage taxpayers to come forward and clear up their delinquencies. In recent audits, however, the DOT has been applying the amnesty penalty not only to persons who were aware of their unpaid obligations when the amnesty program began, but also to taxpayers whose delinquencies were not discovered until after any opportunity to participate in the amnesty had passed.

In his advice to the Chamber of Commerce, the tax commissioner states:

[A]ny eligible delinquencies and tax underpayments discovered after Virginia Tax Amnesty ends, such as future audit assessments in periods that were eligible to receive amnesty, would be subject to the penalties. Ignorance of the liability is no excuse.

Thus, it appears to be the department's position, for example, that a company audited for sales and use taxes for periods covered by the amnesty is liable for the 20% amnesty penalty—in addition to other penalties—for all audit deficiencies discovered even if the audit began after the window of opportunity to participate in the tax amnesty program had closed. "Ignorance of the liability is no excuse"—or more accurately—"Failure to predict a future audit assessment is no excuse."

It is difficult to believe that the General Assembly of Virginia intended the amnesty penalty to be applied in situations where taxpayers who had filed returns in good faith and paid all taxes shown on their returns are later determined by the department to have owed tax. In essence, these taxpayers are being penalized for not participating in a program when they had no inkling that they needed to participate.

Interest

As recently as Tax Bulletin 05-8, P.D. 05-98, June 23, 2005, the department had advised taxpayers that an 8% underpayment rate applied to assessments and refunds, but a 10% rate applied to "large corporate underpayments," generally defined in IRC § 6621(c)(3) as an underpayment exceeding \$100,000. This position directly contradicted the decision by the Circuit Court of Fairfax County in *General Motors Corp. v. Virginia*

Dept. of Taxation, 62 Va. Cir. 4 (2003), *petition for appeal on interest issue denied, rev'd on other grounds*, 268 Va. 289 (2004), that the department had no authority to impose interest at such a rate. In his ruling to the Chamber of Commerce, the tax commissioner acquiesced to the *General Motors* decision and acknowledged that "the additional two percentage points that you refer to in your letter will no longer be applied." This change in policy is confirmed in Tax Bulletin 05-10, P.D. 05-154, issued Sept. 23, 2005.

Advice

Any corporation that has been assessed with a "large corporate underpayment" within the last three years, or had an administrative appeal involving a "large corporate underpayment" decided within the last year, should consider applying for a refund of the excessive interest that was undoubtedly charged. The tax commissioner's ruling indicates that the DOT intends to make "manual adjustments" to current bills until appropriate system changes can be implemented. ♦

New Jersey offers guidance on post-SSTP rentals

The New Jersey Div. of Taxation recently issued a revised notice explaining recent changes to the taxation of leases and rentals enacted by legislation conforming the state's laws to the requirements of the Streamlined Sales and Use Tax Project.

The Sept. 20, 2005 revised notice clarifies that since the lessor will be collecting sales tax from the lessee on both short- and long-term agreements beginning on or after Oct. 1, 2005, the lessor will no longer use Form ST-40, Lessor Certification. ST-40 was required when the lessor, rather than the lessee, was the payor of the tax.

The lessor must separately state the sales tax on invoices, billing slips, and similar documents given to the lessee or renter. The revised notice also clarifies that interest or finance charges will not be excludible from lease payments when calculating the amount of tax due. However, the value of a trade-in of property of the same kind that is accepted in partial payment for the lease will reduce the tax base.

The trade-in credit is only available for property that is owned by the lessee. The tax base is not reduced if the lessee is turning in leased or rented property for credit. ♦

■ REDUCED RATE ON MACHINERY

Mississippi rewards tech ventures

Mississippi recently legislated incentives to bring tech-heavy enterprises into the state, rewarding such firms with a lower sales and use tax rate on purchases of machinery and parts.

Under HB3 of 2005, Third Extraordinary Session, effective July 1, 2005, sales of machinery and machine parts to a technology intensive enterprise are taxed at the reduced sales tax rate of 1.5%. However, the machinery and machine parts must be used exclusively and directly within Mississippi for industrial purposes, including manufacturing or research and development activities.

The reduced 1.5% sales tax rate also applies to electricity, current, power, steam, coal, natural gas, liquefied petroleum gas, or other fuel sold to or used by a qualified technology intensive enterprise.

To qualify for the reduced tax rate, a technology intensive enterprise must:

- 1) meet minimum criteria established by the Mississippi Development Authority;
- 2) employ at least 10 persons in full-time jobs; and
- 3) provide a basic health-care plan to all employees at the facility.

Additionally, at least 10% of the workforce in the facility must be scientists, engineers, or computer specialists, and the average wage of all workers must be at least 150% of the state average annual wage.

Finally, the enterprise must either manufacture plastics, chemicals, automobiles, aircraft, computers, or electronics, or be a research and development facility, a computer design or related facility, a software publishing facility, or other technology intensive facility or enterprise. ♦

Decals a must for Arkansas heavy equipment

An emergency regulation has recently been adopted requiring that heavy equipment in Arkansas must bear a sticker proving payment of sales or use tax.

Upon payment of Arkansas sales or use tax on heavy equipment, the dealer or purchaser must affix a decal to the heavy equipment as proof that either tax has been paid on the equipment or that

(Continued on page 8)

STATE UPDATES

ALL STATES

The American Red Cross has provided a list of the states' sales tax treatment of purchases made with Red Cross Client Assistance Cards. The list is available on the American Red Cross Web site at www.redcross.org/pubs/taxexempt/. The list will be updated as further information is obtained. At least one state, Mississippi, is expected to change its position and begin treating purchases with a Red Cross card as exempt. (*Client Assistance Cards—State Sales Tax Treatment, American Red Cross, Sept. 26, 2005*)

ALABAMA

The Dept. of Revenue has issued its list of current tax rates for county and municipality sales, use, rental, lodgings, tobacco and gasoline taxes as of Aug. 1, 2005. (*Monthly Tax Rate Report, DOR, August 2005*)

CALIFORNIA

Effective Jan. 1, 2008, under the Bradley-Burns Uniform Local Sales and Use Tax Law, the point of sale of jet fuel, which is subject to sales and use tax, is the point of delivery of the fuel to the aircraft. Prior to that date, the point of sale of jet fuel is the point of delivery of that fuel to the aircraft if (1) the principal negotiations for the sale are conducted in the state; and (2) the retailer has more than one place of business in the state. (*Chap. 391 (AB451) of 2005*)

Emergency tax relief in the form of a one-month extension of time to file and pay taxes or fees is made available for California business owners and fee payers directly affected by Hurricane Rita in the states of Louisiana and Texas, as was offered previously to the victims of Hurricane Katrina. This extension is offered to sales and use, gasoline, alcoholic beverage, cigarette and tobacco product, jet fuel, and diesel fuel taxpayers and to numerous fee payers. Relief from interest and penalties may be provided for those persons who are unable to file their returns and pay taxes and fees due in a timely manner. The relief program for interstate user tax under the International Fuel Tax Agreement applies to California tax only. To waive interest and penalties for another jurisdiction, the State Board of Equalization must receive written approval from the other jurisdiction. (*Special Notice, SBE, September 2005*)

The state has issued guidance regarding recently enacted legislation, Chap. 59 (AB575) of 2005, which allows a retailer who leases electronic devices to consumers to choose to pay the electronic waste recycling fee to the vendor of those devices in-

stead of collecting the fee from the consumers/lessees. When specified conditions are met, the vendor, not the retailer or consumer, owes the fee to the state and must remit it with the electronic recycling fee return. (*Electronic Waste Recycling Fee Frequently Asked Questions, State Board of Equalization, Sept. 30, 2005*)

The Legislative Analyst's Office has issued a report on the state's spending plan for 2005-06. The report (1) examines the factors behind the state's ongoing budget shortfall, (2) highlights the major budget solutions included in the 2005-06 budget package, and (3) provides preliminary estimates of how the actions adopted in the 2005-06 budget still affect the fiscal outlook for 2006-07 and beyond. The report discusses key features of the budget package and related legislation, including amnesty-related revenues. (*California Spending Plan, Legislative Analyst's Office, September 2005*)

COLORADO

The Dept. of Revenue now provides links on its Web site to companies offering online services that identify which sales and use tax jurisdictions (state, county, city, or special districts) apply to any address in the state. The links can be found at www.revenue.state.co.us/TPS_dir/wrap.asp?incl=leavesite. Retailers who use the certified database will not be liable for sales and use taxes otherwise owed to the state and state-collected municipalities, counties, and special districts if the database incorrectly identifies the tax jurisdiction. However, home-rule jurisdictions are generally not state-collected municipalities and are not required to hold the retailer harmless in the case of an error in the database. Currently, no home-rule jurisdiction has enacted an ordinance that would hold the retailer harmless. (*Tax Alert, DOR, Sept. 12, 2005*)

Guidance is revised regarding electronic access to Dept. of Revenue information affecting cigarettes and tobacco, liquor, and fuel taxes. Instructions are provided concerning electronic payment, sales tax zero filing, and sales tax account history. (*FYI General 16, DOR, Aug. 1, 2005*)

GEORGIA

The regulation providing guidance regarding the sales and use tax exemption for sales to government contractors of overhead materials used in performance of contracts with the U.S. Dept. of Defense or the National Aeronautics and Space Administration has been amended due to the change in the exemption's sunset date. The amended regulation conforms to statutory changes by pro-

viding that the exemption will remain in effect until Jan. 1, 2007. Previously, the exemption was scheduled to be repealed Jan. 1, 2005. (*Reg. §560-12-2-.106, Dept. of Revenue, effective Sept. 8, 2005*)

HAWAII

The general excise tax exemption for newly constructed or rehabilitated housing projects approved and certified by the Housing and Community Development Corp. has been expanded to include projects to provide affordable rental housing. (*Act 196 (SB179), effective July 1, 2005*)

ILLINOIS

Motor fuel tax refund claims based on taxes paid may be permitted for undyed diesel fuel used by tugs and spotter equipment to shift vehicles or parcels on both private and airport property. The claim can be made only by the equipment owner and can be made only once each quarter. Also, the aggregate of all credits or refunds resulting from claims filed cannot exceed \$100,000 in a calendar year. (*SB1233 of 2005, effective Aug. 22, 2005*)

INDIANA

Effective July 1, 2005, a gasoline tax refund is available for tax paid on gasoline purchased or used for operating implements of agriculture (previously, for gasoline purchased or used for operating implements of husbandry). (*HB1073 of 2005*)

IOWA

A notice issued by the Dept. of Revenue discusses an online system for cities and counties to register construction contracts and issue sales and use tax exemption certificates to their contractors and subcontractors. A city or county may register as an exempt entity through the DOR's Web site. The DOR will provide an ID and password that will allow the city or county to register its construction contracts and the contractors and subcontractors working on the contracts. The city or county may then issue a Designated Exempt Entity Iowa Construction Sales Tax Exemption Certificate to its contractors and subcontractors that will allow them to make tax-exempt purchases of materials, supplies, and equipment for use in the construction contracts. (*E-list Notice, DOR, Aug. 22, 2005*)

A sales and use tax guide for construction contractors has been revised. Information concerning building equipment, hand tools, and modular homes has been updated. Contractors must pay sales tax on any building equipment that they purchase, including hand tools. However, rentals of

STATE UPDATES

building equipment are generally exempt. (*Iowa Contractors Guide, Pub. 78-527, Dept. of Revenue*)

KENTUCKY

The sales and use tax exemption for certain artificial devices (i.e. prosthetic devices or physical aids), contained in KRS §139.472(2), did not apply to all artificial devices prescribed by a licensed physician, as contended by the taxpayer. In effect, the taxpayer contended that the language of the disputed statute created two separate exemptions: one for any artificial device prescribed by a licensed physician, and following the word "or," a second and separate exemption that encompassed artificial devices that were "individually designed, constructed, or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure." However, the taxpayer's contention was rejected. In considering the statute's history, the Court of Appeals concluded that the disputed portion of the statute required an artificial device prescribed by a licensed physician to be "for the use of a crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure, including the extremities of the individual." (*King Drugs Inc. v. Kentucky, Court of Appeals, Dkt. No. 2004-CA-002019-MR*)

LOUISIANA

Due to Hurricane Katrina, for excise tax purposes, vehicles registered for highway use are permitted to remove aviation-grade kerosene (aviation fuel) from Louis Armstrong International Airport. The relief period will coincide with that of the IRS, which, for Louisiana, began Sept. 2, 2005, and will remain in effect through Nov. 1, 2005. (*Revenue Information Bulletin No. 05-024, Dept. of Revenue*)

The Dept. of Revenue has announced sales and use tax relief for taxpayers affected by Hurricane Rita. In accordance with the IRS tax relief guidelines, taxpayers affected by the hurricane may be eligible for tax relief, despite where they live. The DOR has granted a 30-day extension of time to file or make payments for sales tax returns due Oct. 20, 2005. A 60-day extension of time to file or make payments has been granted for other taxes that otherwise would be due Sept. 23, 2005, through Sept. 30, 2005. The department also will work with any taxpayer who re-

sides elsewhere but whose books, records, or tax professional are located in the areas affected by Hurricane Rita. Louisiana taxpayers within the following counties in Texas are also eligible: Chambers, Galveston, Hardin, Jasper, Jefferson, Liberty, Newton, Orange, and Tyler. (*Press Release, DOR, Sept. 30, 2005*)

Mileage logged by commercial trucks from a point of origin in a state other than Louisiana to a destination in the same state is not interstate commerce transportation, as defined. Such mileage cannot be considered mileage in interstate commerce for purposes of meeting the 80% qualifying threshold for exemption from sales and use taxes. (*Revenue Ruling No. 05-004, Dept. of Revenue*)

MICHIGAN

A corporation was not subject to use tax on bowling balls and accessories withdrawn from inventory and given away or used for promotional or advertising purposes in other states. The items were not taxable because they were not used in Michigan. The corporation maintained a "right or power" over the contested items as they were transferred to other states. The term "use" as set out in the use tax statute did not encompass the withdrawal of inventory and subsequent distribution of such items in another state. Because the items in dispute remained in the corporation's control and possession when they were sent to other states for potential promotional or giveaway purposes, their use for these purposes did not occur in Michigan. (*Brunswick Bowling & Billiards Corp. v. Dept. of Treasury, Court of Appeals, Dkt. No. 261682*)

NEBRASKA

A Dept. of Revenue information guide regarding sales and use tax exemptions for manufacturing machinery and equipment has been amended. The amended guide provides that if a machine has other uses in addition to its manufacturing use, the exemptions apply only if the manufacturing use is greater than 50% of the total use. (*Information Guide 6-441-2005, DOR*)

NEW YORK

Effective Dec. 1, 2005, removal of waste material from a facility regulated as a transfer station or construction and demolition debris processing facility by the state Dept. of Environmental Conservation will be exempt from sales and use tax. However, the waste material to be removed must not have

been generated by the facility. (*Chap. 321 (AB3426) of 2005, effective Dec. 1, 2005*)

Effective March 1, 2008, state-chartered credit unions will be exempt from sales and use taxes. However, prior to the effective date of this new exemption, any federal credit union that converts to a state charter after March 1, 2006, will retain its current exemption from state sales and use taxes (federal law prohibits the imposition of state sales and use taxes upon federal credit unions [Tit. 12, §1768 U.S.C.]). (*SB5618 of 2005*)

Effective Dec. 1, 2005, a sales and use tax exemption is created for machinery and equipment used directly and predominantly in loading, unloading and handling cargo at a marine terminal facility located in New York City that handled more than 350,000 20-foot equivalent units in 2003. (*SB4704 of 2005, effective Dec. 1, 2005*)

Effective Dec. 1, 2005, the sales and use tax exemption for the purchase of coin-operated car wash services is expanded to include services provided at "in-bay" automatic car wash facilities. With in-bay washes, the service is performed exclusively by coin-operated automated equipment and not by the purchaser or user of the service actually washing, waxing, or vacuuming the vehicle or other tangible personal property. Previously, the exemption required that the purchaser wash, wax or vacuum the vehicle himself if the vehicle or property was washed, waxed or vacuumed by automated "in-bay" equipment. (*AB5521 of 2005, effective Dec. 1, 2005*)

NORTH CAROLINA

Tobacco products taxpayers that return stale or otherwise unsalable cigars are eligible for a refund of any taxes paid, less any discounts. The refund application must be accompanied by an affidavit from the manufacturer outlining the number of cigars returned by the taxpayer. (*SB868 of 2005, effective Sept. 1, 2005*)

The Dept. of Revenue has revised Form E-595E, Streamlined Sales Tax Agreement Certificate of Exemption. The form is used to claim exemption from sales tax on purchases of taxable items. Purchasers must provide a completed certificate to sellers in order to claim an exemption, and sellers are required to keep copies of exemption certificates and to provide information on purchasers to participating states of the Streamlined Sales Tax Project.

Arkansas *(Continued from page 5)*

the equipment or purchaser is exempt from tax. Earlier legislation, Act 1693 (HB2972 of Laws 2005 enacted the requirement. The Dept. of Finance and Administration promulgated AR Emergency Reg. 2005-4 effective July 1, 2005.

Sales tax

At the time of sale, a dealer must affix a decal in a prominent place on the heavy equipment as follows:

- a red decal if the equipment is taxable and tax has been collected;
- a blue decal if the equipment is exempt under the farming tax exemption; or
- a green decal if the equipment is exempt under any other tax exemption (e.g., sale for resale, manufacturing, or timber harvesting).

The dealer must also record the decal number on the sales invoice.

Use tax

If heavy equipment is purchased outside Arkansas for storage or use within Arkansas, a purchaser who did not pay tax to the out-of-state dealer must pay Arkansas use tax to the DFA. Upon payment of the tax, the purchaser will receive a decal to affix to the equipment purchased.

If the purchaser paid sales or use tax to the out-of-state dealer, the purchaser must present proof to the department and obtain a decal to affix to the equipment.

The rule also covers the definition of "heavy equipment," obtaining decals, removal of old decals, and penalties. ♦

■ TELEPHONE DIRECTORIES

'Paper management fee' subject to Ohio use tax

Fees charged for a paper management service provided in connection with the production of telephone directories were subject to Ohio use tax. The charges were taxable as fees incurred in conjunction with the sale of tangible personal property.

In the Board of Tax Appeals decision in *Ameritech Publishing Inc. v. Zaino*, Dkt. No. 2003-V-698, the telephone directories publisher contracted with a company to produce the directories. In connection with the production of the directo-

ries, the company charged the publisher a paper management service fee. This fee was charged at a percentage of the price of paper material paid by the publisher. The fee was used to compensate the production company for any additional workforce required to ensure that the paper stock arrived on time and in good condition.

The BTA ruled that the paper management service fee was not exempt as a fee for a personal service, however. The BTA determined that the fee did not involve any recognized skill performed by a person specifically engaged to perform the act. ♦

■ MORTON BUILDINGS INC.

North Carolina taxes building components

The North Carolina Court of Appeals recently determined that construction materials bought and stored outside the state that were assembled into building components were subject to use tax.

In *Morton Buildings Inc. v. Tolson*, Dkt. No. COA04-1053, the taxpayer, a construction contractor that produces, sells and erects prefabricated warehouses and other buildings in many states, sought a refund of use tax. Morton Buildings paid use tax on the building materials, such as steel and lumber, that it purchased out of state. The taxpayer argued that the tax was inapplicable because the materials did not become part of a building or other structure in the state. The taxpayer contended that the materials were consumed and transformed into building components outside North Carolina. It was those components that became part of a building or other structure in the state.

The Court of Appeals disagreed, however, and held that the plain language of the statute provides no limitation that tangible personal property must be in the form in which it was purchased in order to be taxable. The materials incorporated into building components were still tangible personal property subject to tax.

The use tax should impose the same burden on out-of-state purchases as the sales tax imposes on in-state purchases, and builders should be unable to gain an advantage by purchasing materials outside North Carolina, the court ruled. Consequently, tax must be paid on all tangible materials, wherever purchased, that are ultimately used in buildings in the state. ♦