

SALES AND USE TAX UPDATE: COLORADO AND SELECT NATIONAL ISSUES



Bruce Nelson, M.A., CPA
EKS&H
bnelson@eksh.com
(970) 282-5446

Colorado Developments in SALT

Colorado Uniform Definitions Project

- 69 Colorado home rule jurisdictions and the Colorado Municipal League are collaborating to create uniform definitions
 - Over 150 standardized definitions
- Next steps
 - Electronic filing for multiple jurisdictions via one website
 - Licensing for multiple jurisdictions via one website



Colorado Developments in SALT

- *Cantina Grill, JV, et al v. City and County of Denver County Board of Equalization*, 344 P.3d 870 (Colo. 2015) –The Colorado Supreme Court held that food and beverage concessionaires at DIA were subject to property tax on their “possessory interest” in government-owned property
- Established three-part test:
 - Whether the interest provides a revenue-generating capability independent of the government property owner (independence test)
 - Whether the interest owner is able to exclude others from making the same use of the interest (exclusivity test)
 - Whether the interest is of sufficient duration to realize a private benefit (duration test)



141

Colorado Developments in SALT

- *Grand County and Larimer County v. YMCA of the Rockies*, No. 14CA1767 (Colo. Ct. App., Jan. 14, 2016)
- The Counties argue that property used for recreational activities such as hiking, fishing, biking, etc., were not sufficiently religious to qualify for exemption.
- The Court holds that the proper test is to look to the character of the property owner. If the organization is religious in nature then activities incidental to its primary purpose do not challenge that purpose.



151

Colorado Developments in SALT

- *ConAgra Foods Food Ingredients Company, Inc. v. City of Commerce City*, Case No. 2014CV31057 (Adams County Dist. Ct. Mar. 16, 2015) –The Adams County District Court found that Commerce City violated TABOR as it added language into the statutes that essentially increased the tax base without voter approval
- Key provision -- §20-4-7 to include "...on the purchase price paid or charged or for any consideration for the performance of a contract, of a total value in excess of \$100, that involves the use or furnishing of tangible personal property with or without the services of an operator of the taxable personal property shall be taxable hereunder as a rental or use of such tangible personal property."



161

Colorado Developments in SALT

- *Colorado Union of Taxpayers Foundation v. Aspen*, No. 14CA1869 (Colo. Ct. App. 2015)
- The Colorado Court of Appeals affirmed the district court's decision that the City of Aspen's ordinance imposing on the taxpayer a 20¢ waste reduction fee on paper bags did not violate the Taxpayer's Bill of Rights (TABOR), because it is a fee and not a tax.



Colorado Developments in SALT

- **Colorado Use Tax on Individual Income Tax Return**
 - Lines 29-33 have been added to the 2015 Individual Income Tax Form 104 to capture use tax from Colorado residents.
 - Only imposing the state sales tax rate of 2.9%...why?
 - The tax will apply to purchases for which sales tax was due, but for some reason was not charged (usually purchases from remote sellers such as Amazon)
 - Amazon will begin to collect Colorado state sales tax on February 1, 2016
- **Does this apply to home rule jurisdictions? NO, NO, NO.**



Colorado Developments in SALT

- **Colorado Use Tax on Individual Income Tax Return**
 - No, the DOR says the information will not be shared with the home-rule cities
 - No, the DOR will not send us assessments for prior years
 - Yes, you can write in zero
 - Yes, you can file a DR 0252, Consumer Use Tax Return instead
 - Does reporting on the individual return start the statute of limitations to run? Mmmm.



Colorado Developments in SALT

Enterprise Zone Changes

- Boundary changes for 2015 and 2016
- If a company was previously located in an EZ and, due to the zone changes is no longer located in an EZ, it may apply for an additional 10 years of eligibility by submitting DR00078 prior to pre-certification
- The Investment Tax Credit, Job Training Program Tax Credit, and New Employee Tax Credits (including the addition for Agricultural Processors) and the Employer Sponsored Health Insurance Credit are the only business credits for which an extension is allowed




[10]

Colorado Developments in SALT

Credit for Business Personal Property Taxes

- Remember HB 14-1279 (No? Me neither. Hey, it was two years ago)
- Now found as CRS §39-22-537
- Provides an income tax credit equal to the amount of the business personal property tax you paid, less the value you receive from deducting property taxes in calculating federal taxable income.
- See Line 6, Form 104CR and instructions page 21




EKS&H

[11]

Colorado Developments in SALT

Colorado Private Letter Rulings

- PLR 15-001 (Electronic Messaging Services)
- PLR 15-003 (Electronic Messaging Services)
- PLR 15-007 (Custom-Made Closet Organizer)



EKS&H

[12]

Federal Developments in SALT

- Marketplace Fairness Act ~~2014-2015~~-2016?
 - In Colorado? Really?
- Digital Goods and Services Tax Fairness Act of 2015
 - Or maybe 2016
 - Regulate and provide uniform sourcing rules
 - Prevent multiple and discriminatory taxation of digital goods
- Permanent Internet Tax Freedom Act
 - Currently extended to October 1, 2016 by the Consolidated Appropriations Act of 2016



EKS&H

133

Federal Developments in SALT

What will the MFA do?


- The bill will allow qualifying states to require remote sellers to collect sales and use tax on sales in that state.

Qualifying State

- A member of the Streamline Sales Tax Agreement, or a state must simplify by providing --
 - A single return filed with a single entity that handles all administration including audits.
 - Uniform tax base.
 - Free boundary database, with taxability matrix, and free "hold harmless" software

Small Seller Exception

- Sellers with gross annual receipts of \$1 million or less in remote sales are exempt.




EKS&H

141

Federal Developments in SALT

Remote Transactions Parity Act

- Similar to the MFA
- Except
 - Small seller exemption is \$10 million/\$5 million/\$1 million spread over three years
 - Catalog seller exemption



EKS&H

145

National Developments in SALT - Nexus

- "Click-through Nexus"
- States that have adopted click-through nexus now include Arkansas, California, Connecticut, Georgia, Illinois (ruled unconstitutional but re-enacted), Kansas, Maine, Michigan (Oct. 2015), Minnesota, Missouri, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington.



EKS&H

[16]

National Developments in SALT - Nexus

- *The Direct Marketing Association v. Brohl*, 735 F.3d 904 (10th Cir. Ct. App., Aug. 20, 2013)(rehearing denied), *petition for certiorari filed* United States Supreme Court (Feb. 25, 2014); *Direct Marketing Association v. Brohl*, U.S. Supreme Court, Dkt. 13-1032, (March 3, 2015)
- *Direct Marketing Ass'n v. Colorado Department of Revenue*, Case No. 13CV34855, Colo. Dist. Ct., Denver (Feb. 18, 2014)



EKS&H

[17]

National Developments in SALT - Nexus

- Out-of-state taxpayers that exceed any of the following thresholds in the state during the tax period:
 - (1) \$50,000 of property; or
 - (2) \$50,000 of payroll; or
 - (3) \$500,000 of sales; or
 - (4) 25% of total property, total payroll, or total sales.

are deemed to be doing business in the state and have an **income tax** filing obligation.



EKS&H

[18]

National Developments in SALT - Nexus

- States with factor presence nexus include Alabama, California, Colorado, Connecticut, Kansas, Michigan, New York, Ohio, and Washington.
 - *Newegg, Inc. v. Testa*, No. 2012-234 (Ohio Bd. Tax App. February 26, 2015)
 - *Crutchfield, Inc. v. Testa*, Nos. 2012-926, 2012-3068, 2013-2021 (Ohio Bd. Tax App. February 26, 2015)
 - *Mason Companies, Inc. v. Testa*, No. 2012-1169, 2012-2806 (Ohio Bd. Tax App. April 20, 2015)



EKS&H

National Developments in SALT - Nexus

- “I am going to reach right through that line and . . . tax you.”
 - Texas Comptroller of Public Accounts, Nos. 201409970H, 304-13-5657.26; CPA Hearing No. 106,632 (September 19, 2014)



National Developments in SALT - Nexus

- Effective January 1, 2016, Alabama implemented a factor presence nexus standard for **sales tax**
- If an out-of-state vendor makes over \$250,000 of sales into Alabama, it is required to collect and remit sales tax
- Challenging the continuing validity of *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992)



Questions?
