

NESTOA 2015

Sales Tax Treatment of Cloud Computing

Scott Clark, Esq.

Dentons US LLP

New York, NY

Scott.Clark@Dentons.com

(914) 843-3053

Alan Lieberman, Esq.

Shipman and Goodwin LLP

Hartford, CT

ALieberman@goodwin.com

(860) 251-5801

Jennifer Whalley, C.P.A.

PricewaterhouseCoopers, LLP

Hartford, CT

jennifer.whalley@pwc.com

(860) 241-7398



What do we mean by “Cloud Computing”?

- Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. (National Institute of Standards & Technology (NIST))
- Cloud computing is a model **to facilitate convenient, on-demand network access to a shared pool of computing resources (e.g., networks, servers, storage, applications, etc.) that can be accessed remotely by multiple users in multiple locations.** (Wikipedia)

The Old World

"The typical sale of tangible goods and certain services sourced to a particular state."

Sample Sales Transactions:

1. Purchase of a book in a bookstore: *The sale takes place at the bookstore (physical location) where the transfer (actual transfer of title and possession) of TPP takes place.*
2. Purchase of software on a compact disc at an electronics store: *As with the book sale, the sale takes place at the electronics store, where the transfer of TPP takes place.*

Nexus - where does the seller have nexus?

Character ("taxability") - what is sold - sale of a license (tangible?)

Sourcing - where is the sale

The New World

Sale, Rental or Use of remote (a.k.a. "intangible") products and remote services

Sample Sales Transactions:

- 1. Purchase access (or download) to a digital book. The purchase occurs remotely through an app on the tablet.*
- 2. Customer purchases access to software, or CPA firm remotely stores client files on "the cloud"*

Nexus - where does the seller have nexus?

Character ("taxability") - what is sold - sale of a license (tangible?)

Sourcing - where is the sale

Taxability 4.0

1. The Classic: "Sale of TPP" (1930s- 1950s)
2. Mail Order (1960s - 1980s)
3. Electronic Commerce (1990s)
4. Cloud (Today)
5. ?????? (Tomorrow) - Virtual Network?

Magnitude of the Issue

BIG!!

We are moving to an era of truly mainstream adoption of cloud...

Nexus Concerns

- **Traditional Approach - Physical Presence (ownership, rental, use, access to server . . .)**
- **Economic Presence**
- **Whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales? (*Scripto, Tyler Pipe*)**

Taxability ("Classification")

How do States Attempt to Analyze the Cloud?

- Electronic access to/use of software
- Information services
- Data processing
- Computer services / Digital automated services
- Communications services
- Remote storage service

- ...*and*, believe it or not, a couple of jurisdictions view certain cloud transactions as the rental of tangible personal property (AZ)

Key Criteria

- **Right to Control the product (or software)**
- **Degree and Duration of Control**
 - **Who controls the application commencement ?
The duration? The termination?**
 - **Are customers integrally involved in the implementation or configuration of the product? Are customers highly technical?
Can they perform this service on their own?**

**In Sum: Transfer of attributes of ownership
a.k.a. . . . Transfer of Custody and Possession of TPP**

**Look at: True Object, Dominant Purpose,
Common Understanding**

National Institute of Standards & Technology (NIST)

Classifications of Cloud Computing Transactions

- **Three primary classifications:**
 - **Infrastructure as a Service (“IaaS”)**
 - **Platform as a Service (“PaaS”)**
 - **Software as a Service (“SaaS”)**

Infrastructure as a Service (IaaS)

- The definition of infrastructure as a service (IaaS) is pretty simple: ***You rent cloud infrastructure—servers, operating systems, applications, storage and networking capabilities — on demand, in a pay-as-you-go model. (IBM.com)***

Infrastructure as a Service (IaaS)

- **Examples:**
 - The service provider hosts a bakery's website
 - The service provider backs up a photographer's hard drive on a regular schedule and stores the photographer's digital files

Infrastructure as a Service (IaaS)

- Taxable or Nontaxable depending on how you describe it:
 - e.g., (1) Purchase of Computing Power & Remote Storage = generally Nontaxable, except in states that broadly tax computer services (e.g., CT) or data processing services (e.g., DC, TX, OH)
 - e.g., (2) Purchase of Software = Taxable

Infrastructure as a Service (IaaS)

- **Formal guidance issued by certain states**
 - **Arizona - Taxable/Nontaxable**
 - **Private Taxpayer Ruling LR13-006, 06/25/2013**
 - **Florida - Not Taxable**
 - **Technical Assistance Advisement 14A19-001, 03/13/2014**
 - **Massachusetts - Taxable/Nontaxable**
 - **Letter Ruling No. 12-8, 11/08/2013**

Infrastructure as a Service (IaaS)

- **Formal guidance issued by certain states**
 - **New Mexico**
 - **Ruling No. 401-13-3, 07/19/2013**
 - **Ruling No. 401-13-2, 06/26/2013**
 - **New York - Not Taxable**
 - **Advisory Opinion TSB-A-15(2)S, 4/14/2015**
 - **Texas - Taxable**
 - **Letter Ruling No. 201207533L, 07/31/2012**
 - **South Carolina**
 - **Private Letter Ruling 14-2, 07/26/2014**

Platform as a Service (PaaS)

- **Allows the consumer to run consumer-created or acquired applications on the cloud provider's platform**
- **The consumer does not manage or control the underlying cloud infrastructure, but has control over the deployed applications and possibly the application hosting environment configurations**
- **Example:**
 - **A courier service's IT department pays to use the vendor's online platform and tools to develop and launch a delivery tracking application.**

Software as a Service (SaaS)

- **Software hosted by Application Service Provider (“ASP”) at one or more locations**
- **Provided to multiple users who access and use the software from one or more remote locations**
- **Customers typically pay for the service based on use or through a periodic subscription fee**
- **Customers do not download the software and cannot manipulate or control the software**
- **License may or may not be granted**

Software as a Service (SaaS)

- **Examples:**
 - The consumer pays a fee to use proprietary software to prepare and file a tax return
 - The consumer pays a fee or subscription to play video games
 - The consumer pays a fee to access information data base
 - The consumer pays a fee for assistance in compiling and/or analyzing information

Software as a Service (SaaS)

- **Alternative Characterizations**
 - **Not a taxable transfer of property**
 - **Taxable transfer of tangible personal property**
 - **Apply true object/primary purpose test to determine if it is a transfer of tangible personal property or a service**
 - **Taxable enumerated service**

Software as a Service (SaaS)

- **Not a taxable transfer of property**
 - **Statutory: Cal. Rev. & Tax. Code §§6006, 6016; 18 Cal. Code Regs. §1502; Ga. Comp. R. & Regs. r. §560-12-2-.111(4)(a); Georgia Letter Rulings SUT No. 2014-02-20-01 (2/20/2014) and 2014-05 (6/9/2014); and 32 V.S.A. §9701(7); Vermont Dept. of Revenue Pub. FS-1084 (08-2015).**
 - **Administrative or judicial opinion**
 - **Typically no applicable taxable enumerated service**

Software as a Service (SaaS)

- Taxable transfer of tangible personal property
 - Lease or license of prewritten software
 - Issues of transfer, possession and control, and use by customer
 - New York: Tax Bulletin TB-ST-128 (8/5/2014); TSB-A-13(22)S (7/25/2013) (sale of access to forms via software stored on company's website subject to sales tax as product is prewritten software). But see Matter of SunGard Securities Finance LLC, 2014 WL 581045 (N.Y. Div. Tax. App. 2/6/2014), aff'd, 2015 WL 1382843 (N.Y. Tax. App. Trib. 3/16/2015) (Smart Loan service determined to be exempt information service).

Software as a Service (SaaS)

- **True Object/Primary Purpose Test**

- Substantial use of software by the customer
- The level of taxable to nontaxable elements included in a bundled offering (tests include: separately-stated, *de minimis* and predominant value of sale) – separate charge for software
- The automated functioning of tasks performed by the product offering
- The performance of tasks sought by the customer from the product offering and the role of the seller's software in performing such tasks
- The intervention in the product offering by seller's personnel or lack thereof
- Massachusetts: Compare Mass. Dept. of Revenue Ruling 14-4 (5/29/2014) (online training applications treated as nontaxable database access services), and Mass. Dept. of Revenue Ruling 12-6 (5/21/2012) (hosting of customer newsletters on provider's website treated as taxable license of software)

Software as a Service (SaaS)

- **Taxable enumerated service**
 - **Computer and/or data processing service**
 - Connecticut: DRS Legal Ruling 93-1, DRS Policy Statement 2006(8)
 - District of Columbia, Texas and Ohio
 - **Information service**
 - New York: TSB-A-14(3)S (1/27/2014); TSB-A-15(5)S (3/23/2015)
 - **Telecommunications service**
 - South Carolina: Revenue Ruling #03-5
 - **Digital automated services (Washington)**

Are Cloud Computing Services Considered “Telecom”?

- Typically not. Both the cloud provider and the customer purchase telecommunications service separately from their respective telecommunications providers.
- Examples:
 - Florida
 - Technical Assistance Advisement TAA 14A19-001, 3/13/2014
 - Illinois
 - General Information Letter No. ST 13-0074-GIL, 11/26/2013
 - Tennessee
 - Tenn. Code Ann. §67-6-102 (92)(B)
 - Virginia
 - Virginia Code §58.1-609.5(1)

Sourcing of Sales

- **Generally, sourced to the location where the customer “uses” the services**
- **Many states source service-based transactions subject to the same hierarchy as all other retail sales (SSTA)**
 - **Business location of customer**
 - **Place of receipt**
 - **Address from sale (e.g., credit card billing address)**
 - **Origin sourcing**

Sourcing of Sales – MPU Sourcing

Multiple Point of Use Sourcing

- State statutes and regulations often do not provide a specific approach that is to be used. Rather, a “range” of acceptable answers are the norm. For example:
 - The taxable amount is determined by the number of users in this state compared to users everywhere.
- Taxpayers and tax authorities are working together to use sensible approaches that provide a reasonable approximation of where services are being received.
 - Multiple points of use or exemption certificates (e.g., 830 CMR 64H.1.3(c)(15))

Cloud Computing Analysis

- **Identify jurisdictions involved**
 - Location of provider
 - Location of users (consider benefit received locations)
 - Sales tax nexus study
- **Factual records review (e.g., agreements, website information, etc.)**
- **Analyze substance of transaction (true object / primary purpose)**
- **Review applicable taxability and sourcing rules**
- **Compliance measures (including documentation)**

Software as a Service (SaaS)

- **Historical positions that various states have held:**
 - **Several states tax electronic access of software (as opposed to actual *delivery*).**
 - **For example, according to Utah Information Publication No. 64, license fees for remotely accessed prewritten software are taxable if the purchased software is used in Utah. See also Utah Private Letter Rulings No. 10-011 (2/24/2012) and 13-003 (12/4/2013).**
 - **Buyer may provide the seller a reasonable and consistent method for allocating the transaction between multiple usage locations; if so, the seller must source the transaction to those locations.**
 - **This type of “allocation”, as opposed to a true MPU exemption, places the burden on the seller to allocate a single transaction to multiple jurisdictions, which is typically very challenging for sellers’ billing systems to handle.**

Software as a Service (SaaS)

- **Pennsylvania**

- In Legal Letter Ruling No. SUT-05-033 (Dec. 19, 2005), an out-of-state taxpayer's web based tax services offering access to databases of exemption documents and processing services for sales tax returns were found to be nontaxable.
- In Legal Letter Ruling No. SUT-10-005 (Nov. 8, 2010), the taxpayer sold web-based services that enabled customers to conduct online meetings and access computers remotely. The service was determined to be nontaxable because customers accessed the service through the Internet and the computer infrastructure supporting the service was not located in Pennsylvania.
- In Legal Letter Ruling No. SUT-12-001 (May 31, 2012), the Office of Chief Counsel concludes that, in light of recent case law and technological advances, the charge for electronically accessing taxable software is taxable. Counsel also appeared to clarify the Department's position on the sourcing of a sale of remotely accessed taxable software. While the 2010 ruling determined that a taxable sale of software accessible via the web was sourced to the location of the server, this more recent ruling indicates that a taxable sale of software was sourced to the end user's location.

Software as a Service (SaaS)

- **Connecticut**

- Connecticut has a broad based tax on computer and data processing services. See Legal Ruling No. 93-1 and Connecticut Policy Statement No. 2006(8) for more information (as amended by Conn. Pub. Act No. 15-244, §75, as further amended by Conn. Pub. Act No. 15-5 (June Spec. Sess.), §§133 and 516).

- **Indiana**

- Indiana Information Bulletin #8 (11/2011) (prewritten software is subject to tax when accessed electronically via the Internet)
- Indiana Revenue Letter of Findings: 04-20120426 (2/27/2013).

- **Massachusetts**

- Mass. Dept. of Revenue Letter Ruling 12-8 (11/13/2013) (cloud computing)
- Mass. Dept. of Revenue Letter Ruling 11-4 (4/12/2011); 830 CMR 64H.1.3 (14)(a) (charges for access or use of software on a remote server are generally subject to tax unless object of transaction is acquiring other good or service)

Software as a Service (SaaS)

- **New York**

- TSB-A-13 (22)S (7/25/2013) (sales of access to forms via software stored on company's website subject to sales tax as product is prewritten software).
- See *Matter of SunGard Securities Finance LLC*

- **Rhode Island**

- R.I. Reg. SU 11-25 (Rule 7(3))

- **Vermont**

- Legislation effective July 1, 2015, provides that charges for the right to access remotely prewritten software shall not be considered charges for tangible personal property under 32 V.S.A. §9701(7). Act 51, Section G.8. (Prewritten software in other forms, including download, remain taxable.)

Software as a Service (SaaS)

- **Unique result in South Carolina:**
 - Generally, software delivered via electronic means is not subject to tax.
 - However, in contrast to most other states, the SC Department of Revenue presumes that charges by an Application Service Provider (“ASP”) that allows a customer to access the ASP website and use software on that website are subject to tax as a communications service.
 - The DOR has equated ASP transactions to “Database Access Transmissions,” which were found to be taxable in Revenue Ruling #89-14. See Revenue Rulings #06-8 and #03-5.

Software as a Service (SaaS)

- **Historical positions that various states have held:**
 - **Michigan**
 - *Auto-Owners Insurance Company v. Dep't of Treasury*
 - *Thomson Reuters Inc. v. Department of Treasury, 2014 Mich. App. LEXIS 836 (5/13/2014)*
 - **Rental/lease classification jurisdictions**
 - Arizona (ALJFIN ALJ Decision No. 14C-2014001975-REV)
 - City of Chicago
 - City of Boulder (*Ball Aerospace & Tech Corp. v. Boulder, 2012 COA 153 (Colo. Ct. App. 9/13/2012)*)

Digital Goods

Streamlined Sales Tax Definition:

- Obtained by the purchaser by means other than tangible storage media:
 - “Digital Audio-Visual Works” a series of related images which , when shown in succession, impart an impression of motion, together with accompanying sounds, if any
 - “Digital Audio Works” works that result from the fixation of a series of musical, spoken, or other sounds, including ring tones and
 - “Digital Books” works that are generally recognized in the ordinary and usual sense as “books”
- Example:
 - A consumer purchases a book online that will be accessed via an e-reading device.

Digital Goods

- **Some states tax digital goods as though they were tangible personal property (e.g., Idaho, Texas)**
- **Other states do not tax digital goods (e.g., Georgia)**
- **Connecticut has a broad definition of computer and data processing services (“CDP”), and digital goods are taxed at the CDP rate.**

Digital Goods vs. Digital Streaming Services

- **Digital Goods** are downloaded and the purchaser retains the right to use them.
- **Streaming Services** provide content at the time of the service and the user typically does not retain rights to the content.

Example:

- A consumer pays a fee each month for the privilege of streaming movies from a content provider.

Digital Goods vs. Digital Streaming Services

- **Alabama**
 - On June 11, 2015 Alabama DOR amended Administrative Rule 810-6-5-.09 to extend Alabama's rental tax to streaming video or audio effective October 1, 2015.
 - Would include “digital transmissions” such as “on demand” movies, streaming video, streaming audio and similar programs.
 - This administrative amendment was retracted on July 7, 2015 due to opposition from state legislators and business advocates.

Digital Goods vs. Digital Streaming Services

- **Idaho**
 - **Effective April 1, 2015, H.B.209 amended Idaho's statute on digital goods to clarify that streaming services are not subject to tax.**
 - **If the right to use the content is temporary (i.e., streaming), sales and use tax does not apply.**
 - **However, if the right to use the content is permanent (i.e., downloaded and stored), then the sale is considered the sale of digital goods, and sales and use tax applies.**

Digital Goods vs. Digital Streaming Services

- **New York**
 - Issued TSB-A-15(25)S on June 3, 2015, clarifying that the sale of video game software downloaded to a customer's computer, remote access of video game software, and the sale of various point or subscription cards that are redeemed for access to third-party computer games or access to in-game content are all subject to New York sales and use tax as tangible personal property.
 - The TSB also provides guidance regarding sourcing of these sales.

Digital Goods vs. Digital Streaming Services

- **Florida**
 - In Technical Assistance Advisement No. 14A19-005, issued on December 18, 2014, Florida clarified that sales and use tax does not apply to sales and rentals of digital video content.
 - However, the *rental* of such video content is a video service subject to Florida's communications services tax.
 - The purchase of downloaded content that is permanently stored in the customer's online library is a non-taxable information service.

How is the Type of Product or Service Determined

- Two different vendors may classify their nearly-identical service offerings differently.
- What does the service entail?
 - Is software involved? If so, is it open source?
 - Is software the true object of the transaction or merely incidental?
 - Are other services provided?
- Understand legal agreement, intent of the parties, and invoice presentation

Case Study – City of Chicago

Background

- **Chicago imposes a Personal Property Lease Transaction Tax on:**
 1. the lease or rental in the city of personal property, and
 2. the privilege of using in the city personal property that is leased or rented outside the city.
- **Personal Property Lease Transaction** is defined as “any transfer of the possession or use of personal property, *but not title or ownership*, to a user for consideration” (emphasis added).

The terms ‘lease’ or ‘rental’ include a nonpossessory lease, which is defined as “a lease or rental wherein use but not possession of the personal property is transferred and includes, but is not limited to, leased time on or use of ... computers, computer software, ... or data processing equipment.”

Case Study – City of Chicago

Background

- Illinois imposes a retailers' occupation tax (sales tax) on the retail sale of tangible personal property, including computer software.

Case Study – City of Chicago

Background

- Regulations provide that a license of software is not a taxable retail sale if the following five - part test is satisfied:
 1. the license is evidenced by a written agreement signed by the licensor and the customer
 2. the license restricts the customer's duplication and use of the software
 3. the license prohibits the customer from licensing, sublicensing, or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor
 4. the licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or of permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury, by the licensor, and
 5. the customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license , without being set forth in the license agreement.

Case Study – City of Chicago

Personal Property Lease Transaction Tax Ruling #5

- Ruling #5 addressed the taxability of computer software.
- Prior to amendment the ruling generally provided that the difference between a taxable lease and a non-taxable sale was determined by the following characteristics of the transaction:
 - Taxable **lease** occurs when use or possession is transferred for consideration. This includes all agreements for use or possession, including license agreements.
 - Non-taxable **sale** occurs if title or ownership passes in an agreement.
 - A license for indefinite use when the software does not have to be returned is considered a sale because ownership has transferred.

Case Study – City of Chicago

Personal Property Lease Transaction Tax Amended Ruling #5

- Effective September 1, 2013, the revised Ruling #5 provided that the transfer of software that meets the Illinois five - part test (and is therefore not a taxable retail sale for state purposes) will be subject to Chicago's Personal Property Lease Transaction Tax.
- Ruling #5 generally ensures that a taxpayer's transfer or use of software in Chicago will either be taxed as an Illinois sale or taxed as a Chicago lease and that perpetual licensees previously exempt from Chicago's Lease Transaction Tax would become subject to tax.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

- Provides guidance on the taxability of cloud computing, software, and related products:
- Obtaining access to a provider's (lessor's) computer and using the computer and its software to input, modify or retrieve data or information, without the intervention of the provider's personnel, is a taxable nonpossessory computer lease.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

- Other examples of taxable transactions include:
 - performing legal research or similar online database searches
 - obtaining consumer credit reports
 - obtaining real estate listings and prices, car prices, stock prices, economic statistics, weather statistics, job listings, resumes, company profiles, consumer profiles, marketing data, and similar information or data that has been compiled, entered and stored on the provider's computer
 - performing functions such as word processing, calculations, data processing, tax preparation, spreadsheet preparation, presentations and other applications available to a customer through access to a provider's computer and its software (i.e., cloud computing, cloud services, hosted environment, Software as a Service, Platform as a Service, and Infrastructure as a Service).

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

Nontaxable transactions:

- Charges for services, such as a report documenting the provider’s own observations, opinions, or ideas are not subject to the Lease Tax even if the report is accessed electronically.
- Charges for creating a database are nontaxable service charges.
- Charges for storage of data on the provider’s computer equipment are not subject to Lease Tax if the provider’s computer is outside of the city and the charges are solely for storage.
 - However, subsequent charges for *access* to stored data will be subject to the Lease Tax if accessed from within Chicago.

Note: Entertainment materials such as books, musical and other sound recordings, feature length and episodic films are not “data or information” as those terms are used in the definition of a “nonpossessory computer lease”.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

Lease Transaction Tax Exemption 11 exempts nonpossessory computer leases where

1. the customer's use or control of the provider's computer is *de minimis* **and**
2. the related charge is predominantly for information transferred to the customer rather than for the customer's use or control of the computer.

A transaction must satisfy both prongs of the exemption to qualify; therefore, any transaction involving more than *de minimis* use of the provider's computer will result in a taxable transaction.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

Examples of transactions qualifying for the exemption:

- Access to information or data that is entirely passive (i.e., without any interactive use), such as streaming data, or
- Access to materials that are primarily proprietary, such as copyrighted newspapers, newsletters, or magazines.

Exemption 11 has created uncertainty for many sellers and users of online products and services as the distinction between taxable computer use and nontaxable information services has become blurred with the evolution of software delivery and the provision of information.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

- Sourcing
 - Nonpossessory computer leases are sourced to the location of the terminal or other device by which a user accesses the provider's computer (e.g., user's personal computer, mobile device).
 - Lease Tax will apply to customers whose residential street address or primary business address is in Chicago, as reflected by their credit card, billing address, zip code, or other reliable information. The application of these provisions attempt to identify the location of primary use for a given user.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

- Apportionment

- In Ruling #12, the Department states that where a customer has employees or other individuals using a provider's computer from both within and without Chicago for a single charge, that charge should be apportioned for purposes of determining the Lease Tax base. All use of each individual will be deemed to take place at that individual's principal office location.
- Apportionment is based on the individuals assigned an access code, seat, license, or other ability to use the provider's computer.
- If a provider has information to indicate that some of its customer's use will take place in Chicago but no information of its own that allows it to perform a reasonable apportionment between the customer's Chicago use and non-Chicago use, then the provider may rely on actual data or estimates provided by the customer.
- If the customer does not supply actual data or estimates, the provider should collect tax based on the assumption that all use takes place in Chicago.
- Under certain limited circumstances, a provider may be relieved from the obligation to collect the tax if the customer is registered to pay lease tax and will pay the tax directly to the Department.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

- **Effective Date**

The effective date of the ruling is July 1, 2015. However, the Department originally limited the effect of the ruling to periods on and after September 1, 2015, in order to allow affected businesses time to make the required system changes.

Case Study – City of Chicago

Personal Property Lease Transaction

Tax Ruling #12 – 2015

- **Ruling #12 was issued June 13, 2015. On June 30th the Department issued the following notice:**

NOTE: In response to numerous requests from providers and customers, the Department is extending the effective date of Lease Tax Ruling #12 from September 1, 2015 to January 1, 2016. The extension will allow businesses additional time to have questions answered and to make any necessary changes to their billing systems or other procedures. The City will use the additional time to complete its consideration of possible ordinance changes designed to address some of the concerns that have been raised by various Chicago businesses about the effect of the lease tax on their operations. Any such changes would require City Council approval and would likely coincide with the new effective date of the ruling. In addition, the Department may issue an information bulletin providing further guidance as to specific questions that have been asked since the publication of Ruling #12.

Case Study – City of Chicago

Amusement Tax Ruling #5

- **Background**

The amusement tax applies to charges for the privilege to witness, view or participate in an amusement.

- **Ruling #5**

Charges paid for amusements delivered to a patron in the City are subject to the amusement tax, including:

- Watching electronically delivered television shows, movies or videos;
- Listening to electronically delivered music; and
- Participating in games, on - line or otherwise.

Case Study – City of Chicago

Amusement Tax Ruling #5

- **Ruling #5 (cont.)**
 - The customer will normally receive the provider’s electronic communications at a television, radio, computer, tablet, cell phone or other device belonging to the customer. Providers who receive charges for electronically delivered amusements are owners or operators and are required to collect the City’s amusement tax from their Chicago customers.
 - The amusement tax does not apply to *sales* of shows, movies, videos, music or games effectuated by “permanent” download. It applies only to *rentals* accomplished by streaming or a “temporary” download.
 - The charges paid for such rentals may be subscription fees, per-event fees or otherwise.

Recent Developments

- **Arizona**

- In ALJ decision No. 14C-201400197S-REV, the taxpayer's online research services were found to be subject to TPT under rental classification.
- The Department argued that Petitioner's research and data content was TPP, because "each customer perceives the research and data content through the customer's sense of sight."
- The manner of access, requiring each subscribing customer to have a user name and a password, demonstrates that each subscribing customer has an "exclusive" use of Petitioner's website and the subscribed-to research and data content.

Recent Developments

- **Georgia**
 - In Letter Ruling SUT No. 2014-02-20-01, the Department reiterated their longstanding position that electronically accessed software is not subject to tax.
 - The taxpayer's "cloud subscription service" was not found to be either an enumerated service or the delivery of TPP.

Recent Developments

- **New York**
 - In *Matter of SunGard Securities Finance LLC*, an administrative law judge ruled that SunGard's "Smart Loan" offering was an information service and not the sale of prewritten software.
 - Additionally, the information service was personal and individual in nature and therefore was an exempt information service.
 - It was determined that SunGard used the proprietary software internally in its provision of the information service to its customers.

Recent Developments

- **New York**

- **Advisory Opinion TSB-A-15(2)S was issued May 13, 2015 and found the taxpayer's IaaS offering nontaxable.**
- **The state applied a true object test, and found that although access to prewritten operating system software was provided as part of the IaaS offering, the taxpayer's customers did not procure the service in order to gain access to the software.**
- **Thus, the transfer of the right to use the operating system software is only an incidental part of the service.**

Recent Developments

- **Tennessee**

- Tennessee imposes sales tax on the retail sale, licensing or use of computer software in Tennessee, regardless of delivery method.
- H.B. 644, known as the Revenue Modernization Act, is effective July 1, 2015, modifies the “use of computer software” to include “access and use of software that remains in the possession of the dealer who provides the software or in possession of a third party on behalf of the dealer.”
- Expands the existing provisions regarding the taxation of digital products to include “video game digital products.”
- Also permits the dealer to allocate to Tennessee a percentage of the sales price based on the percentage of users in the state.

Recent Developments

- **Utah**

- In Utah State Tax Commission Appeal 12-2455, a backup storage provider's fee was found taxable due to a mandatory software component. The fee for the software was not separately stated.
- The Commission appeared to agree that “the object of the transaction was really to provide a service, that being to preserve and protect the customer's data and that the software was merely incidental to that service.”
- However, it appears that the taxpayer did not argue this fact and thus the Commission had to agree with the Division of Taxation.

Questions?