

**Baker
McKenzie.**

SALT Savvy: Coast-to-Coast Updates

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Agenda

SALT Savvy: Coast-to-Coast Updates

- 1. Practical Realities of Hearings and Conferences in 2020**
 - 2. New and Ongoing Litigation**
 - 3. MTC Workgroup on P.L. 86-272**
 - 4. Marketplace Facilitator Updates**
 - 5. Legislative Updates**
 - 6. Taxpayer Win in Michigan**
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Practical Realities of Hearings in 2020

Hearings and Conferences in 2020

States Are Moving to Virtual Meetings via Phone or Internet

- Operating in a WFH environment has changed things
- States have begun holding formal and informal hearings via phone and video
- Fundamental changes to procedures and practice of SALT hearings nationwide

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New and Ongoing Litigation

Instacart – D.C. Litigation

District AG's Office Has Alleged Online Grocery Platform Defrauded Consumers

- D.C. filed a lawsuit against grocery delivery company:
 - D.C. alleges service fees and delivery fees should have been taxed
 - D.C. also alleges Instacart deceived customers by keeping service fees

- Brought by AG and not OTR

Employee vs. Independent Contractor

- CA History: *Dynamex*, AB5 and upcoming Proposition 22
- Uber and Lyft Cases (S.F. Superior Court)
 - Companies must treat drivers as employees
 - Los Angeles, San Francisco, and San Diego all sued the companies to treat drivers as employees and collect/remit payroll taxes
- Effect on companies outside the “gig economy”?

Streaming Services Taken to Court

Municipal Governments Asserting Franchise, or Other Fees

- Municipal governments allege that major streaming services must pay utility franchise fees or other, similar video service provider fees.
 - Currently affected streaming services: Netflix, Hulu, Disney+, DirectTV, and Dish Network
 - Cases filed and pending in Indiana, Missouri, and Texas.
 - Traditional cable companies are subject to these municipal taxes, but are losing subscribers. Municipalities have seen declining revenue.
- Indianapolis, Evansville, and Valparaiso filed class action suit seeking the collection of franchise fees.
 - Ind. Code 8-1-34-1 *et seq.* requires persons offering “video service” in Indiana to apply for a franchise from the Indiana Utility Regulatory Commission and pay a franchise fee to municipalities.
 - “Video service” means “(1) the transmission to subscribers of video programming . . . : (A) through facilities located at least in part in a public right-of-way; and (B) without regard to the technology used to deliver the video programming . . . and (2) any subscriber interaction required for the selection or use of the video programming[.]”

Streaming Services Taken to Court (cont.)

Municipal Governments Asserting Franchise, or Other Fees

- Other municipalities have begun aggressively pursuing revenue through application of existing statutes to streaming services.
- Missouri class action suit filed in 2018 on behalf of up to 640 municipal units in Missouri is still active.
 - Alleges that streaming services are “Video Service Providers” responsible for collecting a 5% tax on gross sales of subscriptions.
- Recent Evanston, IL, entertainment tax on streaming services adopted which was modelled on Chicago’s.
 - Like Chicago, Evanston purports to impose it’s 7% “Amusement Tax” on streaming services and their subscribers.

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MTC Workgroup P.L. 86-272

Public Law 86-272 Work Group: Background

- November 2018: MTC's Uniformity Committee established the Work Group, purportedly to "modernize" the MTC's existing guidance on the application of P.L. 86-272, which has not formally been updated since July 27, 2001.
- Stated scope of project: "to consider how Public Law 86-272 applies to modern business activities."
- Work Group drafted a public statement on application of P.L. 86-272.
- Statement "serves to inform taxpayers the position that states will take when applying the statute to particular activities."

Public Law 86-272 Work Group: Prohibited Activities

- Guidance included a number of activities conducted over the Internet that would eliminate 86-272 protections:
 - Providing a post-sale electronic chat function on the seller's website;
 - Soliciting and receiving applications for branded credit cards via the website;
 - Inviting and enabling viewers to apply for non-sales positions with the business;
 - Placing Internet "cookies" onto the computers or other electronic devices of in-state customers (unless such cookies gather customer information that is only used for purposes entirely ancillary to the solicitation of orders for tangible personal property, e.g., to remember items that customers have placed in their shopping cart during a current web session);
 - Offering extended warranty contracts or streaming services via the website.
 - Pretty much anything else that goes above and beyond the static listing of products and Q&As.

Public Law 86-272 Work Group: Prohibited Activities

- Work Group met by telephone 23 times between February 2019 & February 2020.
- On August 5, 2020, Work Group held public hearing.
- Numerous comments received by members of industry, advocacy groups, academia.
- Highlights of comments:
 - Inconsistent with purpose of Congress – goes beyond jurisdiction.
 - Eviscerates intent of P.L. 86-272.
 - Sweeping changes effectively make P.L. 86-272 a nullity.
 - Telephone example.
- Moving forward – Period for comment open until September 4.
- Report will be made with recommendations.

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Marketplace Facilitator Updates

Tennessee Marketplace Facilitator Law

- SB2182 signed on April 1, 2020.
 - Marketplace facilitator law effective October 1, 2020.
 - Facilitators of in-state registered sellers are able to apply for a waiver.
- New SB1778 signed into law on July 22 – applies to “short-term rental unit marketplaces.”
 - Effective January 1, 2021.
 - Applies only to short-term rentals (not hotels/motels).
- Interplay between marketplace facilitator and short-term rental unit marketplace laws?

South Carolina COVID-19 Surcharge Update

- S.C. Information Letter 20-23 (Aug. 5, 2020).
 - Addresses taxability of “COVID-19 surcharges” charged by restaurants and other retailers.
 - Included in measure of “gross proceeds of sales.”
 - Required to be collected and remitted by marketplace facilitators.
 - Example: Food delivery platform.
 - Importance of marketplace facilitators keeping up to date with COVID-19-related changes.

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Legislative Updates

Legislative/Regulatory Activity

- California corporate disclosure bill
- California's failed attempts at
 - Increased personal income tax and
 - wealth tax
- CARES Act Conformity
- Upcoming Local Ballot Measures:
 - San Francisco Business Tax Reform Ballot Measure (eliminate payroll tax, increase GRT, authorize spending of measures currently in litigation)
- Payroll taxes (Seattle law; Portland ballot measure)

U.S. Senate Coronavirus Relief Bill

- Senate Coronavirus relief bill includes the Remote and Mobile Worker Relief Act of 2020 (S. 3995)
 - Provides an annual 30-day safe harbor for non-residents working in any state
 - Prevents taxation on individuals and withholding requirements on employer
- Additional provisions specific to COVID-19 “covered period”
 - Threshold extended to 90 days
 - Covers localities
 - No nexus on employer
- Bill would exempt professional athletes, entertainers, and other highly-compensated public figures

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Taxpayer Win in Michigan

TOMRA of North America v. Department of Treasury

Michigan Supreme Court – Industrial Processing Exemption

- Taxpayer sold reverse-vending machines (and various replacement parts), which collect and sort plastic, aluminum, and glass for recycling.
- The taxpayer claimed the Michigan “industrial processing” exemption:
 - “Industrial process’ means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimate sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.”
- Primary issue: Interpretation of “industrial processing” for exemptions under two subsections:
 - General definition under MCL 205.94o(7)(A) has temporal limitation
 - However, specific definition under MCL 205.94o(3) does not, and specifically identified machine activity as exempt
- Taxpayer argued temporal limitations didn’t matter, because the activities machines engaged in were specifically identified in subsection (3).
- Court agreed, finding specific trumped the general, and statute must be read according to its plain wording.

TOMRA of North America v. Department of Treasury (cont.)

Michigan Supreme Court – Industrial Processing Exemption

- Secondary Issue: Reversal of the long-held maxim that tax exemptions are to be strictly construed against the taxpayer.
 - Court rejects this oft-cited strict construction approach.
 - Maxim was found to be judicial creation in the interest of policy, not statutory interpretation.
 - Arose from Jacksonian-era concerns regarding narrow groups receiving different tax treatment under the law.
- According to the holding, tax exemptions should be applied according to the plain statutory language at question.
- Strict construction of a tax exemption against a taxpayer is a statutory interpretation canon of last resort.
- It is to be used only when the language of the exemption is ambiguous.

Questions

The image features a dark blue background with a white speech bubble shape. The word "Questions" is written in a bold, dark blue font inside the white bubble. The background has a subtle pattern of small, light blue dots, resembling a starry night sky or a textured surface.

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