On November 17, 2016, the Ohio Supreme Court issued its much anticipated decision in three consolidated tax cases, upholding the constitutionality of the bright-line factor presence nexus standard for the state’s Commercial Activity Tax (CAT). In reaching its conclusion, the court held that the physical presence nexus requirement set forth in Quill does not apply to business-privilege taxes, such as the CAT, “as long as the privilege tax is imposed with an adequate quantitative standard that ensures that the taxpayer's nexus with the state is substantial.” Nevertheless, the court’s opinion did seem to acknowledge that Quill’s physical presence standard is still applicable for sales and use taxes. As such, this decision would appear to provide support for businesses wishing to challenge the new sales and use tax economic nexus standards enacted in Alabama, South Dakota, and elsewhere, at least until Congress or the US Supreme Court decides to revisit the issue.


Although the tax at issue in the cases was not a sales or use tax, the case is widely viewed as having the potential to allow the US Supreme Court to revisit its 1992 Quill decision, which formalized the physical

The Ernst & Young LLP Sales and Use Tax Quarterly Update provides a summary of the major legislative, administrative and judicial sales and use tax developments for the first quarter of 2017.

Will a non-sales and use tax case be the vehicle for overturning Quill?

On November 17, 2016, the Ohio Supreme Court issued its much anticipated decision in three consolidated tax cases, upholding the constitutionality of the bright-line factor presence nexus standard for the state’s Commercial Activity Tax (CAT). In reaching its conclusion, the court held that the physical presence nexus requirement set forth in Quill does not apply to business-privilege taxes, such as the CAT, “as long as the privilege tax is imposed with an adequate quantitative standard that ensures that the taxpayer’s nexus with the state is substantial.” Nevertheless, the court’s opinion did seem to acknowledge that Quill’s physical presence standard is still applicable for sales and use taxes. As such, this decision would appear to provide support for businesses wishing to challenge the new sales and use tax economic nexus standards enacted in Alabama, South Dakota, and elsewhere, at least until Congress or the US Supreme Court decides to revisit the issue. Crutchfield, Corp. v. Testa, Slip Op. No. 2016-Ohio-7760 (Ohio S. Ct. November 17, 2016), Newegg, Inc. v. Testa, Slip Op. No. 2016-Ohio-7762 (Ohio S. Ct. November 17, 2016), and Mason Companies, Inc. v. Testa, Slip Op. No. 2016-Ohio-7768 (Ohio S. Ct. November 17, 2016).

Although the tax at issue in the cases was not a sales or use tax, the case is widely viewed as having the potential to allow the US Supreme Court to revisit its 1992 Quill decision, which formalized the physical
presence nexus doctrine. Specifically at issue in the case was whether the $500,000 sales-receipts threshold for the CAT “complies with the substantial-nexus requirement of the Complete Auto test.” In making its determination, the court applied a “before and after” analysis of Commerce Clause case law with its “pivot point” being Complete Auto Transit. The court also analyzed whether a physical presence was required to support the imposition of CAT, focusing on the applicability of Quill.

Ultimately, the court concluded that Quill’s holding that a physical presence is a necessary condition to imposing a tax obligation does not apply to a business-privilege tax such as the CAT, citing specific passages from that case that indicated the US Supreme Court had not articulated the same physical presence requirement for other types of taxes that it had articulated for sales and use taxes. The court observed that Complete Auto Transit and Jefferson Lines established that business-privilege taxes should be distinguished from transaction taxes, such as sales and use taxes, when applying the four-pronged Commerce Clause test articulated in Complete Auto. In the context of other gross receipts taxes, such as the Washington Business & Occupation (B&O) Tax, the court rejected the taxpayer’s reliance on Tyler Pipe, reasoning that while a taxpayer’s physical presence in a state is a “sufficient basis” for imposing a gross receipts tax, it is not a “necessary condition” to doing so. The court concluded that under the Commerce Clause a physical presence is not required to impose the Ohio CAT.

Two justices did dissent, arguing that there is no evidence that gross receipts taxes are “meaningfully different” from sales/use taxes for substantial nexus purposes. The dissent also viewed Tyler Pipe’s reliance on physical presence “more indicative of a requirement than an option,” noting that the physical presence requirement is grounded in the reasoning of the dormant Commerce Clause that is designed to prevent undue burdens on interstate commerce.

**Our observation:**

Although this case did not involve a sales or use tax, it is widely viewed as one of the more likely cases to get the issue before the US Supreme Court. It would seem likely that the taxpayers will appeal the decision. However, if accepted, a resolution is still some time off in the future. Given the apparent lack of urgency at the Congressional level to craft a legislative solution to the issue of nexus, it is increasingly likely that the fate of Quill will rest ultimately with the US Supreme Court. Justice Anthony Kennedy, in his concurring opinion in The Direct Marketing Assn. v. Brohl, already has stated that the decision may have been wrongly decided in 1992, and Justice Clarence Thomas has expressed a willingness to abandon the doctrine of stare decisis where appropriate; these are the two remaining members of the Quill Court, both of whom voted with the majority to formalize the physical presence doctrine. As such, if the Court were to revisit the issue, the continued viability of Quill is far from certain.

**Other recent developments**

**Nexus**

**Illinois:** An amended regulation (86 Ill. Admin. Code §150.201) provides that a retailer can rebut the presumption of nexus under Illinois’s click-through nexus provisions by maintaining documentation showing that persons with whom it has agreements have not engaged in solicitation activities on its behalf in Illinois that are sufficient to meet Constitutional nexus standards during the preceding four quarterly periods. The retailer must maintain documentation of retailer agreements that prohibit such solicitation activity, and must document the retailer’s annual certification by January 1 of each year, under penalty of perjury, that it has not engaged in any prohibited solicitation activities in Illinois at any time during the previous year. The term “solicitation” means a direct or indirect communication to a specific person or persons, including emails or text messages, done in a similar manner that is intended and calculated to incite a person or persons to purchase tangible personal property from a specific retailer or retailers; it does not mean or include advertising. The term “advertisement” is defined by the amended regulation as a written, verbal, pictorial or graphic announcement of goods or services for sale, employing leased or purchased space or time in print or electronic media, which is intended to communicate that information to the general public. Ill. Dept of Rev., amended 86 Ill. Admin. Code §150.201 (effective September 12, 2016).

**Nevada:** A recently adopted regulation (R137-15) provides guidance for remote retailers to collect and remit Nevada sales and use taxes. Under the regulation, the term “activity that is significantly associated with a retailer’s ability to establish or maintain a market in [Nevada] for the retailer’s products or services” is interpreted to include: (1) the soliciting of sales of goods in Nevada; (2) installing, assembling or repairing goods in Nevada; (3) constructing, installing, repairing or maintaining real property or tangible personal property located in Nevada; (4) delivering products into Nevada other than by mail or common carrier; (5) having an exhibit at a trade show to maintain or establish a market for products in Nevada (but is not to be construed to include mere attendance at trade shows in the state); (6) selling products online and having a brick and mortar store in Nevada that accepts returns of such online purchases; or (7) performing activities designed to establish or maintain customer relationships (e.g., meeting with customers, being available to provide services associated with a product or marketing information). The regulation includes guidance on how taxpayers can rebut the presumption of nexus under Nevada’s affiliate link and click-through nexus provisions. In regard to the click-through nexus provision, “commission or other consideration based upon the sale of tangible personal property” includes money based on the level of completed sales, cost per mille advertising, payment of a flat fee in exchange for a referral, payment of a fixed price in exchange for providing a referral link, or any other item in exchange for a referral. The regulation took effect November 2, 2016. Nev. Tax Commission, R137-15 (approved November 2, 2016).

**Tennessee:** Effective January 1, 2017, a new regulation (Rule 1320-05-01-.129) adopts an economic nexus standard for sales and use tax purposes. The new regulation will expire on July 1, 2017, if not approved by the legislature. Under the regulation, an out-of-state
dealer is deemed to have substantial nexus with Tennessee if the dealer engages in the regular or systematic solicitation of Tennessee consumers through any means, and makes sales exceeding $500,000 to Tennessee consumers during the previous 12-month period. The regulation requires out-of-state dealers meeting the threshold to register with the Tennessee Department of Revenue (Department) for sales and use tax purposes by March 1, 2017, and begin collecting and remitting tax to the Department by July 1, 2017. In a notice filed with the Secretary of State on October 3, 2016, the Department summarized and responded to the public comments it received to the proposed regulation released in June. Due to concerns over whether out-of-state dealers would be required to retroactively collect sales tax if they did not anticipate meeting the $500,000 threshold, but then met the threshold by calendar year’s end, the Department changed the rule to require dealers to register and prospectively collect and remit tax starting 3 months after the end of any 12-month period during which the dealer meets the threshold. The Department also acknowledged that the regulation may not be approved by the legislature and clarified that the collection requirement does not begin until July 1, 2017, but only if the legislature approves the regulation by that time. The Department noted that if the legislature does not take action, and the regulation is allowed to expire, no collection activity will be required.

**Virginia:** An out-of-state management company would establish nexus if it begins leasing portable buildings to Virginia customers. As a result, the company would be required to register with Virginia for the collection and remittance of all sales tax on taxable leases to Virginia customers, in lieu of individual investors who purchase the contract registering separately. The company would be required to file a monthly Form ST-8, Out-of-State Dealer’s Sales Tax Return, and Form ST-8A, Schedule of Local Sales and Use Taxes, allocating the local tax to localities in which the company places portable buildings. Va. Dept. of Taxn., Ruling of the Tax Commissioner No. 16-203 (October 17, 2016).

**Wyoming:** Proposed bill (HB 19) would adopt an economic nexus standard for sales and use tax purposes. Under the provision, a seller of tangible personal property (TPP), admissions or taxable services and who does not have physical presence in Wyoming would be required to remit the state’s sales tax if the seller meets either of the following requirements during the current calendar year: (1) the seller’s gross revenue from the sale of TPP, admissions or services delivered into the state exceeds $100,000; or (2) the seller sold TPP, admissions or services delivered into the state in 200 or more separate transactions. The revenue department would have the authority to bring an action to obtain a declaratory judgment that the seller has an obligation to remit sales tax. Upon filing of this action, the court would grant an injunction during the pendency of the action prohibiting the revenue department or any other state entity from enforcing the tax remittance obligation against any seller who is a party to the action. Any seller who voluntarily remits the sales tax would not be liable to any person who claims the sales tax has been over-collected if any provision of the bill is ultimately deemed unlawful. If enacted, the provisions of the bill would take immediate effect. These provisions would not apply to any tax liability arising prior to the bill’s effective date. HB 19 was introduced in the state legislature on December 8, 2016.

**Tax base**

**Illinois:** A large national bank is entitled to a refund of Retail Occupation Tax Act (ROTA) taxes attributable to the uncollected debts as a result of the assignments from retailers because the retailers’ assignments of the right to refund was not precluded or limited by statute. In reaching this conclusion, the Illinois Appellate Court (Court) reasoned that the assignment of the right to a ROTA tax refund does not violate public policy as unfair in allowing the bank to collect a tax refund where it has already been compensated through vendor discounts, cardholder charges, and interest payments, because the compensation the bank receives for its services has no bearing on whether the right to a tax refund is assignable, and it is not the province of the Court to police what is considered to be fair compensation for the bank’s services. Further, the Court found that any deficiency in the bank’s refund application or supporting documentation is moot because the Illinois Department of Revenue stipulated to the amount of ROTA taxes attributable to the uncollected debt. A case involving another financing company with similar facts was dismissed for lack of jurisdiction. Citibank, N.A. v. Ill. Dept. of Rev., 2016 IL App (1st) 133650 (Ill. App. Ct., 1st Jud. Dist., November 2, 2016).

**Missouri:** Frozen dinners sold to airline customers are taxed at 4% and do not qualify for the reduced 1% rate, because the dinners are not food for home consumption. Citing Wehrenberg as controlling, the Missouri Supreme Court (Court) explained that the context of transactions must be considered in determining whether the reduced rate applies, and the determining factor for a transaction is whether the items are intended for home consumption. Here, the frozen meals sold to customers were expected and intended to be eaten exclusively on the aircraft. In addition, the Court ruled that this finding does not violate the Missouri Constitution’s uniformity clause because the state reasonably distinguished between food that is sold “for home consumption” and food that is not. The Court noted that this finding is not limited to prospective application because it was not “unexpected” as a reasonable person would have expected the decision based on prior law, previous policy or regulation of the revenue department. Gate Gourmet, Inc. v. Mo. Dir. of Rev., No. SC95388 (Mo. S. Ct. October 4, 2016).

**Pennslyvania:** On December 19, 2016, the Philadelphia Court of Common Pleas upheld Philadelphia’s sugar-sweetened beverage tax (Soda Tax), which subsequently took effect on January 1, 2017. While the plaintiffs, including the American Beverage Association, have publicly stated they intend to appeal, Philadelphia city officials have said they intend to enforce the collection of the Soda Tax while litigation is ongoing. The Soda Tax is imposed on every registered distributor of sugar-sweetened beverages at a rate of 1.5 cents per fluid ounce of qualifying product to be sold at retail within Philadelphia. A registered distributor is defined as any person who sells sweetened beverages to a dealer that has registered with the Philadelphia Department of Revenue to collect the Soda Tax. The Soda Tax applies to the sale of any non-alcoholic beverage that lists as an ingredient any form of caloric sugar-based sweetener (including sucrose, glucose or high fructose corn syrup) or any form of artificial sugar substitute (including: stevia, aspartame, acesulfame potassium, sucralose and saccharin). It also applies to any syrups or concentrates listing such sweeteners as an ingredient. The tax is to be reported
and paid by the distributor on a monthly return to be filed with the Department no later than the 20th day of the month for the activity of the prior month. The first return, therefore, is due February 20, 2017, for qualifying sales during January 2017. Williams v. City of Philadelphia, No. 1452 (Philadelphia Ct. Common Pleas December 19, 2016).

**Exemptions and refunds**

**Iowa:** Amended regulations (amended Iowa Admin. Code §701-230.5, .14 through .22(423)) implement statutory modifications to sales and use tax exemptions primarily benefiting manufacturers and other persons engaged in processing (see 2016 Iowa Acts, HF 2433). The amendments exempt supplies and define replacement parts and supplies, and relate to exemption of sales of the following occurring on or after July 1, 2016: (1) gases used in the manufacturing process (no sales date specified); (2) computers, machinery, equipment, replacement parts, supplies, and materials used to construct or self-construct computers, machinery, equipment, replacement parts, and supplies used for certain manufacturing purposes; (3) the sale of property directly and primarily used in processing by a manufacturer; (4) the sale of property directly and primarily used by a manufacturer to maintain integrity or unique environmental conditions; (5) the sale of property directly and primarily used in R&D of new products or processes of processing; (6) the sale of computers used in processing or storage of data or information by an insurance company, financial institution, or commercial enterprise; (7) the sale of property directly and primarily used in recycling or reprocessing of waste products; (8) the sale of pollution-control equipment used by a manufacturer; (9) the sale of fuel or electricity used in exempt property; and (10) the sale of services for designing or installing new industrial machinery or equipment. Amendments to the previously proposed version of the regulations include: (1) an amendment to Iowa Admin. Code §701-230.14(2)(c) to explain that tables on which property is assembled on an assembly line may be exempt equipment when the tables are used for an exempt purpose; (2) an amendment to Iowa Admin. Code §701-230.14(2)(h) to include water used for cooling as a potentially exempt item when the cooling water is used for an exempt purpose; (3) an amendment to Iowa Admin. Code §701-230.14(4) to clarify a claimant’s responsibility to keep records to qualify for exemption; (4) an amendment to Iowa Admin. Code §701-230.15(4)(b) to explain that self-produced patterns may be exempt supplies; (5) an amendment to Iowa Admin. Code §701-230.16(3) to clarify that a cooling or heating system may qualify as exempt machinery used to maintain the environmental conditions necessary for other machinery and equipment directly and primarily used in processing by a manufacturer; and (6) expansion of Iowa Admin. Code §701-230.17(423) to add an exemption for prototype materials directly and primarily used in R&D of new products. The amended regulations take effect November 16, 2016. Iowa Dept. of Rev., amended Iowa Admin. Code §701-230.5, .14 through .22(423) (published October 12, 2016).

**Massachusetts:** Various items of pollution control equipment used in connection with the construction of an electric generating unit (e.g., a dry-low-NOx combustor system, selective catalytic reduction (SCR) system, ammonia injection skid, oxidation catalyst system, dilution air system for the SCR and oxidation catalyst systems, exhaust stack, and aqueous ammonia) are exempt from sales and use tax as machinery that is used directly and exclusively as part of the integrated and synchronized system that furnishes electricity to consumers through mains, lines or pipes. In addition, the aqueous ammonia is exempt from sales and use tax as a material, tool, or fuel that is consumed and used in the furnishing of electricity to consumers through mains, lines, or pipes, provided that its normal useful life is less than one year, or its cost is allowable as an ordinary and necessary business expense for federal income tax purposes. Mass. Dept. of Rev., Letter Ruling 16-2 (October 25, 2016).

**Michigan:** The Michigan Department of Treasury (Department) issued guidance to explain the use tax base for a manufacturer/contractor that affixes its product to the real estate of others and discuss the exemption from use tax available for tangible personal property purchased or manufactured by a contractor that is affixed to (and made a structural part of) real estate located in another state. Where a manufacturer/contractor either maintains an inventory of its product that is available for sale to others or makes its product available for sale to others by publication or price list, and affixes that product to Michigan real estate, the use tax base is the finished goods inventory value of the product. Where a manufacturer contractor does not maintain an inventory of its product available for sale to others or make its product available for sale to others by publication or price list, and affixes that product to Michigan real estate, the use tax base is the sum of the materials cost of the product and certain direct labor costs. Providing guidance on the expansion of the industrial processing exemption, a manufacturer/contractor may claim such exemption for tangible personal property used or consumed by the manufacturer/contractor for industrial processing in connection with its product so long as the product is either: (1) ultimately sold at retail or (2) affixed to (and becomes a structural part of) real estate located in another state. The industrial processing exemption is limited to the percentage of exempt use to total use determined by a reasonable formula or method approved by the Department. The guidance provides examples and answers to frequently asked questions, and applies to tax years beginning on or after January 1, 2005. Mich. Dept. of Treas., Rev. Admin. Bulletin 2016-24 (December 8, 2016) (replaces RAB 1993-5).

**New Jersey:** The Division of Taxation recently announced that, beginning January 1, 2017, qualified businesses located in five Urban Enterprise Zones (UEZs) are no longer allowed to collect sales tax at a reduced rate and will have to collect and remit sales tax at the state’s 6.875% uniform sales tax rate. The affected UEZs are: Bridgeton, Camden, Newark, Plainfield and Trenton. Accordingly, businesses located in these zones are no longer eligible for UEZ incentives or benefits including: 1) collecting sales and use tax at half the sales tax rate, 2) UEZ sales tax exemption certificates, 3) UEZ corporation business tax employees credit/investment tax credit and credit carryforward, and 4) sales and use tax exemption for natural gas and electricity purchased by certain manufacturers. Businesses located in the affected UEZs should have filed the December 2016 monthly UEZ return by January 20, 2017. Beginning January 1, 2017, businesses will be required to file a New Jersey Sales and Use tax return (ST-50) on a quarterly basis. Monthly remittance is required if a business collected more than $30,000 in sales tax in 2016 and the amount of sales tax collected for the month is greater than $500. Additionally, effective January 1, 2017, businesses will no longer be allowed to use the UEZ Exemption Certificate or the Contractor’s Exemption...
the Court found
of the requirements for finding that these services (e.g., software
determined that the company's cloud services offering satisfies all
(Department) applied the statutory service-person test, and
Indiana's sales and use tax because it is a statutorily enumerated
“cloud collaboration service offering” product is not subject to
Indiana:

Although the truck, truck trailer, or semitrailer may occasionally travel
outside Alabama, the receipts would not be subject to the lease tax
that the building could not be transformed by designating the
agreement as a “lease” in which the customers paid “rent.” The Court
noted that the legislature did not envision this kind of a lease as being
tax free and instead, to qualify for such a provision, the legislature
envisioned a party having sole continuous control over a building with
the legal rights that would go along with it, such as an apartment
(writ denied).

Louisiana: A facility’s provision, for a consideration, of a building and
its contents for athletic and recreational entertainment is subject to
sales and use tax because the use of the facility and its contents is a
nontaxable lease of an immovable. In reaching this conclusion, the
Louisiana Court of Appeal (Court) reasoned that since the facility
retained ultimate control of the building, the customers’ payments
to use the building could not be transformed by designating the
agreement as a “lease” in which the customers paid “rent.” The Court
noted that the legislature did not envision this kind of a lease as being
tax free and instead, to qualify for such a provision, the legislature
envisioned a party having sole continuous control over a building with
the legal rights that would go along with it, such as an apartment
(writ denied).

West Virginia: A transportation corporation that is required to pay
West Virginia’s motor fuel use tax is entitled to a credit for sales tax
paid to both other states and to the subdivisions of other states on
purchases of motor fuel in the respective jurisdictions. Under West
Virginia law, a credit is allowed for sales taxes paid to other states,
which offsets the use tax a fuel importer must pay under state law.
At issue is the scope of the sales tax credit and whether it is allowed
for sales taxes paid to cities, counties and localities of other states.
In holding the credit is allowed for both state and local sales taxes paid,
the West Virginia Supreme Court (Court) applied the Complete Auto
test and determined that both the use tax imposed and statutory sales
tax credit have substantial nexus with West Virginia and both are fairly
related to the services provided to the corporation by West Virginia
as well as to the corporation’s presence and activities in the state.
However, although the use tax is fairly apportioned as the use tax
charged to the corporation directly correlates to the fuel that it uses
for the miles it travels within West Virginia, the corresponding sales
tax credit is not fairly apportioned. Citing Wynne,7 the Court found
that the disallowance of the sales tax credit for sales tax imposed
by the subdivisions of other states would produce a total tax burden
on interstate commerce higher than a purely intrastate transaction
and, therefore, the sales tax credit violates the dormant Commerce
Clause. In addition, allowing the sales tax credit only for sales tax paid
to other states unfairly discriminates against interstate commerce.
November 16, 2016).
**Technology**

**Indiana:** An out-of-state company’s “cloud computing service with open source instances,” “cloud computing service with third party instances,” and remote storage products are all services enumerated by statute and, therefore, are not subject to Indiana’s sales and use tax. The cloud computing transactions that the company engages in, for both the cloud computing service with open source instances and with third party instances, do not involve transfers of any specified digital products, prewritten computer software, or other type of tangible personal property. In addition, the statutory service personnel test applies and the services are nontaxable because: (1) the company is primarily in the business of providing data storage and computing capacity, and not selling tangible personal property; (2) the software is for the purpose of enabling the company’s customers to test their own applications incident to the company’s computing resource service; (3) the company does not charge for the software and as such it would be considered as inconsequential compared to the overall service fee; and (4) the software fee was for the company to use, and thus the company did not have to pay sales tax when it was downloaded. Finally, these services are excluded from the definition of “telecommunication service.” The service is providing dynamically scalable and virtualized computing resources for its customers. Remote storage is a service because customers are not required to download any computer software in order to use the remote storage product, the company does not transfer any specified digital products or other type of tangible personal property as part of the remote storage product and does not retain any ownership of the items uploaded, and the company does not charge customers for software. Finally, the separately stated data transfer fee, charged in connection with a customer’s use of the remove storage service, is also not subject to sales and use tax because it is not transferred in conjunction with tangible personal property. Ind. Dept. of Rev., Revenue Ruling No. 2012-05ST (October 4, 2016).

**Massachusetts:** A corporation that sells computers and related products must collect sales tax on the entire sales price for the “single solution ... package” as reflected on the invoice or order acknowledgement sent to a customer, including charges for nontaxable services (e.g., service contracts, accidental damage contracts, and/or extended warranties), because the amounts paid for these nontaxable services were not separately stated on a customer’s invoice or order acknowledgement. Service contracts, accidental damage contracts, and extended warranties are generally not taxable; however, when these additional services are purchased as part of a retail sale of computer hardware, the additional services are considered “part of the sale” and any amounts charged for the additional services are subject to sales tax unless the separately stated charges are clearly stated on both the bill or invoice presented to the customer and the vendor’s books and records. The Massachusetts Department of Revenue based its ruling on the assumption that the value of the taxable components of the single solution package price (e.g., the computers, software) is not inconsequential (more than 10% of the value), in relation to the total amount charged by the corporation for the single solution package price. Mass. Dept. of Rev., Letter Ruling 16-3 (March 24, 2016, released November 22, 2016).

**Virginia:** The Internet Tax Freedom Act (ITFA) does not bar the imposition of communication sales tax on picture mail service because the service does not meet the definition of “internet access” under the ITFA as it does not give customers access to the internet. The service also is not incidental to the provision of internet access, and is not a type of e-mail or messaging described under the ITFA. Lastly, the communications sales and use tax was correctly assessed on the service since it is more in line with Virginia’s definition of picture messaging, which is not the same or a similar service as email or instant messaging service exempt under ITFA. Va. Dept. of Taxn., Ruling of the Comr. PD No. 16-195 (October 13, 2016).

**Controversy and compliance**

**Arizona:** Effective January 1, 2017, the Arizona Department of Revenue (Department) will be the single point of administration and collection of state, county and municipal transaction privilege tax (TPT). Taxpayers are to conduct all TPT-related activity with the Department, regardless of the business’ location. This transition begins with the January 2017 TPT return, which is filed in February 2017. The Department also reminded taxpayers that TPT license renewals are due January 1, 2017. Ariz. Dept. of Rev., TPT Changes and News (December 2016).

**Colorado:** The US Supreme Court will not review the 10th Circuit’s ruling in Direct Marketing Association, in which it held a Colorado statute that requires remote sellers lacking physical presence within the state to file an annual statement with the Colorado Department of Revenue showing the total amount paid for Colorado purchases during the preceding calendar year for each Colorado purchaser, does not violate the dormant Commerce Clause of the US Constitution. Direct Marketing Ass’n. v. Brohl, No. 12-1175 (10th Cir. February 22, 2016), cert. denied, Dkt. No. 16-267 (U.S. S. Ct. December 12, 2016).

**Georgia:** New regulation (Reg. 560-12-2-.21) regarding tax itemization requires retailers to add applicable sales and use taxes at the appropriate rate to the sales price unless the retailer absorbs the tax in compliance with Georgia law. The retailer can add the tax to the sales price by either separately itemizing the sales price and the tax or including the tax in the total charge. Retailers that include the sales tax in the total charge must provide written notification to each customer that the charge includes sales tax (except for sales made from a vending machine). Generally, retailers cannot advertise or directly or indirectly represent to the public that the retailer will absorb all or any part of sales and use tax, or that the retailer will relieve the purchaser of the payment of such taxes, unless (1) the retailer includes in the advertisement that any portion of the tax not paid by the purchaser will be remitted on behalf of the purchaser by the retailer, and (2) the retailer furnishes the purchaser with written notification that the retailer will be liable for and pay any tax the purchaser was relieved from paying. In addition, if the retailer advertises that any portion of the tax not paid by the purchaser will be remitted by the retailer on the purchaser’s behalf, the retailer is solely liable for and must pay that portion of the tax. The regulation, which includes explanatory examples, took effect on October 31, 2016. Ga. Dept. of Rev., Reg. 560-12-2-.21 (approved October 18, 2016).
New Jersey: An information technology solutions business’s (business) receipts for 2004 and the first three quarters of 2005 are not subject to sales tax regardless of a lack of breakdown of the invoices for taxable vs. nontaxable services, because at that time the tangible personal property being sold was prewritten computer software, and the law deeming prewritten computer software to be taxable tangible personal property did not take effect until October 1, 2005. For the remaining tax periods through 2010, the New Jersey Tax Court (Court) found that the business’s accountant’s recomputation of the auditor’s figures to distinguish between taxable and nontaxable goods and services did not overcome the presumptive correctness of the New Jersey Division of Taxation’s (Division) final determination. The Court reasoned that the accountant’s allocations were not supported by “any ascertainable facts” and “there were no supporting invoices or certifications from [the business’s] members or … clients.” Moreover, contracts provided as evidence showed there was no breakdown or itemization of the services being billed. The Court also rejected the business’s challenge of the use tax assessment for purchase of assets and for expenses, finding that since most of the invoices examined did not include a description of a markup, the accountant’s methodology of reducing the taxable purchases by applying a modified markup to the cost of goods sold computation cannot be sustained. Premier Netcomm Solutions, LLC v. NJ Div. of Taxn., No. 016307-2012 (NJ Tax Ct. October 25, 2016) (Unpublished).

Puerto Rico: Puerto Rico’s Treasury Department issued guidance (Circular Letter (CL) 16-12 and CL 16-13) on the new electronic unified system, SURI, which merchants will use to validate their registrations and file monthly sales and use tax returns. Beginning October 31, 2016, all new merchants must register with SURI and request a Merchant Registration Certificate. Once they complete the registration, they should print their certificates and display them in a place visible to the general public. If they do business in various localities, they should identify each locality in which they are registered.

Endnotes
5. No. 12-1175 (10th Cir. Feb. 22, 2016), cert. denied (December 12, 2016).
6. Wehrenberg, Inc. v. Director of Revenue, 352 S.W.3d 366 (Mo. 2011).
For more information about any of the developments discussed in this newsletter, please contact one of the following Ernst & Young LLP Sales and Use Tax practice professionals.

**National resources:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>City, State</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brad Withrow</td>
<td>National Director</td>
<td>Nashville, TN</td>
<td>+1 615 252 2050</td>
</tr>
<tr>
<td>Megan Mahony</td>
<td></td>
<td>Boston, MA</td>
<td>+1 617 585 1822</td>
</tr>
<tr>
<td>Michael Wasser</td>
<td></td>
<td>Boston, MA</td>
<td>+1 802 272 4969</td>
</tr>
<tr>
<td>Faranak Naghavi</td>
<td>National Director</td>
<td>Washington, DC</td>
<td>+1 202 327 8033</td>
</tr>
<tr>
<td>Karl Nicolas</td>
<td></td>
<td>Washington, DC</td>
<td>+1 202 327 6585</td>
</tr>
<tr>
<td>Gabriel Soto</td>
<td></td>
<td>Washington, DC</td>
<td>+1 202 327 7164</td>
</tr>
</tbody>
</table>

**Regional resources:**

<table>
<thead>
<tr>
<th>Name</th>
<th>City, State</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rick Bolt</td>
<td>Chicago, IL</td>
<td>+1 312 879 4321</td>
</tr>
<tr>
<td>Kevin Boyer</td>
<td>Kansas City, MO</td>
<td>+1 816 480 5052</td>
</tr>
<tr>
<td>Joe Imbarlina</td>
<td>Philadelphia, PA</td>
<td>+1 215 841 2603</td>
</tr>
<tr>
<td>Lazar Kajtazi</td>
<td>New York, NY — Financial Services</td>
<td>+1 212 773 2016</td>
</tr>
<tr>
<td>Laura Elder</td>
<td>Boca Raton, FL</td>
<td>+1 561 955 8287</td>
</tr>
<tr>
<td>David Sniezko</td>
<td>Los Angeles, CA</td>
<td>+1 213 977 7734</td>
</tr>
<tr>
<td>Mark Stefan</td>
<td>San Jose, CA</td>
<td>+1 408 947 9592</td>
</tr>
<tr>
<td>Mike Woznyk</td>
<td>New York, NY</td>
<td>+1 212 773 3008</td>
</tr>
<tr>
<td>David Yerkes</td>
<td>Dallas, TX</td>
<td>+1 214 969 0662</td>
</tr>
</tbody>
</table>
About EY
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

Ernst & Young LLP is a client-serving member firm of Ernst & Young Global Limited operating in the US.

© 2017 Ernst & Young LLP.
All Rights Reserved.
SCORE no 00305-171US
ED None.

ey.com
This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax or other professional advice. Please refer to your advisors for specific advice.