# COST 49th Annual Meeting: Sales and Use Tax Compliance For Goods and Services Used in Multiple Jurisdictions

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# Learning Objectives

**1. Who taxes what?**

-- Learn which the states tax digital products/services, SaaS, etc.

**2. How (or where) do they tax it?**

-- See how such sales are taxed when used in multiple places

**3. How to deal with it?**

-- Identify the sales tax process steps to consider if you are a seller or purchaser of goods and services used in multiple jurisdictions

# Part 1: Who taxes what?

## Why are you here?

1. I'm a seller of stuff that customers use in lots of places and need some sales tax help.

2. I buy stuff like software used in multiple places and need some use tax help.

3. The topic seemed less boring than other breakouts.

4. I heard Tim and Will were awesome.

# General Sales Tax Rules

- General Rules: Sourcing of TPP
  - Sales tax is "destination tax;" tax due based on where delivered
  - If the purchaser then uses in other states, most states deal with this via credits NOT thru apportionment
  - Ex: Tim buys new golf clubs on his AZ trip and pays sales tax; gets credit for AZ tax against NY use tax

- General Rules: Sourcing of Services
  - Most states are also destination based, but variations in states if the service is used in different states
  - Ex: AZ service station fixes Will's car, and then he drives it back to NY.  AZ sales tax due, plus NY use tax!

- Application to digital world/electronic services might be tougher….and only gets worse post-*Wayfair*!

# The Main Culprits

- Software
  - Custom vs. prewritten
  - TPP vs. downloaded
  - SaaS
- Digital products
  - Digital books
  - Digital audio and audiovisual works – music, audio books, movies
- Information services
  - Data processing services, furnishing information reports, research services delivered online, title search services

## States that tax:

| Electronically delivered software | Digital products | Information services |
|---|---|---|
| • Alabama | • Alabama | • D.C. |
| • Arizona | • Arizona | • Florida |
| • Connecticut | • Colorado | • Hawaii |
| • D.C. | • Connecticut | • Massachusetts |
| • Hawaii | • Hawaii | • New Jersey |
| • Illinois | • Idaho | • New Mexico |
| • Indiana | • Indiana | • New York |
| • Kansas | • Kentucky | • Ohio |
| • Kentucky | • Louisiana | • Oklahoma |
| • Louisiana | • Maine | • Pennsylvania |
| • Massachusetts | • Minnesota | • South Dakota |
| • Maine | • Mississippi | • Texas |
| • Michigan | • North Carolina | • Washington |
| • Minnesota | • Nebraska | • West Virginia |
| • Mississippi | • New Jersey | |
| • North Carolina | • New Mexico | |
| • North Dakota | • Ohio | |
| • Nebraska | • Pennsylvania | |
| • New Jersey | • South Carolina | |
| • New Mexico | • South Dakota | |
| • New York | • Tennessee | |
| • Ohio | • Texas | |
| • Pennsylvania | • Utah | |
| • Rhode Island | • Vermont | |
| • South Dakota | • Washington | |

Electronically delivered software (continued): • Tennessee • Texas • Utah • Washington • Wisconsin • West Virginia • Wyoming

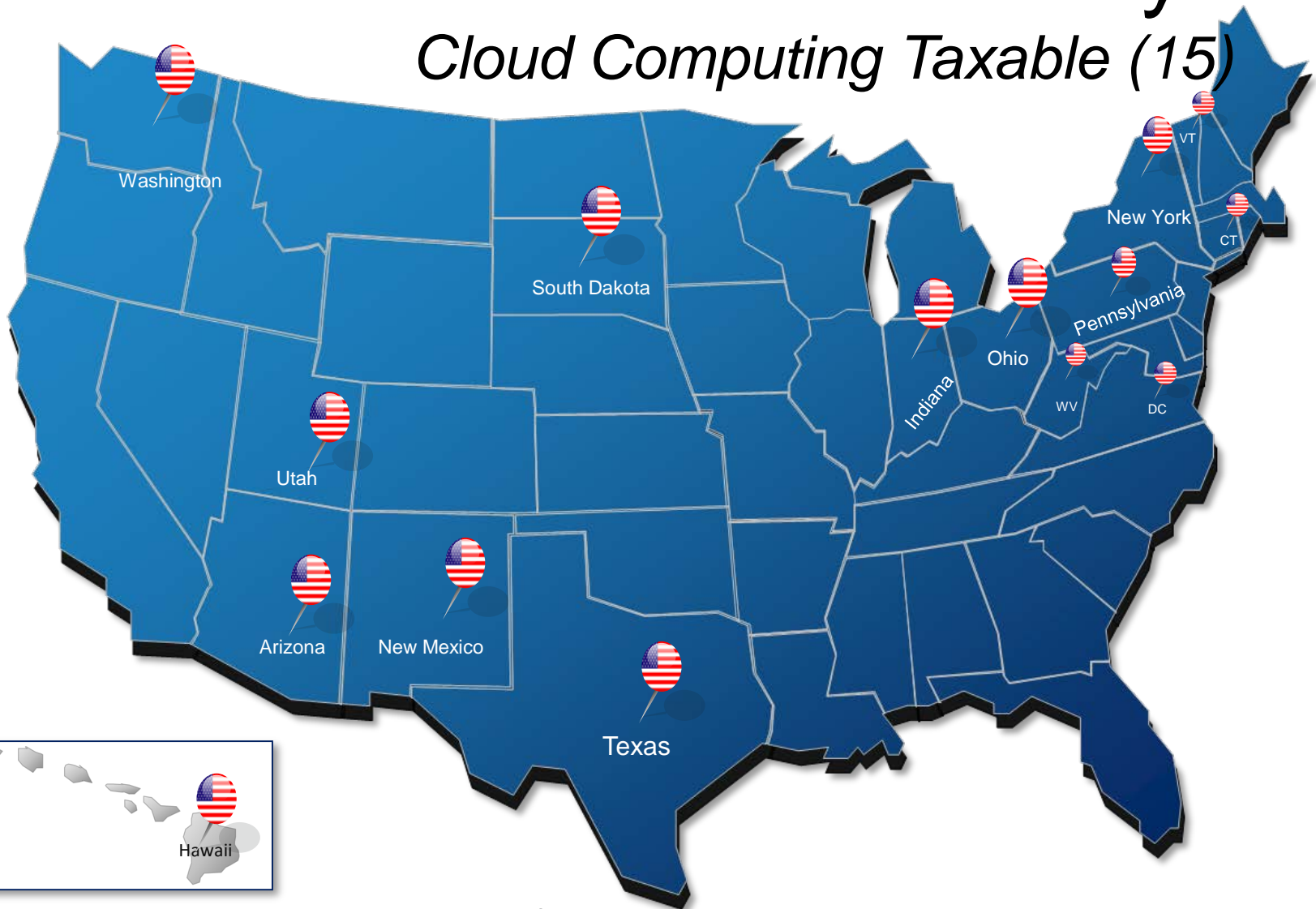Digital products (continued): • Wisconsin • Wyoming

# SaaS Taxability

- Using traditional sales tax concepts, states typically treat cloud computing in one of two ways:
  - As canned software, characterized as TPP (usually taxable)
  - As a service (usually not taxable)
- For example, NY deems SaaS as prewritten software, thus NY treats it as a taxable sale of TPP.

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# Multistate Survey
## *Cloud Computing Taxable (15)*



Washington

South Dakota

New York

VT

CT

Ohio

Pennsylvania

Indiana

WV

DC

Utah

Arizona

New Mexico

Texas

Hawaii

# Multistate Survey
## *Cloud Computing Exempt (31)*

# Part 2: How do they tax it?
# Dealing with Sourcing Issues

# Polling Question 2

**How many kids does Tim have?**

1. 0
2. 2
3. 6
4. 12
5. Trick question

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# The Sourcing Issue

- So how do you source the sale?
  - Location of the server the software is downloaded onto?
  - Location of the software users?
  - Location of service?
  - The purchaser's business address?

# The Sourcing Issue

- Some SSTP Guidance

- Other patchwork guidance or legislation

- And a lot of silence!

# Streamlined Sales and Use Tax Act

- SSUTA general sourcing hierarchy:

  1. The seller's business location if the product is received there;

  2. The location of purchaser's receipt of the product if known to the seller;

  3. The customer's address available from the seller's books and records;

  4. The customer's address obtained at the time of sale, including the address of the payment instrument;

  5. Or, if none of the above can be used, to the location from which the product was shipped or first made available for electronic delivery.

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# Streamlined Sales and Use Tax Act

- *Section 312:  Multiple Points of Use (Repealed)*

- MPU exemption: allowed a purchaser who knew at the time of purchase that the digital good/service would be available for use concurrently in one or more jurisdictions to provide an MPU certificate exempting the purchase.

- Like "Direct Pay Permits." The seller was relieved of its obligation to collect and remit sales tax.

- Also allowed for the parties to determine points of use and collect on that basis.

- But….repealed!

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# State Approaches

- States (that have addressed the issue) authorize multistate apportionment methods in either of two general ways:
    1. MPU exemption provisions, modeled after the repealed SSUTA model
    2. Legislation or guidance

    But most states haven't even addressed the issue.

# State Approaches

- MPU exemption provisions, modeled after the repealed SSUTA provisions:

- OH, MN, MA, and WA

# SSUTA-Like MPU Exemption States

- **Ohio –** *Ohio Rev. Code Ann. § 5739.033*
- Ohio's software sourcing rules are almost identical to the repealed SSUTA exemption provisions.

- **Minnesota –** *Minn. Stat. § 297A.668; Minnesota Sales Tax Fact Sheet No. 134 (9/1/2018); Minnesota Revenue Notice No. 15-03 (9/28/2015)*
- Minnesota's software sourcing rules are also similar to the repealed SSUTA provisions, but:
  - The Department provides the MPU provision does not provide an exemption from sales and use tax, but instead only affords a purchaser the option to apportion use tax to multiple jurisdictions.
  - And it is only available *at the time of purchase*. A purchaser may not, after completion of a sale, claim a refund or amend its return when based on a multiple points of use apportionment

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# SSUTA-Like MPU Exemption States

- **Massachusetts –** *830 Mass. Regs. Code 64H.1.3*
- Massachusetts's sourcing rules are similar to the repealed SSUTA provisions, but provide more guidance on how to apportion:
  - A purchaser that knows at the time of its purchase that the software will be concurrently available for use in multiple jurisdictions must deliver to the seller an MPU exemption certificate.
  - Doesn't apply to computer software for personal use.

# SSUTA-Like MPU Exemption States

- **Washington –** *Wash. Admin. Code 458-20-15502; 458-20-15503; Wash. Rev. Code § 82.08.02088; 82.12.02088*
- Washington's sourcing rules are similar to the repealed SSUTA provisions.
  - The purchaser must be a business or other organization, and the purchaser must provide the seller with a properly completed exemption certificate.
  - The amount of use tax is determined based on an apportionment of the number of users in Washington over the number of users everywhere.
  - The purchaser must pay the use tax directly to the WA Department of Revenue.

# Legislation or Guidance MPU Exemption States

- **New York –** *TB-ST-128 (August 5, 2014); TSB-A-09(41)S (September 22, 2009); TSB-A-10(10)S (March 16, 2010); TSB-A-09(55)S (December 7, 2009); TSB-A-03(5)S (January 31, 2003)*

- Not in the law….only guidance

- The guidance provides the situs of the sale is the location of the purchaser's employees who use the software, not the location of the code embodying the software.

- Based on # of users in NY and outside NY, as told to vendor by purchaser

- Mere statement or estimate is insufficient.  A signed statement containing the total number of employees given passwords and location of those employees including street addresses is acceptable.

# Legislation or Guidance MPU Exemption States

- **Utah –** *Utah Info. Pub. No. 64 (May 1, 2012); Utah Admin. R. R865-19S-92; Utah Code Ann. § 59-12-211*
- Utah promulgated regulations and published guidance on sourcing software sales.
- "Reasonable and consistent method" to allocate allowed.

- **Tennessee –** *Tenn. Code Ann. § 67-6-231; Tennessee Important Notice No. 15-14 (December 2015)*
- Based on the percentage of users located in Tennessee.
- Registered purchaser: can use a "Remotely Accessed Software Direct Pay Permit."
- If not registered, the seller may accept a fulling completed "Streamlined Sales and Use Tax Agreement Certificate of Exemption"

# Legislation or Guidance MPU Exemption States

- **Pennsylvania –** *Pennsylvania Sales and Use Tax Ruling No. SUT-12-001 (5/31/2012)*
- One ruling!
- Presumption that delivery = billing address.
- However, the purchaser may rebut that presumption by completing a Pennsylvania exemption certificate, indicating the percentage of users located in Pennsylvania.

# Legislation or Guidance MPU Exemption States

- **Chicago, Illinois –** *Chicago Dept. of Revenue Personal Property Lease Transaction Tax Ruling No. 12 (6/9/2015)*

- If the customer knows some of the use will be in Chicago, but doesn't have enough information for a reasonable apportionment, then the provider may rely on the customer's "actual data or estimates" to apportion the charge.

- Or, if a customer has at least 10 employees who use the provider's computer, and the customer provides a written confirmation from the Department that the customer is registered for lease tax, the customer must pay the tax directly to the Department and the provider is relieved of the obligation to do so.

# Texas!

- **Texas –** *Tex. Admin. Code § 3.330(f); Tex. Policy Letter Ruling No. 201004665L (April 29, 2010); Tex. Comptroller Decision No. 111,499 (June 9, 2015)*

- The "multistate benefit exemption" for data processing services (and software), to the extent the service is used to support a "separate, identifiable segment of a customer's business."

- Claimed via a "multistate benefit exemption certificate".

- Only applies to data process, SaaS, and info services.  Not to tpp, or to normal software licenses delivered electronically (since, like NY, that's TPP).

- The purchaser's records must support "the assignment of the service to an identifiable segment of the business."

  - An "identifiable segment" is a part of a business that has its own identity and performs a function that is separate from the general administration or operation of the company

  - Can't just base it on the number of employees

# Summing Up

- **States with Some MPU-Type Guidance?**
  - MA
  - MN
  - NY
  - OH
  - WA
  - TN
  - UT
  - Chicago
  - TX

- Electronically-Delivered Software: taxed in 33 states

- SaaS: taxed in 15 states

- Digital product: taxed in 27 states

- Info Services: taxed in 14 states

**Do you think state sales tax auditors are focused on these multiple-points-of-use issues?**

1. No.  Billing address is usually gospel.
2. Yes.  It's already coming up in audits I've been involved in.
3. Not yet.  But as digital products become more prevalent, I expect this line of inquiry will be common in all audits.

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# Part 3: Practical Guidance

# Seller Responsibility?

- ## Known Use in Multiple Jurisdictions

- Selling into states where buyer can not provide an MPU exemption certificate?

- Selling into states where you have nexus (post Wayfair) in the state of use?

- How material is the problem?
  - Significant sales into states that tax SaaS or information?
  - The risk of the statute of limitation whipsaw

# Seller Responsibility?

- Known Use in Multiple Jurisdictions

- Consider contract or license agreement terms that would require buyer to provide the best location of use information available.

- Contract term holding customer liable for sales taxes if they are not able to provide accurate licensee location information?

# Seller Responsibility?

- ## Known Use in Multiple Jurisdictions

  - Salesmen role is to get the license agreement signed or the PO approved
  - What is a realistic expectation for salesmen's role on gathering multiple location information?
  - Give sales awareness and additional tools to gather the information in the unlikely event the capability to charge tax in multiple jurisdictions is a selling point?
  - Optional order forms query about delivery to multiple jurisdictions?

# Seller Responsibility?

- ## Known Use in Multiple Jurisdictions

  - Can custom procedures be integrated with the billing process? or,
  - Can sellers technology precisely determine the state and city of user location?
  - IP address coupled with software that can associate IP address with a physical address?

# Seller Responsibility?

- ## Known Use in Multiple Jurisdictions

  - Consider an estimate mechanism for the bid stage of the sales process

  - Seller's purchase order approval checklist includes a flag or validation step to at least inquire from sales whether there are likely users or licensees in multiple states?

  - Realistic process step is at billing system set up of the customer master requiring a query to customer AP about delivery to multiple jurisdictions.

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# Seller Responsibility?

- ## Known Use in Multiple Jurisdictions

  - Billing system or invoice template design includes multiple ship-to or licensee location fields

# Seller Responsibility?

- What data elements from the sales journal will be needed to determine what taxes are due?

- How is that product taxed in that jurisdiction when sold to that customer?

- Company, date, customer code, amount,

- Address: street, city, state, zip, country

# Seller Responsibility?

- ## Data elements, con't

- Product code, product description
- If multiple products, then multiple line items each with varying taxability
- Product code linked to a product taxability code at that address

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# Seller Responsibility?

- ## Data elements, con't

- What if products are sold to multiple addresses?
- Multiple invoice line items with a separate ship to location assigned
- Does the ship-from address matter?

- Example of data elements with multiple address line items

# Buyer Responsibility?

- Here you can reasonably introduce process steps at the Purchase Order stage!

- Elements of a purchase order template

# Buyer Responsibility?

- Purchase order template continued:

  - Price, quantity, description, terms of delivery
  - Bill to address, contact person
  - Method of delivery
  - Delivery locations
  - Local sales taxes to be paid for each location

# Buyer Responsibility?

- What process to consider for invoices not associated with a Purchase Order?

- Validation codes in AP process for purchases of software and other MPU services to require break out of invoices by location?

# Buyer Responsibility?

- Data elements to be captured for use tax accrual purposes.

- Line item breakout of use by locations by appropriate data element: cost center, tax code, ship to

- Assignment of the appropriate taxability determination and tax rate

# Summing Up

**Best Practices for Sellers?**

1. When in doubt, obtain exemption certificate or collect 100%.
2. In states with MPU rules, implement only if purchaser insists OR if it adds value to customer relationship
3. Implement contract/process steps from above
4. Use for relief in audits? (be careful!)

**Options for Purchasers?**

1. Pay 100% in "bill to" state, blissful ignorance in rest; OR
2. In states with MPU rules, work with seller to implement and follow process step from above; OR
3. Resale entity?

# Purchasing Entity?

```
[ Vendor ] ──── [ Resale LLC ] ──── [ OpCo ] ──── ( Locations )
```
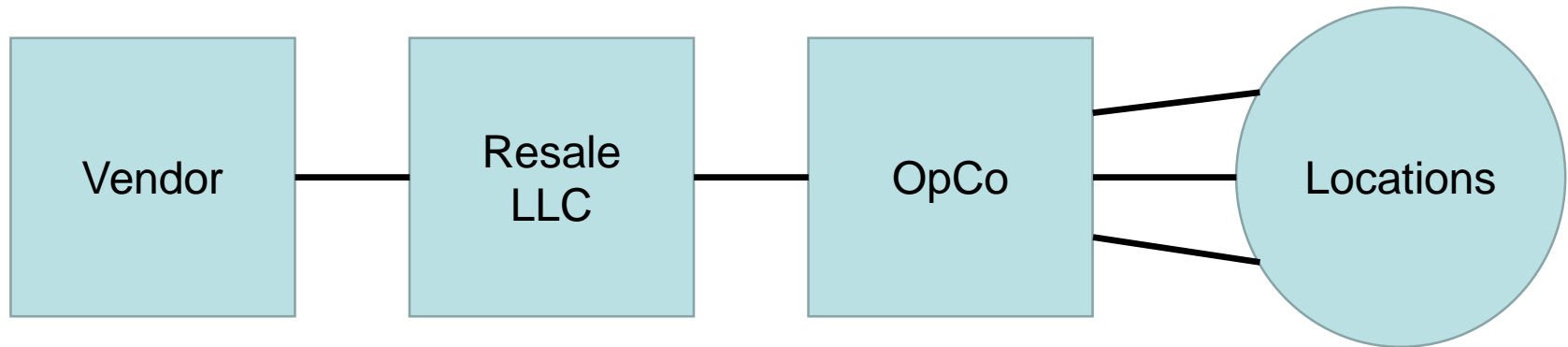
- Allows for exempt purchase for resale by DRE
- Except, for sales tax, it's not a DRE
- Customer then determines where used
- Internal invoicing based on # of users
- Tax collected by resale entity on each state's share

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The information provided herein is educational in nature and is based on authorities that are subject to change. You should contact your tax adviser regarding application of the information provided to your specific facts and circumstances.

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