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SALES & USE TAX ALERT

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INSIDE

HAPPY HOLIDAYS!
NO JAN. 1 ISSUE

As part of the regular publishing schedule of 22 isues per year, *Sales & Use Tax Alert* will not publish a Jan. 1 edition. Publication will resume with the Jan. 15 issue. As 2007 nears its end, *SUTA*'s editors thank you for a great year and wish you a wonderful holiday season and a Happy New Year.

■ BROAD 'SELLING' DEFINITION REMAINS

No California nexus for barnesandnoble.com by stores distributing coupons

The California Superior Court determined that mere distribution of coupons by an online seller through marginally related bricks-and-mortar stores did not constitute an agency relationship triggering use tax nexus. Though the activity did meet the state's broad definition of "selling," the stores did not act as agents or representatives of the online seller, barnesandnoble.com. While the decision limits the state's aggressive stance on what constitutes an agency or representative relationship, the controversial definition of selling remains in effect. Meanwhile, issues regarding the legality of that definition and the constitutionality of California's taxation of published materials have yet to be addressed.

In *Barnesandnoble.com LLC v. State Board of Equalization*, Dkt. No. CGC-06-456465, the court was legally bound to apply the definition of selling affirmed by the Court of Appeal ruling in a somewhat similar case, *Borders Online LLC v. State Board of Equalization* (2005). However, barnesandnoble.com did not have the overlapping management and coupon reimbursement circumstances of *Borders*. Barnes & Noble retail stores merely placed barnesandnoble.com discount coupons in the stores' shopping bags.

Sidewalk sandwich board

"The decision is important in that it takes away the ambiguity the California State Board of Equalization has tried to inject into the definition of 'agent' and 'representative,'" says David Bertoni, a partner with Brann & Isaacson LLP, in Lewiston, Maine, the firm that represented barnesandnoble.com. "The SBE has been on a path to try to dilute those terms."

In fact, language in the decision underscores the court's rebuke of the SBE's overreaching in interpreting those terms: "Here the undisputed evidence shows that Barnes & Noble retail stores passively distributed coupons issued by Plaintiff, much like a person on a street corner might hand out flyers or coupons. The concept of agency requires something significantly more than simply passing out information at somebody else's request."

Rather, the party distributing coupons must possess the authority to bind the principal, an authority the brick-and-mortar stores did

not have. On the basis of the coupons alone, the SBE in its earlier determination had found that the plaintiff was a "retailer engaged in business in the state" under RTC § 6203(c) with a substantial nexus in California as required under the Commerce Clause of the U.S. Constitution.

In this case, Barnes and Noble stores:

(1) had no input in creating the coupon program;
(2) had no authority to adjust the terms of the coupons or to redeem them;
(3) could not accept returns of books purchased from the taxpayer with the coupons;
(4) did not solicit sales and could not accept orders for the taxpayer;
(5) had no authority to accept anything from customers that would be passed on to the taxpayer; and
(6) could not speak for or bind the taxpayer on any subject.

Bertoni says under the SBE's interpretation of "agent" and "representative," interchangeable terms, a newspaper publishing an advertisement could be considered an agent.

SBE's 'selling' remains

Currently, California taxpayers must abide by the SBE's definition of "selling" as affirmed by *Borders,* a decision the SBE relied on heavily in its argument in the instant case. That definition includes all activities that are an integral part of making sales.

"Right now, the definition of selling under *Borders* is an incredibly broad term," Bertoni says.

The court noted that the Barnes & Noble retail stores engaged in "selling" under *Borders.* But the selling did not occur with the retail stores acting as agents or representatives of barnesandnoble.com. So the court did not address that definition. Therefore, the definition of selling still stands.

Bertoni says the definition could be changed by a Court of Appeals ruling in another case, or the COA could return to the issue in the *Borders* case and alter its stance. Also, a California Supreme Court case could address the issue.

"I think there are grave legal issues with the Court of Appeal definition of selling," he adds.

Issues outstanding

The decision failed to address other matters, also. Particular to the definition of selling, now a matter of settled decisional law, the BOE's policy of retroactive application of new policy was not broached, Bertoni points out.

"The SBE announces principles and then applies them retroactively," he says.

The definition of selling under *Borders* could be deemed afoul of the notice and hearing provisions of the California Administrative Procedures Act.

Also, California's taxation system could be determined unconstitutional under the First Amendment of the U.S. Constitution, Bertoni says. California taxes the sale of books but not the sale of commercial publications such as catalogues.

ADVICE: Bertoni advises taxpayers to pay close attention to business relationships in California and

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to any kind of marketing activity in connection with California. Be aware that the state has an extremely aggressive tax department. Nonetheless, the barnesand noble.com case offers hope to taxpayers.

Facts and circumstances

Barnesandnoble.com, an Internet retailer of books, music, and movies, had operations facilities and personnel located outside California. All orders were accepted outside California and all products were delivered by common carrier from locations outside the state.

A minority owner of the taxpayer, Barnes & Noble Inc., neither directed nor controlled the taxpayer's operations. The taxpayer operated as a separate and distinct legal entity from Barnes & Noble Inc. and its subsidiaries and affiliates. Barnesandnoble.com's management was separate and independent from Barnes & Noble Inc. and its subsidiaries and affiliates.

Additionally, the taxpayer maintained and shared no employees, warehouses, fulfillment centers, or inventory of products, equipment, and computer systems with any other company. As a wholly-owned subsidiary of Barnes & Noble Inc., the taxpayer's sister company operated retail stores across the United States, including in California, yet had no connection or relationship to barnesandnoble.com.

The retail stores entity had no ownership interest or operational role in any activities of or decisions by barnesandnoble.com. The two companies did not share personnel, inventory, property, facilities, management or information systems. Further, the retail stores entity did not accept returns of products purchased from the taxpayer and did not provide any unique or preferential services to the taxpayer's customers.

Editor's note: *Bertoni can be reached at dbertoni@brannlaw.com.* ✦

Chicago hikes rates, taxes bottled water

In addition to adding a new tax on bottled water, the City of Chicago has increased rates and/or made other changes to the hotel occupancy, personal property lease transaction, liquor, wheel, and gas use taxes, the wireless communications fee, and the emergency telephone system surcharge.

The Revenue Ordinance for 2008 is effective Jan. 1, 2008.

The tax on the retail sale of bottled water is imposed at the rate of $0.05 per bottle. The tax is paid by the purchaser, and it expressly is not a tax on the occupation of retail or wholesale bottled water dealer. The tax is to be collected and remitted by each wholesale bottled water dealer who sells bottles of water to a retail bottled water dealer located in the city.

New rates

Tax or fee increases include the following:

- personal property lease transaction tax, 8% (formerly, 6%),
- beer tax, $0.29 (formerly, $0.16) per gallon,
- tax on alcoholic liquor, other than beer, containing at most 14% alcohol, $0.36 (formerly, $0.246) per gallon,
- tax on alcoholic liquor, other than beer, containing more than 14% alcohol and less than 20% alcohol, $0.89 (formerly, $0.615) per gallon,
- tax on alcoholic liquor, other than beer, containing at least 20% alcohol, $2.68 (formerly, $1.845) per gallon,
- wheel tax on larger passenger vehicles, $120 (formerly, $90),
- emergency telephone system surcharge, $2.50 (formerly, $1.25) per month per qualifying voice grade communications channel,
- wireless communications fee, $2.50 (formerly, $1.25) per month, and
- gas use tax, $0.063 (formerly, $0.052) per therm.

For the wheel tax category for "other vehicles, including trucks, tractor-semitrailer units, motor buses, and recreational vehicles," the new rates are $180 for vehicles weighing at most 16,000 pounds and $420 for vehicles weighing over 16,000 pounds. Previously, there were three classifications: up to 14,000 pounds ($150), 14,001-36,000 pounds ($200), and over 36,000 pounds ($300). Fees for three classes of trailers were deleted.

Existing liquor inventory

For the liquor tax, a provision was added to specify that each retailer must pay the difference between the old rates and the new rates on the quantities of alcoholic beverages in the retailer's possession on Jan. 1, 2008. ✦

Florida allows statistical sampling of fixed assets

A provision regarding sampling is amended to state that in the case of fixed assets, a dealer may agree in writing with the Dept. of Revenue for adequate but voluminous records to be statistically sampled.

Under Chap. 106 (SB2482) of 2007,effective July 1, 2007, such an agreement must provide for the methodology to be used in the statistical sampling

process, and audit findings derived from such sampling shall be projected over the period represented by the sample in order to determine the proportion that taxable purchases bear to total purchases.

Once an agreement is signed, it is final and conclusive with respect to the method of sampling fixed assets. The department may not conduct a detailed audit of fixed assets, and the taxpayer may not request a detailed audit after the agreement is reached.

This provision (1) is applicable to all pending sales and use tax audits or other actions or inquiries excluding those currently under protest or in litigation, and (2) does not create any right to refund for taxes previously assessed and paid in regard to audits or other actions or inquiries that are no longer pending.

DOR issues guidance

The Dept. of Revenue has issued Tax Information Publication No. 07ADM-02 regarding statistical sampling of fixed assets when a compliance audit or review of a tax refund application is conducted.

"Adequate" records are those that constitute sufficient and accurate books and accounts that are ordinarily maintained by the average prudent businessman engaged in the same type of activity and that can be used to determine the correct amount of any tax liability or refund for the entire period to be sampled.

Adequate records are "voluminous" when the records maintained by a taxpayer are so numerous and extensive that review of the records would be most effectively and expeditiously accomplished using a sampling methodology.

Refund applications

For refund applications based on statistical sampling of fixed assets, the sample conducted by the taxpayer must reflect both overpayments and underpayments found in the sample.

The following requirements apply to refund applications:

- taxpayers who are entitled to a refund from a dealer must request the refund from the dealer, unless specifically authorized by statute or rule;
- refund requests must be filed within three years of the date the tax was paid;
- taxpayers should retain the documentation concerning any refund received for three years after the refund is made; and
- a listing of the documents sampled should be retained, as well as all the documents and records concerning the refund for the period included in the refund. ✦

South Carolina enacts alternative energy incentives

A South Carolina law has enacted sales and use tax exemptions for items related to hydrogen and fuel cell technologies, incentive payments for sales of alternative fuel, and incentives for production of energy using biomass resources.

SB243 of 2007 is effective Oct. 1, 2007.

Hydrogen, fuel cell

Effective Oct. 1, 2007, a sales and use tax exemption is enacted for

- any device, equipment, or machinery operated by hydrogen or fuel cells;
- any device, equipment, or machinery used to generate, produce, or distribute hydrogen and designated specifically for hydrogen applications or for fuel cell applications; and
- any device, equipment, or machinery used predominantly for the manufacturing of, or research and development involving, hydrogen or fuel cell technologies.

Additionally, a sales and use tax exemption is enacted for any building materials used to construct a new or renovated building and any machinery or equipment located in a research district. The amount of sales tax that would have been assessed without this exemption must be invested by the taxpayer in hydrogen or fuel cell machinery or equipment located in the same research district within 24 months of the purchase of an exempt item.

A research district is land owned by the state, a county, or other public entity that is designated as a research district by the University of South Carolina, Clemson University, the Medical University of South Carolina, South Carolina State University, or the Savannah River National Laboratory.

Alternative fuel sales

An incentive payment will be provided to a retailer or wholesaler on sales of alternative fuel after June 30, 2009, and before July 1, 2012, as follows:

- $0.05 to the retailer for each gallon of E70 fuel or greater sold provided that the ethanol-based fuel is subject to the South Carolina motor fuel user fee;
- $0.25 to the retailer for each gallon of pure biodiesel fuel sold so that the biodiesel in the blend is at least 2% B2 or greater, provided that the qualified biodiesel content fuel is subject to the state motor fuel user fee; and
- $0.25 to the retailer or wholesaler for each gallon of pure biodiesel fuel sold as dyed diesel fuel for

off-road uses, so that the biodiesel in the blend is at least 2% B2 or greater.

Electricity, fuel from biomass

An incentive payment will be allowed for producing electricity or methane gas fuel from biomass resources after June 30, 2008, and before July 1, 2018, as follows:

- $0.01 per kilowatt-hour (kwh) for electricity produced from biomass resources in a facility not using biomass resources before June 30, 2008, or in facilities that produce at least 25% more electricity from biomass resources than the greatest three-year average before June 30, 2008.
- $0.09 per therm for methane gas fuel produced from biomass resources in a facility not using biomass resources before June 30, 2008, or in facilities that produce at least 25% more methane gas from biomass resources than the greatest three-year average before June 30, 2008.
- The maximum incentive payment is $100,000 per year per taxpayer for five years. A biomass resource means wood, wood waste, agricultural waste, animal waste, sewage, landfill gas, and other organic materials. ✦

North Carolina revamps appeals process

Legislation is enacted that dramatically revises the appeals process for resolving disputes of taxes administered by the North Carolina Dept. of Revenue. The legislation changes how taxpayers pursue tax refunds and revamps the procedures to protest refund denials, proposed assessments, vendor license revocations, and imposition of penalties.

Chap. 491 (SB242) of 2007 is effective Jan. 1, 2008.

Under the revised administrative provisions, the Tax Review Board will be abolished and taxpayers will be afforded an opportunity for an independent appeal before the Office of Administrative Hearings prior to paying any proposed tax assessment or penalties.

Refund procedures

The DOR must refund an overpayment anytime it discovers an overpayment was made in error as long as the discovery is made within the statute of limitations period. A taxpayer may request a refund by filing an amended return reflecting the overpayment or filing a refund claim. The taxpayer's statement of the basis of the claim does not limit the taxpayer from changing the basis at a later date.

Within six months from the time the refund claim is filed, the DOR must (1) send the taxpayer the full amount of the refund requested; (2) send the taxpayer an adjusted amount; (3) deny the refund and send the taxpayer a notice of proposed denial; or (4) send the taxpayer a letter requesting additional information. If a taxpayer does not respond to a request for additional information, the DOR may deny the refund and send the taxpayer a notice of proposed denial.

If a taxpayer provides the requested information, the DOR must respond within the later of (1) the remainder of the six-month period; (2) 30 days after receiving the information; or (3) a time period mutually agreed upon by the taxpayer and the DOR. A taxpayer may treat the DOR's failure to timely respond to the refund request as a proposed denial of the refund request.

A notice of proposed denial must state the basis for the denial, although the basis may be changed at a later date.

Assessment procedures

A notice of proposed assessment must separately state the amount of tax, interest, and penalties assessed. Although the DOR is required to specify the basis for the assessment, the DOR is not precluded from changing the basis of the assessment at a later date.

Taxpayer protests

Applicable to assessments that are not final as of Jan. 1, 2008, and to refund claims pending or filed on or after Jan. 1, 2008, the process to appeal a proposed assessment or refund denial is revamped. These provisions also apply to a taxpayer's protest of a revocation of a vendor license for sales and use tax purposes and to challenges of penalties that are assessed.

Under the new procedures, taxpayers must request a DOR review of a refund denial, proposed assessment, penalty imposition, or revocation of a vendor's license within 45 days (currently, 30 days for refunds, proposed assessments, and penalties, 10 days for revocation of a license) from the date the notice was mailed or delivered, or in instances in which the DOR failed to timely respond to a taxpayer's request for refund, from the date of the deemed denial. Failure to timely request a DOR review will result in the proposed denial or assessment becom-

(Continued on page 8)

STATE UPDATES

ARKANSAS

The Dept. of Finance and Administration has issued a guide that reviews some of the significant sales and use tax law changes that take effect Jan.1, 2008. The guide covers changes affecting delivery of merchandise to customers; sales by meter and route delivery; taxable services; rentals or leases of tangible personal property, motor vehicles, trailers, semi-trailers, and aircraft; taxable services purchased from out-of-state vendors; elimination of city and county local tax caps; rebates or refunds of local tax paid to the seller; refunds for tax collected for construction contracts resulting from a rate change; and bad debt write-offs. (*Changes in Arkansas Sales and Use Tax Law Effective Jan. 1, 2008*, DFA)

CALIFORNIA

The State Board of Equalization discusses the 2008 interstate user tax rate and changes to the electronic funds transfer payments program for 2008. The interstate user tax rate for calendar year 2008 is decreased from 36.7 cents to 36.6 cents per gallon. The rate is comprised of 18 cents per gallon of diesel fuel tax and an additional excise tax of 18.6 cents per gallon. The state has a new EFT payment processor and bank beginning Jan. 2, 2008. Taxpayers are referred to the SBE's Publication 80, Electronic Funds Transfer Information Guide, Sales and Use Taxes, or Publication 89, Electronic Funds Transfer Information Guide, Special Taxes, both effective January 2008. The updated publications will be available at www.boe.ca.gov by Jan. 1, 2008. *(Tax Information Bulletin, SBE, December 2007)*

FLORIDA

The state and local motor fuel, diesel fuel, aviation fuel, and county local option motor fuel tax rates for 2008 have been released. The tax rate on motor fuel will increase to 15.6 cents (currently, 15.3 cents) per gallon. The tax rate on diesel fuel will increase to 29 cents (currently, 28.5 cents) per gallon statewide. This rate is based on the total of the state tax rate on diesel fuel, which will increase to 15.6 cents (currently, 15.3 cents) per gallon, and the State Comprehensive Enhanced Transportation System and local option tax rates, which will increase to 13.4 cents (currently, 13.2 cents) per gallon statewide. The state tax rate on aviation fuel will remain at 6.9 cents per gallon. In addition to the $0.156 state fuel taxes collected at the loading rack, terminal suppliers must collect a minimum local option fuel tax in the amount of $0.103 (currently $0.102) on each gallon of gasoline sold to licensed wholesalers. Total fuel taxes collected by terminal suppliers on gasoline sold to wholesalers must be $0.259 per gallon. Wholesalers must remit the local option tax above the state and minimum local option tax ($0.259) on gasoline sold to retail dealers or end-users. *(Tax Information Publication No. 07B05-03, DOR)*

GEORGIA

A policy statement has been issued to explain the rules and procedures for requesting a declaratory ruling from the Dept. of Revenue. A declaratory ruling is an official advisory opinion in response to a specific request from a specific taxpayer. A declaratory ruling may only be relied upon by the taxpayer to whom it is issued for the transaction to which it relates. It has no precedential value and may be superseded by a change in existing law or regulation. The department does not issue a declaratory ruling in response to a hypothetical question. A request for a declaratory ruling must be in writing from a specific taxpayer or the taxpayer's representative. A declaratory ruling will not be issued in response to oral inquiries. The department has the authority to ascertain whether the representations made in the request reflect an accurate statement of material facts or whether the transaction was carried out as proposed. Although there are no provisions for appealing an adverse advisory opinion, a taxpayer still has the right to those provisions of the law that relate to the appeals process or a claim for refund. *(Policy Statement SUT-2007-11-14, DOR)*

ILLINOIS

Changes in the rates of a variety of Chicago taxes were the topic of a notice issued by the Chicago Dept. of Revenue to businesses. The notice also provides a synopsis of the new bottled water tax, as well as contact information for taxpayers with questions regarding responsibilities for collecting and remitting the taxes. The changes at issue are effective Jan. 1, 2008. *(Notice of Changes to Chicago Tax Ordinances, CDOR)*

INDIANA

The prepayment rate of sales tax on gasoline for the six-month period Jan. 1, 2008, through June 30, 2008, has been set at 12.4 cents per gallon, up from 9.9 cents per gallon. Prepayment of sales tax on gasoline must be collected by refiners, terminal operators, and qualified distributors. *(Departmental Notice #2, Dept. of Revenue)*

KANSAS

The Dept. of Revenue has issued a new publication on sales and use tax refunds that answers frequently asked questions such as whether taxpayers are entitled to interest on refunds, and whether a retailer may take a credit on its return in lieu of a refund. The publication includes the most current version of the Kansas Sales and Use Tax Refund Application (Form ST-21) and related instructions. The publication also describes the documentation required to process a sales and use tax refund request based on the reason for the request, such as an amended return, bad debt, or an exemption. *(Information Guide No. KS-1220, Dept. of Revenue)*

KENTUCKY

The Dept. of Revenue has issued an emergency regulation providing additional guidance on requirements for sales and use tax refunds relating to tax increment financing signature projects. *(103 KAR 31:180E, DOR, effective Nov. 15, 2007)*

MARYLAND

Recently enacted legislation raises the cigarette tax and the vehicle excise tax rate. The cigarette tax is doubled to $2 per pack of 20 cigarettes, effective Jan. 1, 2008. The $2 tax will apply to all cigarettes used, possessed, or held in the state on or after Jan. 1, 2008, specifically those in vending machines or other mechanical dispensers and to cigarettes generally referred to as "floor stock." The vehicle excise tax rate is increased from 5% to 6% of the vehicle's purchase price or fair market value, effective Jan. 1, 2008. "Total purchase price" now includes a trade-in allowance but no allowance for other nonmonetary consideration. Previously, there was no trade-in allowance. *(HB5 of 2007, First Special Session)*

MISSISSIPPI

A company that operated water and sewer systems for several municipalities was not liable for contractor's tax on fees it received for making minor repairs to motors, water pumps, and electrical panels within water wells and lift stations, because such work constituted repairs to personal property rather than real property. The contractor's tax is imposed only on money earned by a contractor for making repairs to real property. The Court of Appeals affirmed that the personal property exemption is applicable to repairs made to water and sewer systems. The motors and pumps at issue were about four-feet tall, two-feet in diameter, and weighed between 250 to 300 pounds. The motors were commonly moved and could be reused at different locations. The pumps and electrical components were not permanently attached to their locations and could be removed intact without alteration or destruction of the structure or real property. *(Blount v. ECO Resources Inc., Court of Appeals, Dkt. No. 2006-CC-00673-COA)*

STATE UPDATES

MISSOURI

The Dept. of Revenue has issued a new emergency rule explaining the application of the previously enacted sales and use tax exemption for energy. The exemption applies to electricity, gas (natural, artificial, or propane), water, coal, and energy sources used or consumed in manufacturing, processing, compounding, mining, or producing any product, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product. The exemption applies to state sales and use tax and local use tax, but not local sales tax. *(Reg. 12 CSR 10-110.621, DOR, effective Oct. 20, 2007, expires April 16, 2008)*

Charges by the manager of a time-share condominium for monthly linen fees, cleaning fees, set-up fees, association fees, replacement reserves, and daily fees are not subject to sales tax. These fees charged to the condominium time-share owners are for sales of services and do not represent the sale of tangible personal property. The charges are for non-taxable services provided by the taxpayer to the time-share owner. The fees do not represent the sale or charge for rooms provided to the general public. The taxpayer's management agreement also provides that it may lease the condominium unit when not being used by the owner. Any of the above fees charged a transient guest for using the condominium are subject to sales tax. *(Letter Ruling No. LR4113, Dept. of Revenue)*

NEW YORK

The Dept. of Taxation and Finance has announced the interest rates on overpayments and underpayments of taxes for the period Jan. 1, 2008, through March 31, 2008. The overpayment rate decreases from 7% to 6% for taxes on alcoholic beverages, beverage containers, diesel motor fuel, estate and gift, hazardous waste, highway use, lubricating oil, motor fuel, petroleum business, sales and use, and waste tires. The underpayment rate decreases from 10% to 9% for taxes on alcoholic beverages, cigarettes, diesel motor fuel, highway use, motor fuel, petroleum business, tobacco products, and waste tires. The underpayment rate for taxes on beverage containers and sales and use remains at 14%. The overpayment and underpayment rates for fuel use tax remain at 12%, and the underpayment rate for tax on lubricating oil remains at 12%. The underpayment rate for tax on hazardous waste remains at 15%. *(Release, DTF, Nov. 19, 2007)*

Computer hardware sales, services and installations performed by a computer sales and consulting firm are subject to sales tax. Prewritten software is also subject to sales tax but certain maintenance, installation, and diagnostic troubleshooting services performed with respect to the software may be exempt from sales tax. In general, the advisory opinion discusses various scenarios and transactions that can be described as sales of computer hardware and software, installation of computer hardware and software (provided by either the taxpayer or a customer), consulting services (including research, evaluation, design, and troubleshooting), customization of computer software, and data conversion. *(TSB-A-07(28)S, Commissioner of Taxation and Finance)*

OHIO

An Information Release explains changes to accelerated payment requirements for taxpayers who are required to make sales and use tax payments by electronic funds transfer (taxpayers whose tax liability exceeds $75,000 in any calendar year). The accelerated payment schedule has been changed to require only one accelerated payment per month. Accelerated payments must be made by the 23rd day of the month for which the tax is due (the same day on which the previous month's return is due). Any remaining tax due for the month must be paid when the return is filed in the following month. Taxpayers may make one payment per month that includes the accelerated payment and the balance due for the previous month, or they may make separate payments. Beginning in January 2008, an additional line will be added to returns to show accelerated payments. *(Sales and Use Tax Information Release ST 2007-06, Dept. of Taxation)*

SOUTH CAROLINA

A financial printing company's charges to non-print customers for providing certain SEC compliance and electronic filing services are nontaxable charges for personal services rather than taxable charges for communications services for sales and use tax purposes. The services at issue involve the timely and compliant filing of customers' financial documents with the Electronic Data Gathering, Analysis and Retrieval (EDGAR) System utilized by the SEC. These services do not involve transferring printed material or other tangible personal property to any person. Because the true object of the services is not a communications service, but rather a personal service, the charges are not taxable. (*Private Letter Ruling 07-6*, Dept. of Revenue)

TEXAS

The Texas sales and use tax regulation on gratuities has been amended to clarify that if a mandatory gratuity charge exceeds 20% of the sales price, the entire mandatory gratuity charge is subject to sales tax regardless of how the gratuity is disbursed to qualified employees. *(34 TAC 3.337, Comptroller of Public Accounts, effective Nov. 28, 2007)*

VIRGINIA

The Dept. of Taxation has issued a ruling changing its policy regarding the application of sales and use tax to certain persons that sell and install trees, shrubbery, plants, and other nursery stock, sod, silt fence, and similar items that become real property upon installation. Construction contractors, landscape contractors, and other persons that perform real property services such as construction site preparation, excavation, erosion control, drainage and irrigation system installation, debris removal, and similar services will no longer be treated as retailers with respect to the furnishing and installation of trees, shrubbery, nursery stock, plants, sod, silt fence, and similar items. These businesses will be the taxable users and consumers of the items and must pay the applicable sales tax upon purchase from vendors or suppliers. *(Ruling of Commissioner, P.D. 07-171, DT)*

WASHINGTON

The Dept. of Revenue reminds retailers that legislation enacted earlier this year conforms the state's law to the requirements of the Streamlined Sales and Use Tax Agreement, effective July 1, 2008. The changes require a shift from origin-based sourcing to destination-based sourcing. Retailers will need to collect local sales tax based on the destination of the shipment or delivery. Destination-based sales tax will apply only to businesses that deliver the goods they sell to locations within the state. If a retailer delivers or ships merchandise to a buyer in Washington, sales tax is collected based on the rate at the location where the buyer receives or takes possession of the merchandise. There is no change for deliveries made outside the state or over-the-counter sales where customers take home goods from the store location. *(Destination-Based Sales Tax, DOR)*

WEST VIRGINIA

The State Tax Dept. has revised its publication discussing the sales and use tax collection and payment obligations of travel agents, travel agencies, and travel services. The publication details the tax treatment of commissions, service fees, vendor charges, and purchases of tangible personal property and services by a travel agent. *(TSD-376, STD)*

Appeals changes *(Continued from page 5)*

ing final. Currently, taxpayers are not required to administratively contest a refund denial decision but may immediately pursue a judicial review.

The DOR must schedule a conference to resolve any contested issues and must notify the taxpayer at least 30 days (previously, 10 days) before the date of the conference, unless an earlier time is agreed upon. The conference is an informal proceeding. Testimony under oath is not taken, and the rules of evidence do not apply. A taxpayer may designate a representative to act on the taxpayer's behalf.

Unless a longer period is agreed to, the DOR must respond to the taxpayer's request for relief within nine months of the taxpayer's request by either granting the taxpayer's request or issuing a final notice of determination. However, failure to issue the notice within the nine-month period does not affect the validity of the DOR's proposed assessment. The DOR must publish its final decision, but any identifying taxpayer information must be redacted.

Judicial reviews

A taxpayer may challenge an OAH decision by filing a petition for judicial review in the Superior Court of Wake County within 30 days of the OAH's decision and paying the tax, penalties, and interest stated in the final decision. The option to post a bond in lieu of paying the tax, penalties, and interest is repealed. Only taxpayers that have exhausted their administrative remedies may petition for a judicial review. Under current law, taxpayers may bring an action in Superior Court directly upon a denial of a refund claim without appealing the decision to the Tax Review Board.

Appeals involving tax disputes will be treated as mandatory complex business cases. A taxpayer may appeal a decision of the Business Court to the appellate division.

Failure to pay

The failure to pay penalty will not be imposed if the taxpayer pays the proposed assessment within 45 days (previously, 30 days) of receiving a proposed assessment from the DOR. ✦

Michigan repeals tax on services

Gov. Jennifer M. Granholm has signed legislation that replaced the 6% use tax on selected services hours after it went into effect on Dec. 1, 2007, with a business tax surcharge.

Businesses that already have collected the use tax on selected services may refund the money to the purchaser or remit the funds to the state when the first use tax payment is due. In many cases, that payment is due on Jan. 20, 2008.

According to a Dec. 1, 2007, Dept. of Treasury press release, as part of the repeal of the tax on services, legislators have agreed to pass legislation to hold harmless any business that did not collect the tax on Dec. 1, 2007.

Act 145 (HB5408) of 2007, effective Jan. 1, 2008, is applicable to all business activity occurring after Dec. 31, 2007.

HB5408 adds an annual surcharge to the Michigan business tax (MBT). The bill also makes changes to the compensation, investment, and research and development credits against the MBT and potential refunds if MBT collections exceed certain targets. ✦