

# SALES & USE TAX ALERT

Vol. XVIII, No. 4, March 1, 2008

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## COMING SOON

- SSTP wavers on destination sourcing

## ■ NON-ITEMIZED SERVICE CONTRACTS

### Dell computers, service were California mixed transactions; Rhode Island case proceeds

**P**ersonal computer leviathan Dell Inc., often subject to litigation concerning state sales and use tax, experienced setbacks recently in two separate cases involving tax charged on service contracts. Optional computer service contracts sold with computers for a single, lump-sum price were not subject to California sales and use taxes. The transactions were mixed transactions that involved separately identifiable transfers of goods and services. Also, a Rhode Island Superior Court has denied a motion to dismiss a putative class action lawsuit in which two computer purchasers are alleging that Rhode Island sales and use taxes were improperly collected on service contracts and shipping and handling charges that were included in the purchase price of computers.

#### Separately stated or not

In *Dell, Inc. v. The Superior Court of the City and County of San Francisco*, Dkt. No. A118657, the California Court of Appeal determined that both the computers and the contracts were distinct consumer items, each was a significant object of the transaction, and the service contracts had readily ascertainable values even without itemized invoices.

The service contracts were separable from the computers the taxpayer sold, the appellate court stated. Computers could be purchased without service contracts, and the transaction price was reduced by a specified sum if the service contract was declined.

The service contract was not a part of the sale of the computer, but was, rather, a separate object of the transaction with an easily ascertained value, even without an itemized invoice.

#### No law or reg

Additionally, there is no state statute or regulation that requires service contract charges to be separately stated in order to avoid taxation. In mixed transactions, the separate elements of the transaction are analyzed as separate transactions for tax purposes. The tangible personal property aspect of the transaction is

taxed, and the service aspect of the transaction is not taxed.

As such, the appellate court held that it was proper to tax the computer, i.e., the tangible personal property, but not the service contract, i.e., the service or intangible property.

### Rhode Island class action

In the Rhode Island Superior Court case *Long v. Dell Computer Corp.*, Dkt. No. PB 03-2636, the plaintiffs brought claims against the seller for negligence and violation of the Unfair Trade Practices and Consumer Protection Act, seeking statutory damages as well as declaratory and injunctive relief.

### Jurisdiction issues

The fact that the amount of taxes at issue was less than the Superior Court's \$5,000 amount-in-controversy threshold did not deprive the court of jurisdiction. The plaintiffs had joined a negligence claim with their UTPCPA claim for damages. Furthermore, the court could exercise ancillary jurisdiction over the negligence claim.

Although the District Court generally has subject matter jurisdiction over tax matters, in this case the plaintiffs' claims involved more than tax matters. Thus, the claims could be adjudicated in the Superior Court, which could decide the taxation question as a necessary step in resolving the negligence and UTPCPA claims.

### Exhaustion of administrative remedies

The plaintiffs were not required to exhaust their administrative remedies by seeking a refund or declaratory ruling from the Div. of Taxation prior to bringing suit in Superior Court. The DT was not capable of adjudicating a violation of the UTPCPA and awarding statutory damages. ♦

■ TELECOM, ANCILLARY, VIDEO, SPIRITS

## North Carolina increases combined general rate

Effective April 1, 2008, North Carolina's combined general rate of sales and use tax is increased from 6.75% to 7%. The combined general rate applies to the gross receipts derived from the provision of telecommunications service, ancillary service, and video programming. The rate also applies to sales of spirituous liquor other than mixed beverages. This rate is the state general rate of tax plus the sum of the rates of the authorized local sales and use taxes, as specified, for every county in North Carolina.

Legislation enacted in 2007 provides all counties with authority to levy an additional 0.25% local sales and use tax upon approval by county voters. In accordance with that legislation, six counties have adopted resolutions to levy the additional 0.25% sales and use tax, effective

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April 1, 2008: Alexander, Catawba, Martin, Pitt, Sampson, and Surry.

However, North Carolina law provides that for an increase in the authorization for local sales and use taxes, the effective date of a rate change for an item taxed at the combined general rate is the date on which local sales and use taxes authorized for every county become effective in the first county or group of counties to levy the authorized taxes. As a result of the levy of the additional 0.25% local tax in six counties, effective April 1, 2008, the combined general rate increases from 6.75% to 7%. The increased rate applies to sales of telecommunications service, ancillary service, video programming, and spirituous liquor to purchasers in *all counties* and is not limited to such sales in only those counties that adopted the additional 0.25% local tax.

See the Dept. of Revenue's Important Notice: Increase in Combined General Rate of Tax, February 2008, for more details. ♦

## South Dakota taxes electronically transferred products

Recently enacted South Dakota legislation will impose sales and use tax on all sales, leases, or rentals of any product transferred electronically.

HB1017 of 2008 is effective July 1, 2008.

The tax will apply if:

- the sale is to an end user;
- the sale is to a person who is not an end user, unless otherwise exempted;
- the seller grants the right of permanent, or less than permanent, use of the products transferred electronically; or
- the sale is conditioned or not conditioned upon continued payment.

### Applicable definitions

A "product transferred electronically" is defined as any product obtained by the purchaser by means other than tangible storage media. A product transferred electronically does not include any intangible items such as a patent, stock, goodwill, trademark, franchise, or copyright.

The term "end user" does not include any person who received by contract any product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person.

The term "permanent use" is defined as perpetual or for an indefinite or unspecified length of time. The sale of a digital code that may be utilized to obtain a product transferred electronically must be taxed in the same manner as the product transferred electronically. A digital code is a code that permits a purchaser to obtain at a later date a product transferred electronically. ♦

## South Dakota's definition of "telecommunications service" revised

South Dakota has redefined the term "telecommunications service" for sales and use tax purposes to address VoIP issues.

HB1010 of 2008, is effective July 1, 2008.

"Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, and any other information or signals to a point, or between or among points. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing regardless whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added.

"Telecommunications service" includes the following services:

- 800 service;
- 900 service;
- fixed wireless service;
- mobile wireless service;
- paging service;
- prepaid calling service;
- prepaid wireless calling service;
- private communication service; and
- value-added non-voice data service.

"Telecommunications service" does not include the following:

- data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information;
- installation or maintenance of wiring or equipment on a customer's premises;
- tangible personal property;

- advertising, including directory advertising;
- billing and collection services provided to third parties;
- Internet access service;
- radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service, as of June 1, 2007, and audio and video programming services delivered by commercial mobile radio service providers;
- ancillary services; or
- digital products delivered electronically, including but not limited to software, music, video, reading materials, or ring tones. ♦

## Minnesota authorizes local taxes, rental car fee

The Minnesota Legislature has overridden Gov. Tim Pawlenty's veto of the omnibus transportation finance bill and thus increased the rental motor vehicle fee from 3% to 5%. The transportation finance bill also authorizes certain local taxes.

HF2800 of 2008 is effective July 1, 2008.

The rental motor vehicle fee applies to rentals of passenger automobiles for up to 28 days, and is imposed in addition to a 6.2% rental motor vehicle tax.

### Met transportation area

The counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington, i.e. the metropolitan transportation area, may impose a 0.25% transportation sales and use tax and a \$20-per-vehicle excise tax on retail sales of motor vehicles in the counties.

To impose these taxes, a county would have to enter into a joint powers agreement with the other counties imposing the tax. The taxes would first become effective on the first day of a calendar quarter beginning at least 90 days after a joint powers board is formed. The authorization to impose the taxes expires on Oct. 2, 2008, if the sales and use tax has not been imposed.

### Greater Minnesota

Counties outside the metropolitan transportation area may impose a transportation sales tax of up to 0.5% and a \$20-per-vehicle excise tax on retail sales of motor vehicles, effective July 1, 2008. Two

or more counties may enter into a joint powers agreement to impose the taxes. These taxes must be approved by a majority of voters in each of the affected counties.

### Gas tax hike vetoed

The governor, on Feb. 22, 2008, vetoed HF2800, which also contained a five-cent gasoline tax increase. ♦

## Kansas discusses sales tax treatment of propane

The Kansas Dept. of Revenue has issued information on the application of retailers' sales tax to the sale of propane, excluding propane delivered through lines, mains, or pipes.

The publication, Information Guide: Application of Kansas Sales Tax to the Sale of Propane, released Jan. 11, 2008, also discusses interstate transactions and the taxability of fees for setup, repair, and delivery.

### Taxability, generally

As a general rule, the retail sale, lease, or rental of propane, propane tanks, and related equipment is subject to retailers' sales tax. Sales of propane gas for agricultural use or to a residence for heating or lighting are exempt from state sales tax but subject to local sales taxes.

"Residence" does not include recreational vehicles, campers, and the like. Dormitories, for-profit nursing homes, and businesses conducted within residences are taxed on a percentage basis.

### Exemption certificates

Exempt entities, such as governmental entities and churches, may use exempt entity exemption certificates on purchases of propane, tanks, and related equipment. Wholesale propane sales to retailers are not taxable, but require the use of resale exemption certificates.

A "consumed in production" exemption certificate can be used on the retail sale of propane, but not on the sale of tanks and related equipment. The certificate can be used for propane directly consumed, for example, in agricultural production, the heating of hotel sleeping rooms, and in manufacturing, restaurant, and warehouse processes.

### Destination sourcing

Destination-based sourcing applies to the sale of propane, tanks, and related equipment. In a lease or rental, destination sourcing applies if the customer

does not make recurring, periodic payments. If the customer does make recurring, periodic payments, destination sourcing applies to the first payment and origin-based sourcing applies to all other payments.

## New Jersey imposes recycling tax on solid waste

Recently enacted New Jersey legislation imposes a recycling tax on solid waste generation. Revenue from the tax will provide financial support to municipalities and counties for recycling programs.

AB1886 of 2008 is effective Jan. 13, 2008.

The measure levies a recycling tax on the owner or operator of every solid waste facility at the rate of \$3 per ton on all solid waste accepted for disposal or transfer. A recycling tax also is imposed on solid waste collectors that transport solid waste for transshipment or direct transportation to out-of-state disposal sites at the rate of \$3 per ton. The taxable solid waste includes that collected for transportation to a railroad transfer station or other facility designed to transport waste on railroads or directly to an out-of-state disposal site.

### Exclusions from the tax

The recycling tax will not be imposed on solid waste transported from an in-state transfer station from which the recycling tax has been levied to an in-state solid waste facility for final disposal.

- The recycling tax also will not be imposed on:
- the owner or operator of a railroad transfer station or other facility designed exclusively to transport waste on railroads;
  - the owner or operator of a sanitary landfill facility for the acceptance for disposal of the ash residue resulting from the incineration of solid waste at a resource recovery facility;
  - the owner or operator of a solid waste facility for the acceptance for disposal of solid waste originating from out-of-state sources under a contract awarded prior to Dec. 31, 2007, if the contract does not include a change in law or similar mechanism by which the recycling tax may be passed through as a fee or surcharge on the rates and charges set forth in the contract; and
  - the owner or operator of a resource recovery facility for the acceptance for disposal of solid waste originating from in-state sources under a contract awarded prior to Dec. 31, 2007, if the contract does not include a change in law or

similar mechanism to pass through the recycling tax as a fee or surcharge on the rates and charges set forth in the contract.

The recycling tax will be imposed on the owner or operator of a solid waste facility for the acceptance for disposal of solid waste originating from out-of-state sources under any contract awarded after Dec. 31, 2007.

### Solid waste services tax

A solid waste services tax is imposed on the owner or operator of every sanitary landfill facility at the rate of \$1.65 per ton of solid waste on all sold waste accepted for disposal at a sanitary landfill facility. The solid waste services tax expires on Feb. 1, 2008. However, the expiration will not affect any obligation, lien, or duty to pay taxes that may be due or any interest or penalties that may accrue by virtue of any assessment imposed prior to the expiration date.

### Repealed taxes

The legislation repeals the resource recovery investment tax and the solid waste importation tax. ♦

## U.S. Supreme Court asked to review Kentucky tax on satellite TV

Satellite providers of television programming have asked the U.S. Supreme Court whether the Kentucky tax on multichannel video programming service discriminates against interstate commerce in violation of the dormant Commerce Clause.

The Kentucky utilities tax includes both an excise tax component and a gross receipts tax component and is collected on the charges paid by subscribers within Kentucky for both satellite and cable television service.

Petition for certiorari was filed Jan. 31, 2008, in *DIRECTV Inc. v. Treesh*, Dkt. No. 07-1004.

Local governments in Kentucky historically had imposed franchise taxes and fees on cable providers, but not satellite providers because federal law prohibits local franchise fees on satellite service. This changed when the legislation enacting the state tax prohibited local governments in Kentucky from imposing franchise fees or taxes on any programming services. However, local governments receive a share of the state tax in proportion to the amount of franchise fees that they historically had been collecting from cable providers.

(Continued on page 8)

# STATE UPDATES

## ALABAMA

### Carbon dioxide in poultry taxable

Carbon dioxide used in a chicken processing plant to cool the chicken immediately after it was cooked, so that it could be efficiently cut into pieces, was subject to sales tax. The carbon dioxide did not qualify for the ingredient and component exemption. Regardless of whether the carbon dioxide remained in the chicken, its function was merely to cool the chicken, and its subsequent presence in the chicken was incidental to that function. (*Wayne Farms LLC d/b/a Dutch Quality House v. Dept. of Revenue, Administrative Law Division, Dkt. No. S. 06-797*)

### Governor appoints DOR head

Gov. Bob Riley has appointed Tim Russell as Commissioner of the Dept. of Revenue. Russell replaces Assistant Revenue Commissioner Cynthia Underwood, who has served as acting commissioner since the departure of Tom Surtees last September. (*Release, Governor's Office, Feb. 22, 2008*)

## CALIFORNIA

### Reg clarifies permit liability

A sales and use tax regulation regarding permits is amended to clarify the application of seller's permit predecessor liability rules. The methods for notifying the State Board of Equalization when a seller's permit becomes inactive are also clarified. Additionally, the fraud penalty can be imposed on a predecessor when the ownership of the successor who committed fraud is substantially the same as the predecessor ownership. (*Reg. 1699, SBE, effective Feb. 23, 2008*)

### SBE names chair, vice-chair

The State Board of Equalization unanimously voted to name Judy Chu as chair of the SBE, and selected Betty T. Yee as vice-chair. As chairwoman, Chu will also serve as a voting member of the Franchise Tax Board. (*News Release 5-08-C, SBE*)

### Interest rates announced

The interest rate on state sales and use tax liabilities from July 1, 2008, through Dec. 31, 2008, is 10%. The interest rate on refunds and credits for the second half of 2008 is 3%. (*Interest Rates--Sales and Use Tax Programs, State Board of Equalization*)

## COLORADO

### Transportation panel suggests rate hikes

Gov. Bill Ritter presented his Blue Ribbon Transportation Panel's final report to the Legislature, 2008. The report recommended a 0.35% increase in the sales and use tax rate and a 13-cents-per-gallon increase in the motor fuel tax rate. Voter approval would be required to raise the sales and use tax and the motor fuel tax. (*Executive Summary--A Report to Colorado, Transportation Finance and Implementation Panel; Press Release, Office of the Governor*)

## FLORIDA

### Governor wants tax holidays, energy perks

Gov. Charlie Crist's budget recommendations for fiscal year 2008-09 include the continuation of sales tax holidays for hurricane preparedness supplies and back-to-school items. Last year, the hurricane preparedness holiday was conducted from June 1-12, 2007, and the school supplies and clothing holiday on Aug. 4-13, 2007. The Governor's proposals also include sales tax exemptions for installing wind energy turbines and alternative fuel facilities. (*Press Release, Policy and Budget Recommendations, Governor's Office, Jan. 31, 2008*)

### Taxability of fax services discussed

The service of sending or receiving a facsimile is subject to the state communications services tax. The rate is 9.17% at the state level, and the local rates vary by jurisdiction. Fax services that are provided during the course of providing professional or advertising services are not subject to the tax. A business that sells fax services must register with the Dept. of Revenue as a communications services dealer. (*Tax Information Publication No. 08A19-01, DOR*)

### Advertising materials exemption explained

A rule is amended to provide the administrative requirements for the sales and use tax exemption for certain advertising materials distributed free of charge by mail in an envelope. The exemption is applicable to individual coupons or other individual cards, sheets or pages of printed advertising. The envelope must contain advertisements from 10 or more advertisers. Sales and use tax is not due on the purchase of materials (i.e., paper, ink, envelopes, glue or replenisher) that are incorporated into and become a

component part of the exempt advertising materials. No use tax is imposed on the cost of manufacturing, producing, processing, or fabricating the exempt advertising materials. (*Rule 12A-1.008, Dept. of Revenue, effective Jan. 28, 2008*)

## ILLINOIS

### DOR explains production exemption

The Dept. of Revenue has issued an explanation of how it will administer the partial sales tax exemption for the purchase of production-related tangible personal property enacted as part of the budget bill. The DOR will administer the exemption on a claim basis after the close of the exemption period, which is retroactive to July 1, 2007, and runs through June 30, 2008. Claims will be prorated to remain within the statutory maximum of \$10 million for all taxpayers combined. Retailers are advised that they cannot claim the exemption on their ST-1 Sales and Use Tax Returns and must collect the tax from purchasers at the time of sale. (*New Exemption Under SB783, DOR*)

### Local tax regs amended

Several non-home rule municipal retailers' occupation (sales) tax and service occupation tax regulations have been updated to conform with current law. The changes reflect that currently either tax may be imposed in 1/4% increments up to 1%. Formerly, the tax could only be imposed at a 1/2% rate. Also, rate changes adopted and certified before April 1 will take effect on the following July 1, and rate changes adopted and certified before Oct. 1 will take effect on the following Jan. 1. Formerly, rate changes could only take effect on Jan. 1. (*86 Ill. Adm. Code § 693.101, 693.130, 694.101, and 694.130, Dept. of Revenue, effective Feb. 8, 2008*)

## KANSAS

### Leasing e-mail list nontaxable

Charges for leasing an e-mail mailing list sent through the Internet were not subject to sales or use tax. Tax did not apply because Kansas does not tax sales of electronically-downloadable digitized information or products that are not downloaded, canned "prewritten computer software." The charges would have been taxable if a tangible hard copy of the mailing list were also provided. In such a case, charges for both the downloaded information and the hard copy would have been subject to tax. (*Private Letter Ruling No. P-2007-006, Dept. of Revenue*)

# STATE UPDATES

## MICHIGAN

### Prepaid gas rate rises

The Dept. of Treasury has announced that effective April 1, 2008, the prepaid gasoline sales tax rate increases from 13.1 cents per gallon to 16 cents per gallon. (*Revenue Administrative Bulletin 2008-1, DT*)

## MISSISSIPPI

### Direct pay permit rule amended

The rule on direct pay permits has been updated to reflect previous legislation. Information is added on the issuance of direct pay permits to qualified industries and taxpayers eligible for certain sales and use tax incentives, including the national or regional headquarters exemption, the broadband technology exemption, the major economic impact project exemption, and the data/information and technology intensive enterprise exemption. Permits issued to qualified industries will be active as long as the taxpayer maintains the use tax account for the permit or until the state revokes the permit. Project and special purpose permits will be good only for the special purpose or for the eligible time frame associated with a specific project. (*Rule 35.IV.01.01 (old Rule 8), State Tax Commission, effective April 1, 2008*)

## MISSOURI

### Recovery exemption for wood pellets

A company that purchases sawdust that it screens, dries, and forms into wood pellets to be burned in pellet stoves for heat is a material recovery processing plant entitled to claim the sales tax exemption in §144.030.2(4), RSMo. The recovery of sawdust into usable products is the taxpayer's primary purpose. (*Letter Ruling No. LR4194, Dept. of Revenue*)

## NEBRASKA

### Governor floats economic incentives

Gov. Dave Heineman has announced a new legislative proposal, called Nebraska Super Advantage, which would modify certain existing sales and use tax and other tax incentives available under the existing Nebraska Advantage program. Specifically, the proposal would add a new tier to provide tax incentives to businesses creating new jobs that pay at least 150% of the state average wage or 200% of the average wage in the county where the business is located,

whichever is greater. Additionally, companies would have to create at least 75 new jobs in an industry other than retail and would be required to make a \$10 million investment in capital. Qualifying businesses would be eligible to receive a 15% investment tax credit and a 10% wage credit, in addition to sales tax refunds on purchases associated with expansion and a 10-year exemption on personal property. (*Press Release, Governor's Office, Jan. 11, 2008*)

## NEW YORK

### High Court declines retaliation allegation

The U.S. Supreme Court has denied the request of two affiliated limousine companies and their owner to decide whether their constitutional rights were violated when employees of the Dept. of Taxation and Finance allegedly caused sales tax assessments to be imposed on one of the companies (STS) in retaliation for a successful challenge to a prior tax assessment by the other company (Classic). The New York Supreme Court held that the officials' conduct with respect to STS did not implicate any constitutional rights, and the officials' actions were entitled to qualified immunity. Furthermore, the court held that STS, as a separate legal entity, could not assert a claim that Classic's constitutional rights were violated. The New York Court of Appeals denied review. (*STS Management Development Inc. v. Dept. of Taxation and Finance, U.S. Supreme Court, Dkt. 07-724, petition for certiorari denied Jan. 14, 2008*)

## OHIO

### Converter box coupons discussed

Coupons issued by the U.S. government that can be used toward the purchase of a digital-to-analog television converter box cannot be used to pay Ohio sales tax on the purchase. Retailers must compute sales tax on the total selling price of a converter box before the coupon amount is deducted. (*Sales and Use Tax Information Release ST 2008-01, Dept. of Taxation*)

## OKLAHOMA

### Governor's reveals budget proposal

Gov. Brad Henry's budget proposal includes a tax amnesty program for sales and use and other taxpayers. The amnesty would give those delinquent on liabilities three months to pay up. Taxpayers who take advantage of the amnesty would be relieved of half the interest and all penalties

due. The Governor also proposes publishing a list of all delinquent taxpayers for any state tax on the state's OpenBooks Web site. Taxpayers would be listed on the Web site after the state has made its standard attempts at collection and has issued a notice to the taxpayer. (*FY-2009 Executive Budget Proposal, Governor's Office*)

## PENNSYLVANIA

### Rebated sales tax for poor?

Gov. Edward G. Rendell's 2008-2009 proposed budget calls for immediate action to enact a one-time tax rebate of up to \$400 per household for 475,000 personal income taxpayers who currently take advantage of Pennsylvania's Tax Back program. While these low-income individuals don't pay any state personal income taxes, the governor said, they do pay a disproportionate amount of their income in sales, gas and local taxes. The governor also renewed his call for action on a comprehensive plan to provide health care to all Pennsylvanians funded partly by increased taxes on tobacco products. (*2008-2009 Budget Address; Press Release, Governor's Office; Feb. 5, 2008*)

## SOUTH CAROLINA

### Reminder to tax return preparers

The Dept. of Revenue has issued a memorandum reminding that all tax return preparers that file more than 100 returns in a single tax year are required to file electronically. To the extent electronic filing is not available but 2D barcode filing is available, then the return must be filed using the 2D barcode. Further, if the underlying taxpayer requests that the return be filed using another means, then the tax return preparer must file the return via the taxpayer's preference. (*Electronic Filing Mandate for Tax Return Preparers, DOR*)

## TENNESSEE

### March tax holiday detailed

The special, one-time sales tax holiday will run from Friday, March 21, 2008, at 12:01 a.m., through Sunday, March 23, 2008, at 11:59 p.m. During the tax holiday, the following items are exempt from sales and use tax: (1) clothing with a price of \$100 or less per item; (2) school and art supplies with a price of \$100 or less per item; and (3) computers with a price of \$1,500 or less. Additional information is available on the Dept. of Revenue's Web site at [www.tntaxholiday.com](http://www.tntaxholiday.com). (*Notice, DOR, Feb. 7, 2008*)

## Kentucky *(Continued from page 5)*

The satellite providers challenged the state tax in federal court on the basis that the tax unconstitutionally burdens a service with an infrastructure that is predominantly outside the state (satellite) in order to provide a subsidy for a competing service with an infrastructure that is predominantly inside the state (cable). The satellite providers assert that the franchise taxes formerly imposed on cable providers had defrayed the cost of cable's use of public rights-of-way and other local services not exploited by satellite providers.

The federal district court dismissed the satellite providers' suit, and the U.S. Court of Appeals for the Sixth Circuit affirmed. The appellate court held that there was no direct monetary subsidy provided, that satellite and cable are distinct businesses, and that the state may have been motivated by goals other than to favor the service with the greater in-state connections. Therefore, the court found no unconstitutional tax-and-subsidy scheme of the kind found in *West Lynn Creamery, Inc.* (1994). ♦

## California revises appeals process

The California State Board of Equalization has adopted a comprehensive revision to its Rules of Practice that addresses the appeals process for sales and use taxes, timber yield taxes, property taxes, and special taxes and fees administered by the SBE, as well as corporation franchise and income and personal income tax appeals from the Franchise Tax Board. Now entitled Board of Equalization Rules for Tax Appeals, the revised rules codify important procedures not contained

in the former Rules of Practice, reorganize the rules for the appeals process in a more logical manner, and generally explain the appeals processes as plainly and comprehensively as possible, according to the SBE.

The RTA, Reg. 5000 et seq., was approved by the Office of Administrative Law and filed with the Secretary of State on Jan. 7, 2008.

Articles 1 through 8 (§5010-§5087) of the former Rules of Practice have been repealed and are replaced by five chapters of the RTA at §5000 through §5576, as part of Title 18, Div. 2.1, Chap. 10 of the California Code of Regulations. Other sections and cross-references have been renumbered accordingly.

Chap. 2 of the RTA, Sales and Use Tax, Timber Yield Tax, and Special Taxes and Fees, includes rights and policies that were not included in the previous rules.

Chap. 3, Property Taxes, incorporates the existing procedures for the board's property tax appeals processes, except appeals under the Timber Yield Tax Law and appeals of jeopardy assessments issued under the Private Railroad Car Tax Law, which are governed by Chap. 2 of the RTA. Chap. 4, Appeals from Actions of the Franchise Tax Board, clarifies the Board's procedures for hearing appeals from actions of the FTB and codifies the board's existing practices that were not contained in the former rules.

Also, a new briefing schedule for innocent spouse appeals and new pre-hearing conference procedures have been added. Chap. 5, General Board Hearing Procedures, incorporates the appeals processes and revises the board's historical practices regarding the disclosure of information relevant to an oral hearing. ♦