



State and Local Taxation: Headline News and Trends

April 28, 2015

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CATEGORIES TO BE COVERED

○ Megatrends and Developments

○ Business Activity Taxes

○ Transaction Taxes

○ Other Issues

MEGATRENDS AND DEVELOPMENTS

U.S. Supreme Court



*Maryland State Comptroller of the Treasury
v. Brian Wynne*

Oral argument held on November 12, 2014



MEGATRENDS AND DEVELOPMENTS

U.S. Supreme Court

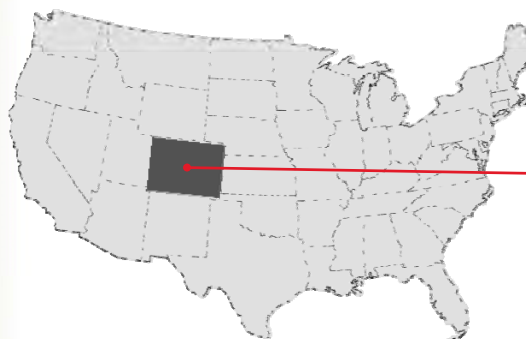


Direct Marketing Association v. Brohl
DMA wins. Direct marketers lose?
135 S.Ct. 1124 (March 3, 2015)



MEGATRENDS AND DEVELOPMENTS

U.S. Supreme Court



Colorado Click-Through Nexus

Direct Marketing Association v. Brohl

On April 13, 2015 the 10th Circuit Court of Appeals vacated its earlier decision holding against DMA. The court has ordered the parties to brief Commerce Clause, comity and "and any other issues the parties consider pertinent."

MEGATRENDS AND DEVELOPMENTS

U.S. Supreme Court



Ala. Dep't. Rev. v. CSX Transportation, Inc.
Alabama wins.
135 S.Ct. 1136 (March 4, 2015)
Ct. App. Orders rebriefing (April 15, 2015).

MEGATRENDS AND DEVELOPMENTS

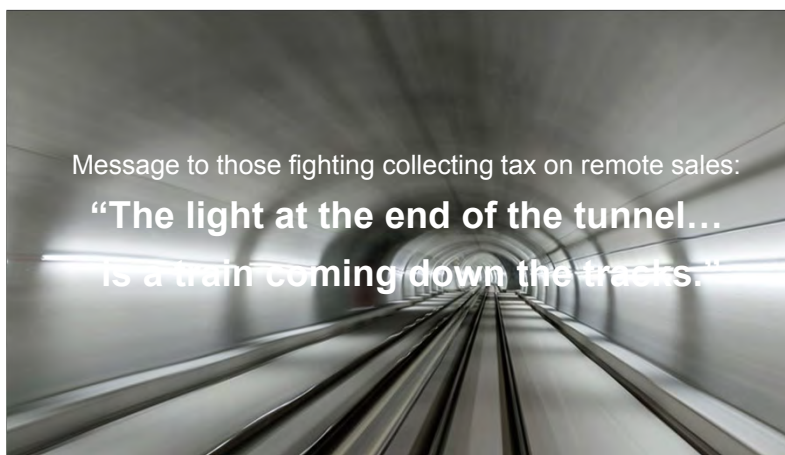


Tax Presence

Overall theme: Borders matter less than ever...But there are some taxpayer wins

MEGATRENDS AND DEVELOPMENTS

Nexus -- Federal Action: "One if by Litigation, Two if By Legislation"?



Message to those fighting collecting tax on remote sales:

"The light at the end of the tunnel...
is a train coming down the tracks."

MEGATRENDS AND DEVELOPMENTS

Legislation



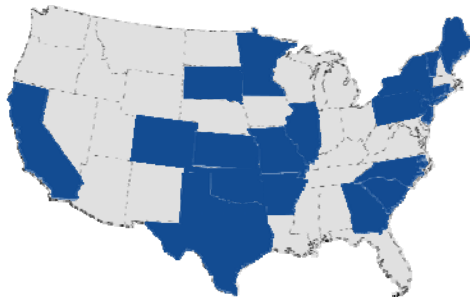
Marketplace Fairness Legislation

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9

MEGATRENDS AND DEVELOPMENTS

Click-Through Nexus States



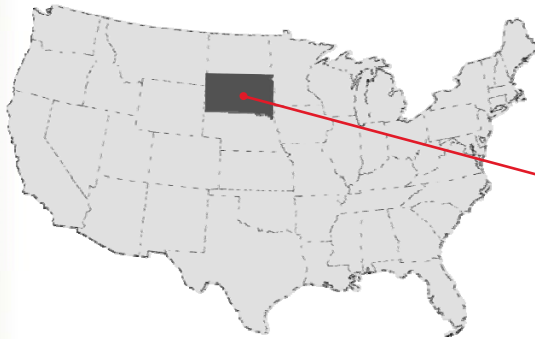
States With Some Type of Click-Through Nexus:

ARKANSAS	MAINE	PENNSYLVANIA (DOR Position)
CALIFORNIA	MINNESOTA	RHODE ISLAND
COLORADO	MISSOURI	SOUTH CAROLINA
CONNECTICUT	NEW JERSEY	SOUTH DAKOTA
GEORGIA	NEW YORK	TEXAS
ILLINOIS	NORTH CAROLINA	VERMONT
KANSAS	OKLAHOMA	

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10

MEGATRENDS AND DEVELOPMENTS

State Nexus Legislation



South Dakota

South Dakota HB 1001, signed into law on February 19, 2015, permits direct shipments of wine if the shipper registers with the DOR. Registration (purportedly) required even if shipper lacks tax presence in South Dakota.

MEGATRENDS AND DEVELOPMENTS

State Nexus Legislation




New York

New York Gov. Cuomo proposes tax collection obligations for on-line marketplaces. "A big deal," per NYS Budget Division.


MEGATRENDS AND DEVELOPMENTS

State Nexus Litigation




Ohio

Ohio Board of Tax Appeals. In three decisions involving the Commercial Activity Tax, the BTA found tax presence despite lack of physical presence.


*  13

MEGATRENDS AND DEVELOPMENTS

Federal Legislation

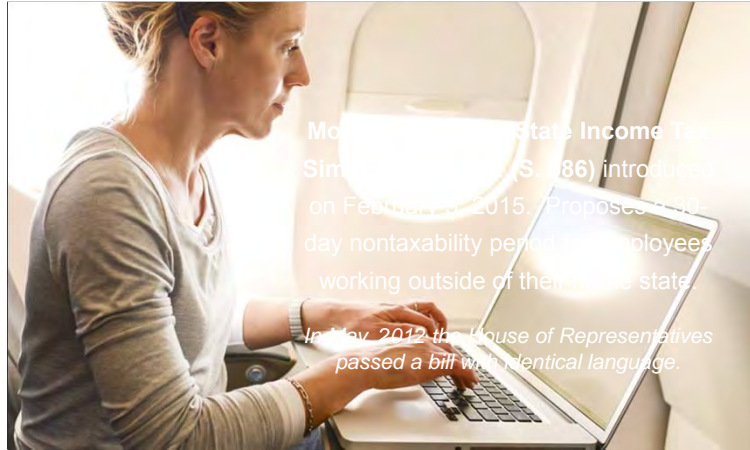


- Internet Tax Freedom Forever Act. Reintroduced February 10, 2015 as S. 431 (See also H.R. 235 (Introduced January 9, 2015))
- Digital Goods and Service Tax Fairness Act of 2015 (S. 851) (Introduced March 24, 2015)

 14

MEGATRENDS AND DEVELOPMENTS

Federal Legislation



Modernizing State Income Tax
Simplification Act (S. 386) introduced
on February 11, 2015. Proposes a 90-
day nontaxability period for employees
working outside of their home state.

In May 2012 the House of Representatives
passed a bill with identical language.

MEGATRENDS AND DEVELOPMENTS

Qui Tam and Class Actions

PRIVATE LAWSUITS. CHOOSE YOUR POISON?

- Vendor Undercollection

Suit by private lawyers under state False Claims Acts (“qui tam actions”) seeking reward of 15% to 30% of the state’s recovery

- Vendor Overcollection

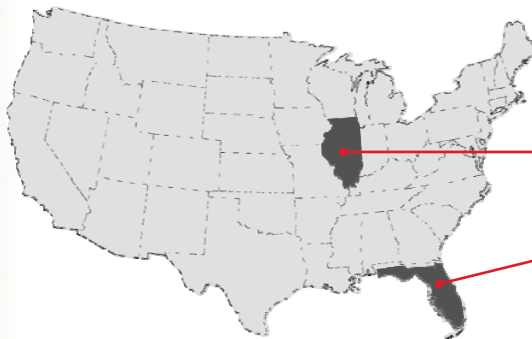
Suit by private lawyers in class action refund claims



Vendors and the states hate this use
of the False Claims Acts and class
actions.

MEGATRENDS AND DEVELOPMENTS

Qui Tam and Class Actions – Case Developments





Illinois & Florida

Case dismissal and denial of qui tam award upheld:

- *State of Illinois ex rel. Schad Diamond and Shedden P.C. v. QVC, Inc.*

Florida case settled:

- *Schojan v. Papa Johns International, Inc.*

 17 

MEGATRENDS AND DEVELOPMENTS

Qui Tam and Class Actions – New Cases

- *Wong v. Whole Foods Market Group, Inc.*
- *Wong v. Target Corporation*



 18 

MEGATRENDS AND DEVELOPMENTS

Qui Tam and Class Actions – State Legislation



Several bills pending in Illinois.

MEGATRENDS AND DEVELOPMENTS

Qui Tam and Class Actions: MTC Working Group



The Multistate Tax Commission has organized a working group of practitioners and state officials to address this issue

MEGATRENDS AND DEVELOPMENTS

"Tax Haven" Legislation: Say Goodbye to This...?



MEGATRENDS AND DEVELOPMENTS

"Tax Haven" Legislation: ...And Goodbye to This, Too?



BUSINESS ACTIVITY TAXES

Litigation



Mississippi
State Chancery Court holds the state's dividend received deduction unconstitutional because it was limited to dividends received from affiliates doing business and filing income tax returns in Mississippi. Involves years 1997-1999 and an assessment issued in 2003. *AT&T Corp. v. Miss. Dep't Rev.*, No. 25CH1:04-cv-001393 (March 20, 2015).

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BUSINESS ACTIVITY TAXES

Multistate Tax Compact: Litigation Update



Minnesota.
Kimberly-Clark Corp. et al. v. Comm. (Tax Ct. Doc. 8670-R) (12/12/13).
Oral argument heard on March 19, 2015

Michigan.
1. Legislation; 2. Litigation (a) MBTA (b) SBT. *Emco Enterprises, Inc. v. Dep't. Treas., Ct. Claims No. 12-000152-MT* (4/21/15)

Oregon.
Health Net Inc. and Subs v. Dept. of Rev. Oral arguments on cross motions for summary judgment held on July 22, 2014.

Texas.
Graphic Packaging Corporation v. Comptroller of Public Accounts (Ct. App. No. 03-14-00197-CV).
Oral argument scheduled for June 3, 2015

California. *Gillette Company v. FTB, Ca. S. Ct.*
Fully Briefed. Oral argument was expected in 2014, and now in 2015, but has not yet been scheduled.

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24

BUSINESS ACTIVITY TAXES

Unitary Businesses/Tax Presence



Maryland

ConAgra Brands, Inc. v. Comptroller,
Maryland Tax Court No. 09-IN-OO-0150 (2/24/15).



25

BUSINESS ACTIVITY TAXES

Unitary Businesses/Retroactivity



Oregon

Department of Revenue v. Rent-A-Center, Inc., TC 5224 (1/26/15).



26

BUSINESS ACTIVITY TAXES

Apportionment



Pennsylvania

Important Notice Corporate Taxes 2014-01 (December 12, 2014) regarding apportionment of sales of services was criticized by PA. Institute of CPAs in a March 24, 2015 letter to the DOR (Notice is "impractical," "confusing," and needs "clarification.")

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BUSINESS ACTIVITY TAXES

Amnesty/Revenue Issues



Massachusetts

Amnesty collections for March, 2015 were predicted to be \$3.6 million, but were only \$163,000. Amnesty remains open through May 15, 2015.

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BUSINESS ACTIVITY TAXES

Revenue Issues



Minnesota

On Nov. 4, 2014, Minnesota's Solicitor General filed a Memorandum of Law with the State's Tax Court alleging that a ruling for the taxpayer in *Kimberly-Clark* would cost the state \$700 million. (Actual claims are \$150M.) This is not a proper basis for deciding the case... Then on Feb. 27, 2015, the Minnesota Management and Budget Office announced that the state had a \$2 billion budget surplus.

→ *Under the circumstances, let's hope this means that the case will be decided on its merits.*

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BUSINESS ACTIVITY TAXES

Revenue Issues



Wisconsin

Announced a desire to hire an additional 102 corporate tax auditors. Executive Budget released 2/3/15.

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30

BUSINESS ACTIVITY TAXES

Legislation and Guidance



New York State

New York State's corporation tax system overhaul became effective January 1, 2015.

(See our prior coverage in the May 28, 2014 Headline News and Developments, slides 24-28, available at <https://rimon.egnyte.com/h-s/20140530/qfBiSqueAq>.)



31

BUSINESS ACTIVITY TAXES

Legislation



New York City

Retroactive to January 1, 2015, NYC corporate tax conforms to many of the changes to NYS's corporate tax system. S. 4610, signed into law April 13, 2015. Title 11, Ch. 6, subch 3-A.



32

Mark your calendars:

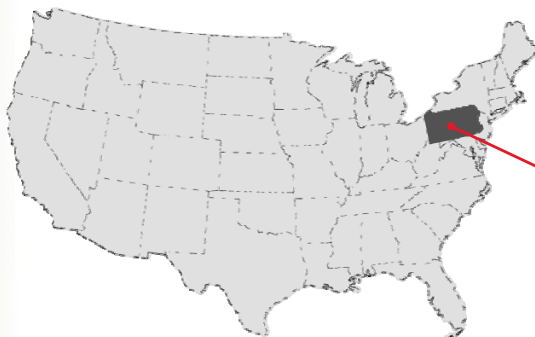
- The next “State and Local Taxation: Headline News And Trends” is scheduled for

September 10, 2015 (11:00 a.m. Eastern)

- Please send me a LinkedIn connection request to be sure that you receive the invitation.

TRANSACTION TAXES

Sales Tax on Services




Pennsylvania

Pennsylvania Gov. Wolf proposes an expansion of the sales tax. On March 18, 2015, Pa. DOR issued a memo identifying goods and services that newly will be subject to sales tax. Includes investment advisory, real estate agent and brokerage, nursing and rehabilitative care, accounting and legal services.

TRANSACTION TAXES

Sales Tax on Services



California

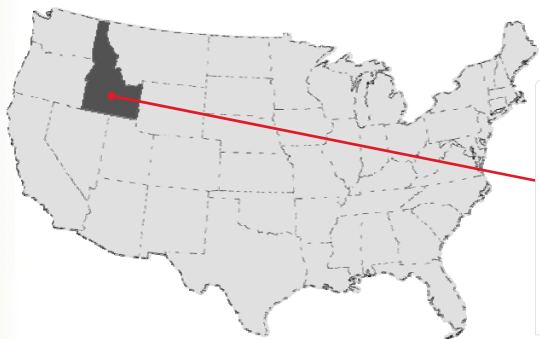
SB 8 proposes taxing retail sales of services when the benefit is received in California. In an April 14, 2015 report, the SBE estimates potential tax revenue as \$122 billion in 2016 alone. Put in context: On April 16, 2015 the U.S. Census Bureau reported that in 2014 the 50 states collected \$866B from all taxes.

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TRANSACTION TAXES

Legislation



Idaho

Law clarifying that subscription and streaming services are not subject to sales tax on digital goods signed on March 30, 2015, and takes effect April 1, 2015. HB 209.

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36

TAXING THE CLOUD

CLOUD COMMERCE

Definition



"Cloud" can be defined as "Services that allow customers to access and use computer software, servers, operating systems, databases, and other computing and storage resources *via* the Internet."

CLoud COMMERCE

Administrative Rulings and Pronouncements



image courtesy of atomhawk.deviantart.com

39

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TRANSACTION TAXES

Recent Cases

Hotel Occupancy Taxes

Endless litigation across the country.



- Hawaii
- San Francisco
- District of Columbia
- Chicago
- Maryland
- Montana
- Texas


40

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OTHER ISSUES

Derivative Liability



California

Purchaser of property was responsible for its predecessor entities' unpaid taxes and penalties - \$570,000. Recession was not reasonable cause. And price purchaser paid should have taken into account these unpaid liabilities.

*  41

OTHER ISSUES

Derivative Liability




Ohio

Taxpayer was not a responsible party. Taxpayer proved that she resigned as an officer prior to the periods at issue. Taxpayer also proved that during the periods at issue she was an independent contractor rather than an employee.

 42 *

OTHER ISSUES

Nondischargeability in Bankruptcy



Massachusetts

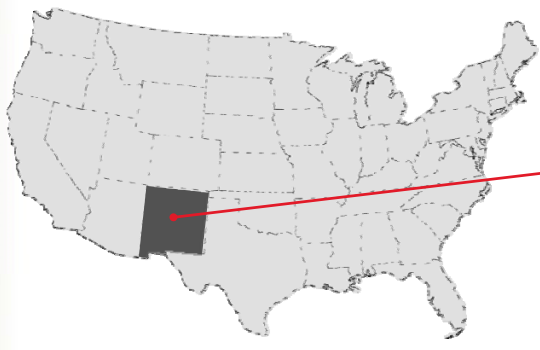
Bankruptcy did not discharge unpaid state income tax liability as taxpayer failed to comply with tax return filing requirements.

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43

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OTHER ISSUES

Procedures


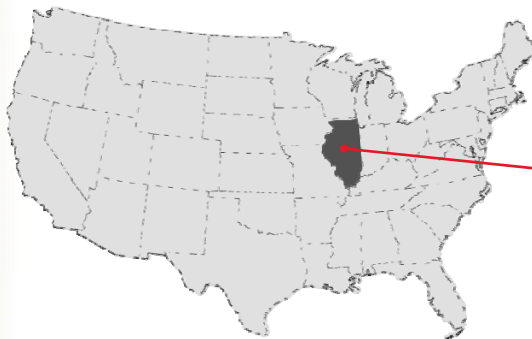


New Mexico

On April 7, 2015, New Mexico enacted a law establishing a hearing process for tax disputes that is independent of the Department of Finance of Administration and the Taxation and Revenue Department. SB 356.

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OTHER ISSUES
Tax or Fee?



Illinois
Illinois Supreme Court holds that a nursing home license fee was a valid tax (January 23, 2015).

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OTHER ISSUES
Tax or Fee?



Idaho
Idaho Supreme Court rules that a sewer connection fee was an impermissible tax (February 26, 2015).

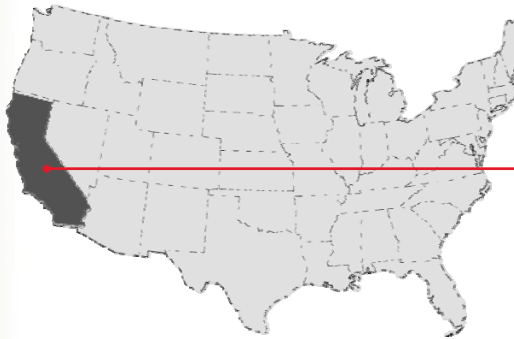
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46

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OTHER ISSUES

Tax or Fee?



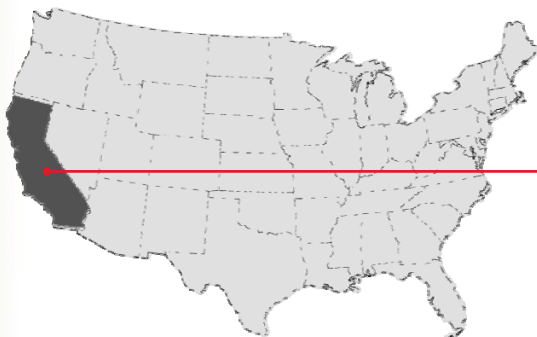
California

Water pumping fees are not taxes and are valid.

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OTHER ISSUES

Tax or Fee?




California

June, 2015 hearing on requested class certification in challenge to rural fire fee as an invalid tax. *Howard Jarvis Taxpayers Ass'n v. Dep't of Forestry and Fire Prot.*; Case No. 34-2012-00133197-CU-WM-GDS. See also S.B 520 proposing repeal of the fee/tax.


OTHER ISSUES

Retroactivity




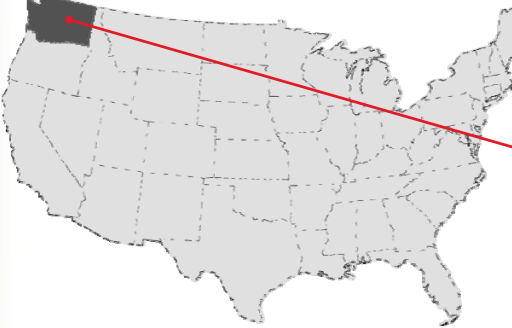
Florida

Right to property tax exemption was vested on January 1 of the tax year. Subsequent repeal of exemption did not deprive property owner of its vested exemption.

*  49


OTHER ISSUES

Virtual Currency





Washington

DOR Tax Topic "Accepting virtual currency as payment for goods or services" (published January 28, 2015).

 50

OTHER ISSUES

Virtual Currency



New Jersey
NJ conforms to IRS Notice 2014-21 (Technical Advisory Memorandum 2015-1 (Issued March 10, 2015)).

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Questions????



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- ✔ Has advised clients regarding taxes in all 50 states.

- ✔ For Mr. Fruchtman's complete biography and links to more than 30 of his articles, outlines and newsletters, please go to www.rimonlaw.com

NOTES

SLIDE 9

Marketplace Fairness Legislation

- Senate Passed as S. 743 on May 6, 2013
- House has assigned its version (H.R. 684) to the Judiciary Committee.
 - September 18, 2013 Judiciary Committee released its seven "Principles on Internet Sales Tax"
 - Tax Relief; Tax Neutrality; No Regulation without Representation; Simplicity; Tax Competition; States' Rights; Privacy Rights.
- SSTGB has engaged a lobbyist (April 2014)
- Efforts to tie the MFA to the Internet Tax Freedom Act" were unsuccessful.
- Marketplace Fairness Act. Reintroduced March 10, 2015 as S. 698). Rep. Goodlatte alternative proposal (origin-based) panned by MTC and others.

SLIDE 12

See 2015-2016 New York State Executive Budget Revenue Article VII Legislation, Part X, "Revenue Bill," at 220-225).

NOTES

SLIDE 13

Newegg, Inc. v. Testa, No. 2012-234 (2/26/15); *Crutchfield, Inc. v. Testa*, Nos. 2012-926, 2012-3068 and 2013-2021 (2/26/15); *Mason Companies, Inc. v. Testa*, Nos. 2012-1169 and 2012-2806 (4/20/15)

SLIDE 17

QVC: 2015 IL App (1st) 132999 No. 1-13-2999 (March 31, 2015).
Papa John's: U.S. Dist. Ct. Mid. Dist. FL., Case No. 8:14-cv-1218-T-33MAP

SLIDE 18

- *Whole Foods*: No. 1:15-cv-00848 (U.S. Dist. Ct. No. Dist. IL.);
- *Target*: No. 1:15-cv-01985 (U.S. Dist. Ct. No. Dist. IL.)

SLIDE 39

- Colorado General Information Letter GIL-15-003 (January 27, 2015)
- Missouri Letter Ruling LR 7503 (February 2, 2015)
- Kansas Private Letter Ruling P-2015-001 (March 12, 2015)

55

NOTES

SLIDE 40

- On January 28, 2015, Airbnb announced that it would begin collecting and remitting hotel occupancy taxes in Chicago and the District of Columbia.
- On February 20, 2015, announced that it paid “in full” a liability for San Francisco hotel taxes reaching into the millions of dollars.
- On March 17, 2015, the Hawaii Supreme Court ruled that on-line travel companies owed “up to tens of millions in back taxes to the State of Hawaii” (quote from the Attorney General’s press release of the same date). The Court also ruled that the travel companies were not liable for transient accommodations tax – an exposure that reached hundreds millions of dollars.
- On April 3, 2015 the Montana Department of Revenue filed its opening brief at the state Supreme Court in *Montana v. Priceline.com* (Cause No. DA 14-0260)
- On April 8, 2015, Maryland’s General Assembly approved legislation (S.B. 190 and H.B. 1065) requiring online travel companies to pay the state’s six percent sales tax on the full amount they charge customers. The OTCs currently argue that they are liable for hotel tax, if at all, only on the price they pay to the hotels.

NOTES

SLIDE 41

Ashlan Park LLC v. Crow, Calif. Ct. App. F069221 (2/2/15)

SLIDE 42

Kingery v. Testa, Case Nos. 2012-887 through 890 (1/27/15).

SLIDE 43

Fahey v. Massachusetts Department of Revenue, U.S. Dist. Ct. Mass. No 14-1328 (February 18, 2015).

SLIDE 45

Grand Chapter, Order of the Eastern Star of the State of Illinois v. Topinka, 2015 IL 117083 (IL. S. Ct. January 23, 2015).

SLIDE 46

North Idaho Building Contractors Association v. City of Hayden, 2015 Opinion No. 19 (ID. S. Ct. 2/26/15).

57

NOTES

SLIDE 47

City of Buenaventura v. United Water Conservation District, B251810 (Ca. Ct. App. 2nd App. Dist. as modified April 15, 2015).

SLIDE 49

Stranburg v. Panama Commons L.P., Case No. 1D14-1671 (Dist. Ct. App. 1st Dist. April 8, 2015).

58

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