

PENNSYLVANIA STATE AND LOCAL TAX UPDATE

**ALLEGHENY TAX SOCIETY
MARCH 22, 2021**

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I. PENNSYLVANIA PERSONAL INCOME TAX

A. Structure of Tax

1. Decoupled from the federal income tax system
2. Separate Classes of income worth no offsets between classes
3. It is possible to argue that many items of income taxable for federal purposes are not taxable for Pennsylvania purposes
 - (a) alimony
 - (b) arbitration awards
 - (c) annuities

B. Sources of Authority

1. Statute
2. Regulations
3. Rulings
4. PIT Guide

C. Dispute Resolution

1. Correspondence
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3. Appeals Process - New Policy at the Board of Appeals (Tax Bulletin 2011-02)
4. Voluntary Disclosure
5. Amended Returns (New Rules)
6. New Amnesty Program
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II. TOPICS OF CURRENT INTEREST

- A. Deduction of Intangible Drilling Costs. See Section 7303 (a.2) of the tax reform code, Chapter 23, PIT Guide, Staley 344 A2d 748 (1975) Act 52 Changes, and Bulletin 2013-04 and (Schedule I)
- B. Deb Forgiveness Income. Wirth 82 MAP 2012 (6-17-14)
- C. Section 1031 Exchanges (Pearlstein 741-743 FR 2017)

- D. PPP Loan Forgiveness and Deductions
- E. Working from Home Issues
- F. Grantor Trusts. See PIT Guide Chapter 14. Also consider voluntary disclosure and planning with Delaware S, Pennsylvania C
- G. Pass Thru Entities
 - 1. Withholding 72 PS 7324
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- I. Net Profit from Business Profession or Farm - Trade or Business Requirement - See PIT Guide Chapter 11 - 61 PA Code 103.12
- J. Installment Sale Planning - Redemption
- K. Residency Audits - Hvizdak 833 F.R. 2008 (2012 - PTBU)
- L. Bulletin 2010-04
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- N. McNeil v. Commonwealth 67 A3rd 135 (2013)
- O. N.C. Department of Revenue v. Kaestner 588 US June 21, 2019

III. PENNSYLVANIA CORPORATION TAXES

- A. Proposed Legislation
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 - 2. Corporate Net Income Tax Legislation providing for Consolidated Reporting
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 - M. New Nexus Rules
- IV. SALES AND USE TAX
- A. Electronically downloaded software and software maintenance - Dechert LLP 942 A.2d 210 (2008) - Cloud Computing SUT 12-001
 - B. Printing - EUR Systems 664 FR 2006 (2009). Printed items must be substantially similar. Constitutional issues were not raised below.
 - C. Enhances Telecommunications Service - America Outline 963 A2d 903 (2008)
 - D. Audits and Refund Opportunities presented by audit - New Refund rules
 - E. Appeal procedures have changed for assessments issued after December 31, 2017
 - F. AllStaffing Inc. v. Commonwealth 325 F.R. 2006 (January 6, 2010)

- G. SUT - 10-003 Fracturing Service - Oil and Gas Drilling Draft Information Notice 2014-0X
 - H. Information Notice 2017-02 - Information Retrieval Products
 - I. Sales Tax Bulletin 2017-01 Review of Large and Complex Refund Cases
 - J. Northwestern Pennsylvania Imaging Center 93 MAP 2009 (12-21-11)
 - K. Penalty Abatement available at the audit level
 - L. Bulletin 2011-1 Remote Seller Nexus
 - M. Proctor & Gamble Paper v. Commonwealth 29 A3d 1221 (2011)
 - N. Information Notice 2014-02 - Natural Gas Mining
 - O. Wayfair case - Sales Use Tax Bulletin 2019-01
 - P. Gross receipts audits - Form 1099-K
- V. LOCAL TAX
- A. Business Privilege Tax - Rendina v. City of Harrisburg 938 A2d 988 (2007) - New Legislation
 - B. Penalties - Borough of Braddock and Central Tax Bureau v. Sullivan 954 A2d 672 (2008)
 - C. Local Earned Income and Net Profits Tax - Countywide Collection
 - D. O'Reilly
 - E. State Definition of Local Earned Income and Net Profits
 - F. Voluntary disclosure - Local Level
 - G. Shelly Funeral Home v. Warrington Twp. 769 C.D. 2009
- VI. REALTY TRANSFER TAX - 61 PA CODE 91.70 ASSIGNMENT AS A TRANSFER
- A. Bulletin 2012-4
- VII. INHERITANCE TAX
- A. Bulletin 2012-1
- VIII. PROCEDURES - 67 A3d 1268 (2013)
- A. Offers in Compromise at the Board of Appeals
 - B. Structural Changes at the Board of Finance and Revenue (See Act 52 Changes)

- C. New Amnesty Program
- D. Mission Alpha Funding 129 A.3d 61 (2015)
- E. New Amended Returns Rules

Coronavirus Aid, Relief, & Economic Security (CARES) Act: Pennsylvania Taxability

The Coronavirus Aid, Relief, & Economic Security Act, more commonly known as the CARES Act, is a law that was established to help individuals who were financially affected by the COVID-19 pandemic in the United States. Below is information on CARES Act relief payments and how they are treated in Pennsylvania.

ANNUITY FUNDS FROM LABORERS' UNIONS

The taxability of an Annuity Fund distribution in 2020 from a Laborers' Union would not be affected under the CARES Act. Whether PA tax is applicable will depend on the specifics about the distribution and fund.

CORONAVIRUS-RELATED DISTRIBUTIONS (CRD)

Coronavirus-related distributions on retirement accounts allow taxpayers to spread their federal income tax burden on the distribution over three years. If the amount is paid back within three years, taxpayers may request a refund of federal taxes paid on the withdrawal.

Pennsylvania does not follow the federal provision on this. If the withdrawal meets the age or years of service requirement, then it is not subject to PA income tax. Otherwise, early distributions from retirement accounts are subject to tax to the extent that they were not already subject to tax at the time the money was contributed to the account.

In the event someone takes an early distribution from a retirement plan that would be subject to tax and subsequently pays it back, the department would not refund tax paid on that amount. Any reinvestment would be considered basis and wouldn't be taxable upon later distribution.

COVID DISASTER RELIEF PAYMENTS

COVID-19 disaster relief payments set up by employers or charities to be paid to employees do not constitute compensation for federal income tax purposes under IRC 139(a).

The department does not follow IRC § 139. The taxability of these payments would be dependent on the nature of the payments and would have to be reviewed on a case by case basis.

ECONOMIC IMPACT PAYMENTS (EIP) FEDERAL STIMULUS CHECK

The stimulus checks, otherwise known as economic impact payments, being distributed by the federal government are not subject to Pennsylvania personal income tax. The payments are considered a rebate that is non-taxable in Pennsylvania. Additionally, Act 1 of 2021 (SB 109) that was signed into law by the Governor specifically states the payments are not taxable under Pennsylvania's Tax Reform Code.

ECONOMIC INJURY DISASTER LOANS (EIDL)

The Economic Injury Disaster Loan (EIDL) program provides for an "advance" of up to \$10,000 within 3 days of the loan application even before the loan is approved. Section 1110(e)(5) of the CARES Act provides that the EIDL "advance" does not have to be repaid (even if the loan is subsequently denied). Because the "advance" never has to be repaid (i.e., there are no

conditions that have to be met to have the advance on the loan forgiven or discharged), the department will treat the "advance" as a grant which is not subject to tax.

GRANTS FROM LOCALITIES

Grants that businesses received from their localities due to COVID-19, that were not from the EIDL program, are not subject to PA income tax.

PAYCHECK PROTECTION PROGRAM (PPP)

Act 1 of 2021 (SB 109) that was signed into law by the Governor on February 5, 2021 states that Paycheck Protection Plan (PPP) loans used to pay business expenses during the COVID-19 pandemic that are subsequently forgiven by the lender are not taxable income for Pennsylvania personal income tax purposes. The bill also states that for PA personal income tax purposes no deduction may be disallowed for an expense that is otherwise deductible if the payment of the expense results in forgiveness of a covered loan.

For corporate net income tax, Pennsylvania taxable income is based upon federal taxable income. Pennsylvania law does not include an add back to or deduction from federal taxable income for forgiveness of a Paycheck Protection Plan loan.

1099-C, CANCELLATION OF DEBT

The IRS has clarified that lenders should not file Forms 1099-C to report the amount of qualifying forgiveness of covered loans made under the Paycheck Protection Program administered by the Small Business Association. This is not required to be filed with the PA Department of Revenue as well.

PROVIDER RELIEF FUND (PRF)

The federal government has allocated \$175 billion in payments to be distributed through the Provider Relief Fund (PRF) to support healthcare providers in the battle against the COVID-19 pandemic. The PRF distributes payments to healthcare providers to cover healthcare-related expenses or lost revenue due to COVID-19. The payments are nontaxable as grants for PIT Purposes.

This includes Health Resources and Service Administration (HRSA) claims reimbursements for uninsured patients.

STUDENT LOAN DEBT

The CARES Act provides that certain student loan repayments made by an employer up to \$5,250 will not be subject to Federal Income Tax. However, these repayments are considered taxable for PIT purposes. The amount of the student loan debt repayment made by the employer on behalf of an employee should be included as compensation on the employee's PA-40 return.

Telework During the COVID-19 Pandemic

Governor Tom Wolf issued a Proclamation of Disaster Emergency on March 6, 2020, for the COVID-19 pandemic. The Department of Revenue has issued temporary guidance relating to telework and related tax implications. This guidance will be in effect until the earlier of June 30, 2021, or 90 days after the Proclamation of Disaster Emergency in Pennsylvania is lifted (“End Date”). As of that End Date, the guidance below is rescinded and all prior tax rules are applicable.

Employees

In summary, if an employee is working from home temporarily due to the COVID-19 pandemic, the department does not consider that as a change to the sourcing of the employee’s compensation. For non-residents who were working in Pennsylvania before the pandemic, their compensation would remain Pennsylvania sourced income for all tax purposes, including PA-40 reporting, employer withholding and three-factor business income apportionment purposes for S Corporations, partnerships and individuals. Conversely, for Pennsylvania residents who were working out-of-state before the pandemic, their compensation would remain sourced to the other state and they would still be able to claim a resident credit for tax paid to the other state on the compensation.

Employers

For a Pennsylvania employer with a non-resident employee temporarily working from home due to the COVID-19 pandemic in a state that doesn’t have a reciprocity agreement with Pennsylvania, the department advises that the employee’s compensation remains Pennsylvania sourced, and the employer is required to withhold on the compensation.

Nexus for Corporate Net Income Tax/Sales and Use Tax

As a result of the COVID-19 pandemic causing people to temporarily work from home, the department will not seek to impose Corporate Net Income Tax (CNIT) nexus or Sales and Use Tax (SUT) nexus solely on the basis of this temporary activity.

Relief for Taxpayers During COVID-19 Pandemic

To help taxpayers facing financial challenges resulting from the COVID-19 pandemic, the Pennsylvania Department of Revenue is providing taxpayers with increased flexibility, additional time to meet tax obligations, and relief from a number of compliance actions. The goal is to help Pennsylvania taxpayers and citizens during this unprecedented health crisis.

The department has issued waivers for certain requirements and the Governor signed legislation to extend tax due dates in order to give taxpayers more time to meet their tax obligations during this difficult time. To complement these actions, from April 15, 2020 to July 15, 2020, the department will adjust many of its tax compliance programs and processes to help individuals and businesses. This will allow Pennsylvania taxpayers three months to focus on their health, safety and adhering to guidance from health authorities.

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Pause Payments for Existing Payment Plans

Sales and Use Tax Help for Businesses	(https://www.revenue.pa.gov/COVID19/ReliefForTaxpayers/SUTHelp/Pages/default.aspx)
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[Pause Payments for Existing Payment Plans](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#PausePayments)

[Provide Flexible Terms for New Payment Plans](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#ProvideFlexibleTerms)

[Focused Customer Service](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#FocusedCustServ)

[Collections and Enforcement Activities](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#Collections-Enforcement)

[Non-filer Notices](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#Non-filerNotices)

[Trust Fund Taxes](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#TrustFundTaxes)

[Tax Credit and Incentive Programs](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#TaxCredit-IncentivePrograms)

[Assessed Penalties](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#AssessedPenalties)

[Desk Review and Field Audit](#)
(/COVID19/ReliefForTaxpayers/Pages/default.aspx#DeskReview-FieldAudit)

taxpayers under an existing payment plan are granted the opportunity for payments to be suspended without canceling the agreement by emailing a request to

RA-RV-CEC-DPP@pa.gov

(mailto:RA-RV-CEC-DPP@pa.gov)

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department will not default any payment plans during this limited timeframe, even if new delinquencies or non-filed periods arise. However, interest will continue to accrue on any unpaid tax balances.

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Provide Flexible Terms for New Payment Plans

The department will revise general payment plan guidelines to permit greater flexibility on payment amount and duration of time. Taxpayers will now have the ability to request a payment plan for outstanding liabilities without the department imposing a lien. The department will also not require financial disclosure documentation for payment plans that are under \$12,000 and can be resolved within 12 months.

\$6,000 and less – Plans up to 6 months

\$12,000 and less – Plans up to 12 months

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Focused Customer Service

[COVID-19 Appeals](#)

(/COVID19/ReliefForTaxpayers/Pages/default.aspx#Appeals)

(/COVID19/ReliefForTaxpayers/Pages/default.aspx#Conclusion)

[Conclusion](#)

[Additional COVID-19 Information](#)

(/COVID19/Pages/default.a

[on](#)spx)

Wage garnishments – action will not be taken for new tax debts

Bank attachments – action will not be taken for new tax debts

License inspections, revocations and citations – actions will be limited during this program

Requirements for tax clearances – tax clearances and compliance checks will be conducted consistent with the more lenient debt collection/resolution approach. Collectors will encourage use of the deferred payment plans.

Use of private collection agencies – new case referrals are suspended. Private collection agencies will be instructed only to respond to taxpayer inquiries for accounts previously referred by the department.

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Non-filer Notices

The department will continue to send non-filer notices and conduct automated call campaigns for business taxes as a reminder of their obligations. Businesses are encouraged to file

and remit online using [e-TIDES](https://www.etides.state.pa.us/), the department's online tax system for businesses. Find the

</FormsandPublications/FormsforBusinesses/SREV-819UT/Pages/default.aspx> on the department's website for a schedule of return and prepayment due dates.

Once returns have been filed, taxpayers who have a financial hardship can take that opportunity to resolve any outstanding liabilities by entering into a payment plan using the department's new flexible terms.

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Trust Fund Taxes

The Bureau of Audits will continue to work with taxpayers to complete audit work that is in process through correspondence where possible and avoid in-person meetings until at least July 15, 2020. The Department of Revenue will continue to take the steps necessary to protect applicable statutes of limitations. In instances where statute expirations might be jeopardized during this period, taxpayers are encouraged to cooperate in extending such statutes and the department will also be flexible with taxpayers in granting requests to provide more time.

In-Person Meetings – In-person meetings will be suspended.

The Bureau of Audits will continue to conduct its audit work remotely where possible. To facilitate the progress of open examinations, taxpayers are encouraged to respond to any requests for information if they are able to do so. Where field work at a taxpayer's site will be necessary, the department will work with taxpayers to schedule that work to resume after this period. Keep in mind that depending on developments, it may be determined that resuming field work is in the best interest of both parties due to availability of people and records. If all parties agree, field work may be approved to resume prior to July 15.

Audit Penalty Abatement and Interest Relief – Existing audit penalty abatement parameters will be broadened for audits that are completed during the remainder of this calendar year.

Additionally, to take into account the impact of halting field audit work, currently in progress sales tax, fuels tax, and IFTA audits that are completed and assessed prior to December 31, 2020 will include up to 90 days of interest relief to address delays in fieldwork.

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Board of Appeals

CORPORATION TAX BULLETIN 2019-04¹

ISSUED: SEPTEMBER 30, 2019

NEXUS FOR CORPORATE NET INCOME TAX PURPOSES

The federal underpinnings of a state's jurisdiction to tax is based on both the Due Process and the Commerce Clauses of the U.S. Constitution. Per applicable precedent, a state's jurisdiction to tax under the Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S.Ct. 1904 (1974) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S.Ct. 535, 98 L.Ed. 744 (1954)). This threshold has traditionally been deemed to have been met by a showing that the entity has purposefully directed its activity into a jurisdiction. In *Quill* the Supreme Court noted that the Commerce Clause of the United States Constitution imposes a similar but more rigorous standard than that of Due Process; thus, "a tax may be consistent with due process and yet unduly burden interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298 at 313-14 n.7 (1992).

Historically, the U.S. Supreme Court has held that in order for a state tax to be constitutionally valid under the Commerce Clause it must:

- (1) Apply to an activity with a substantial nexus with the taxing State;
- (2) Be fairly apportioned;
- (3) Not discriminate against interstate commerce; and,
- (4) Be fairly related to the services the State provides.

Complete Auto Transit v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

In June 2018 the U.S. Supreme Court issued its decision in the matter of *Wayfair v. South Dakota*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018). As part of that decision the Court found that:

First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing state." *Complete Auto*, 430 U.S. at 279. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary,

¹ To the extent this bulletin conflicts with Pennsylvania Corporation Tax Bulletin No. 2004-01 (05/19/2004), that bulletin is superseded.

formalistic distinction that the Court's modern Commerce Clause precedents disavow.

The Court went on to conclude "that the physical presence rule of *Quill* is unsound and incorrect."

As a result, the Commerce Clause analysis set forth in *Complete Auto Transit* remains valid, but the physical presence rule, which was previously held in *Quill* to be a necessary part of the substantial nexus prong is incorrect. While taxpayers contested for years whether the physical presence nexus standard in *Quill* was limited to sales taxes or also applied to corporate net income taxes, the decision in *Wayfair* has made certain that, at least prospectively, no physical presence standard exists for purposes of limiting the ability of a state to impose a net income tax on an out of state taxpayer so long as the constitutional requirements under the Due Process and Commerce Clauses of the United States Constitution are satisfied.

The corporate net income tax is imposed under Article IV of the Tax Reform Code (TRC), 72 P.S. §§7401 et seq. upon corporations:

[E]xercising, whether in its own name or through any person, association, business trust, corporation, joint venture, limited liability company, limited partnership, partnership or other entity, any of the following privileges:

- (1) Doing business in this Commonwealth.
- (2) Carrying on activities in this Commonwealth, including solicitation which is not protected activity under the act of September 14, 1959 (Public Law 86-272, 15 U.S.C. Section 381 et seq.).
- (3) Having capital or property employed or used in this Commonwealth.
- (4) Owning property in this Commonwealth.

For Pennsylvania Corporate Net Income Tax purposes the decision in *Wayfair* has confirmed that out of state corporations are considered to be doing business in this Commonwealth and/or carrying on activities in this Commonwealth to the extent they are taking advantage of the economic marketplace of the Commonwealth regardless of whether they are physically present in Pennsylvania. As a result, the Department will require such taxpayers to begin filing Corporate Tax Reports so long as they meet the minimum thresholds for nexus under the Constitution of the United States. While the Court in *Wayfair* did not express a bright line threshold of economic activity which would satisfy the nexus requirements existing under the Due Process and Commerce Clauses, it did approve the approach of South Dakota whereby an out of state taxpayer was subjected to a sales tax collection requirement where it had in excess of either 200 sales or

\$100,000 worth of sales of goods or services to South Dakota customers during the course of a tax year. While all taxpayers with nexus under the Constitution of the United States should file a Corporate Tax Report with Pennsylvania, the Department will deem there to be a rebuttable presumption that corporations without physical presence in the state, but having \$500,000 or more of direct or indirect gross receipts from any combination of the following, sourced to Pennsylvania per year pursuant to the sales factor rules contained in 72 P.S. § 7401, have a filing requirement with the Commonwealth for purposes of the Corporate Net Income Tax:²

- (1) Gross receipts from the sale, rental, lease, or licensing of tangible personal property;
- (2) Gross receipts from the sale of services; and/or,
- (3) Gross receipts from the sale or licensing of intangibles, including franchise agreements.

In interpreting this standard the Department recognizes that taxpayers with or without physical presence in the Commonwealth can still potentially claim exemption from the imposition of the Corporate Net Income Tax under the provisions of P.L. 86-272.³ To the extent protection under this federal law is claimed, taxpayers should continue to file a Pennsylvania Corporate Tax Report (Form RCT-101) and complete the necessary schedules to claim this exemption from tax.

Consistent with the standards in this bulletin, the Department will require taxpayers without physical presence in the Commonwealth, but having nexus with Pennsylvania under the Constitution of the United States, to file Corporate Tax Reports for tax periods starting on or after January 1, 2020.

² Note that in keeping with existing law and practice this standard will apply to taxpayers regardless of whether or not the entity is subject to federal income tax.

³ See Pennsylvania Corporation Tax Bulletin No. 2004-01 (05/19/2004).

SALES AND USE TAX BULLETIN 2019-01

Issued: January 8, 2019

Revised: January 11, 2019

Effective July 1, 2019

Maintaining a Place of Business in the Commonwealth

The relevant information contained in this bulletin was codified with the passage of Act 13-2019, which also suspended the Marketplace Sales laws. Please refer to Act 13 and the Department of Revenue's website for information on calculation, compliance and CSP guidance.

The Department of Revenue issues this bulletin to clarify when marketplace and remote sellers, marketplace facilitators, and all other vendors maintain a place of business in the Commonwealth, after the June 21, 2018, Supreme Court of the United States opinion in South Dakota v. Wayfair, Inc., 585 U.S. ___ (2018). The decision upheld South Dakota's economic nexus statute, and overturned its previous decision in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), which required a business to have a physical presence in a state in order for it to be required to collect that state's sales tax. The decision in Wayfair, read in conjunction with the Tax Reform Code, creates an economic nexus for certain sellers of products in the Commonwealth, where previously, nexus existed only for those with a physical presence. The Department will enforce the Tax Reform Code consistent with the analysis set forth below and in accordance with applicable state and federal law.

Factual and Legal Background

South Dakota's statute, enacted in 2016, required out-of-state vendors who sold more than \$100,000 worth of property to South Dakota's residents in the past year, or in more than 200 separate transactions, to begin to collect South Dakota's sales tax on future sales into the state. The statute applied prospectively only, and South Dakota previously had adopted the Streamlined Sales and Use Tax Agreement. The Agreement system standardizes taxes, including a single, state level tax, uniform definitions, simplified tax rates, and the availability of free tax administration software. Users of the state supplied software are immune from select audit liability.

In its decision, the Supreme Court concluded that its earlier decision in Quill was incorrect; a physical presence nexus rule is not required by the Constitution's Commerce Clause. As long as a vendor has a substantial nexus with a taxing state and the tax does not create an undue burden to that vendor, a virtual presence is sufficient to require the vendor to collect sales tax.

Although choosing not to resolve the undue burden issue in its decision, the Court

did address those specific portions of South Dakota's Act that it found to satisfactorily prevent discrimination. These included the safe harbor for those vendors who have limited business within South Dakota (less than \$100,000 of sales or 200 transactions per year); no retroactive application; and the uniform rules and administration of the tax afforded by the Streamlined Agreement and corresponding software.

Current Pennsylvania Law

The Tax Reform Code requires every person maintaining a place of business in the Commonwealth to sell tangible personal property, or perform taxable services, to be licensed to, and collect, sales tax from its customers. 72 P.S. §§ 7202, 7208. The Code defines "maintaining a place of business in this Commonwealth" to include "[h]aving any contact within this Commonwealth which would allow the Commonwealth to require a person to collect and remit tax under the Constitution of the United States."

Upon careful review of the Supreme Court's decision in Wayfair that a physical presence was not required by the United States Constitution, and that an economic nexus, such as that prescribed by the South Dakota Act, is sufficient, the Department provides this guidance that a substantial economic nexus satisfies the Tax Reform Code's definition of maintaining a place of business, requiring a person to collect and remit Pennsylvania's sales tax.

Vendor Safeguards

Pennsylvania currently has only one state sales tax rate that applies across the Commonwealth. 72 P.S. § 7202(a).

To prevent any discrimination or undue burden on taxpayers whose virtual presence with the Commonwealth is limited:

1. Pennsylvania's economic nexus applies only to those persons who, in the previous twelve months, made more than \$100,000 of gross sales into the Commonwealth.
 - a. A marketplace facilitator with no physical presence in Pennsylvania should use both facilitated and direct sales to determine whether it has exceeded the economic nexus threshold.
 - b. A marketplace seller with no physical presence in Pennsylvania should use only its direct sales and those sales made through a marketplace facilitator that does not collect sales tax on its behalf, to determine whether it has exceeded the economic nexus threshold.
2. The Department will certify service providers that will offer software and perform services that when relied upon by a vendor to determine whether or not the sale of a particular product or provision of a particular service is subject to sales tax, will relieve the vendor of liability upon audit.
3. The certified service provider also will aid in the registration, collection, reporting, and remittance of sales tax.

Coordination with the Marketplace Sales Act

The economic nexus rules do not replace or provide an alternative to the provisions of Act 43. The provisions of Act 43 remain valid law applicable to those vendors who have neither a physical presence nexus nor an economic nexus in Pennsylvania. However, for those marketplace facilitators and remote sellers who were required by Act 43 to elect to either collect and remit sales tax or give notice to customers and report to the Department, but now have an economic nexus in Pennsylvania, the Act 43 election no longer is available. Marketplace facilitators and sellers who made over \$100,000 in Pennsylvania sales now will be required to register for a license and collect, report, and remit sales tax on sales into the Commonwealth. Additionally, if a marketplace facilitator has economic nexus in Pennsylvania, it now will be required to collect the sales tax on all sales into the Commonwealth, even if the sale is on behalf of a marketplace seller that does not individually have any nexus.

The provisions of this Bulletin shall apply to transactions that occur on or after July 1, 2019 and do not affect marketplace sellers for whom marketplace facilitators collect and remit on their behalf.

Additional procedural and technical guidance, as well as the available certified service providers, will be available on the Department's website.

06/10/2019

New Services Help Online Sellers with Pennsylvania Sales Tax

Harrisburg, PA — The Department of Revenue is making it easier for people and businesses selling products online to collect and remit Pennsylvania sales tax.

The department is working with Certified Service Providers (CSPs) — companies that allow out-of-state online sellers to outsource most of their sales tax collection responsibilities. CSPs will file tax returns and also collect and forward tax payments to the Department of Revenue on behalf of their clients.

The software that CSPs offer can also help an online seller determine which items they are selling are subject to Pennsylvania sales tax. Under the CSPs' arrangement with the Department of Revenue, CSPs will offer their services for free or at a reduced cost to online sellers with no physical presence in Pennsylvania.


There have been significant changes to federal and state laws in recent years that have drastically changed the sales tax obligations for those who are selling products over the Internet," Revenue secretary Dan Hassell said. "Because of these changes in the law, we have developed a solution that will make it easier for out-of-state sellers and Pennsylvania purchasers to meet their sales tax obligations. We want to do everything that we can to provide taxpayers with the tools they need to follow the law."

The department

has launched a new [web page](https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Economic-Presence/Pages/Certified-Service-Providers.aspx) that provides an overview of the services offered by CSPs. The four CSPs the department is working with are:

<https://www accuratetax.com> 

AccurateTax (<https://www accuratetax.com/>)

<https://www avalara.com> 

Avalara (<https://www avalara.com/>)

<https://sovos.com> 

TaxCloud (<https://taxcloud.com/>)

The department started working on this initiative after the U.S. Supreme Court in June 2018 issued an opinion in *South Dakota v. Wayfair*. The opinion overturned the court's previous ruling in *Quill Corp. v. North Dakota*, which required a business to have a physical presence in a state in order for the business to be required to collect that state's sales tax.

In conjunction with Pennsylvania's Tax Reform Code, the Supreme Court's decision in the *Wayfair* case requires out-of-state sellers making \$100,000 or more in annual gross sales to Pennsylvania customers to collect and remit Pennsylvania sales tax. This was the threshold suggested in the *Wayfair* case. This requirement will take effect in Pennsylvania on July 1, 2019.

The Supreme Court made it clear in its decision that tax administrators should not make it overly difficult for out-of-state sellers to comply with the law," Hassell said. "The work the department is doing with Certified Service Providers will remove many of the obstacles for Internet sellers who will soon be required to collect Pennsylvania sales tax."

For more information, visit the Department of Revenue's [website \(https://www.revenue.pa.gov/\)](https://www.revenue.pa.gov/) or visit the

department's pages on Facebook [\(https://www.facebook.com/padepartmentofrevenue/\)](https://www.facebook.com/padepartmentofrevenue/)

Twitter [\(https://twitter.com/parevenue/\)](https://twitter.com/parevenue/)

and LinkedIn [\(https://www.linkedin.com/company/padepartmentofrevenue/\)](https://www.linkedin.com/company/padepartmentofrevenue/)

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Department of Revenue > Tax Information > Tax Types and Information > Sales Use and Hotel Occupancy Tax > Marketplace Sales > Remote Sellers

REMOTE SELLERS

A remote seller is a seller that does not maintain a place of business in Pennsylvania and makes sales directly to individual and business customers in Pennsylvania.


Mandatory Election

A remote seller that makes taxable sales totaling \$10,000 or more to Pennsylvania customers in the previous calendar year must elect one of two options by March 1, 2018:

Option 1 - Register to collect and remit Pennsylvania sales tax.

Option 2 - Comply with Pennsylvania's notice and reporting requirements.

An election made on or before March 1, 2018 will be in effect through June 30, 2019.

The remote seller must complete  REV-1830 (Annual Marketplace Sales Election Form) to make the election.

An election to comply with the notice and reporting requirement may be changed at any time to an election to collect and remit sales tax.

Failure to file an election will be treated by the Department of Revenue as an election to comply with the notice and reporting requirements.

Option 1 - Sales Tax Registration

If a remote seller elects to collect and remit sales tax, then it is required to register for a sales tax license. A sales tax license can be obtained at this web address:

<https://www.pa100.state.pa.us/Registration.htm>.

Collections are to begin April 1, 2018 for the current election cycle.

Option 2 - Notice and Reporting Requirements

If a remote seller elects to comply with the notice and reporting requirements, it must

take the following actions starting April 1, 2018:

1. Post a notice on the sales forum that states:

Pennsylvania sales or use tax may be due in connection with the purchase and delivery of tangible personal property to Pennsylvania individuals and businesses.

The purchaser is required to file a use tax return if tax is due in connection with the purchase and delivery in the Commonwealth.

This notice is required pursuant to the provisions of the Tax Reform Code of 1971. 72 P.S. § 7213.2.

2. Provide a written notice on all invoices, order forms, sales receipts or similar documents, whether in paper or electronic form, to each purchaser at the time of each sale that states:

Pennsylvania sales tax was not collected on this sale. Therefore, you may be required to remit use tax directly to the Commonwealth on your purchase if the items are subject to Pennsylvania sales tax. Please visit [this link](#) to learn more about your use tax obligations under Pennsylvania law.

No statement that sales or use tax is not imposed on a transaction may be made by a remote seller, unless the transaction is exempt from sales and use tax, pursuant to Article II of the Tax Reform Code or other applicable Commonwealth law.

3. Provide an annual report to the purchaser that states:

A remote seller making an election to comply with the notice and reporting requirements must submit an annual report by January 31 of each year to the purchaser that includes the following.

[Name of remote seller] did not collect sales tax in connection with your transactions. You may be required to remit use tax to the Pennsylvania Department of Revenue. Following is a list by date, type and purchase price of each product, purchased or leased by the purchaser from this remoter seller, and delivered to a location within this Commonwealth.

[Insert list]

Please visit [this link](#) to learn more about your use tax obligations under Pennsylvania law.

[Name of remote seller] is required to submit an annual report to the Department of Revenue that includes the name of the purchaser and total dollar amount of the purchases from this remote seller.

This report shall be mailed by first class mail, in an envelope prominently marked with words indicating that important tax information is enclosed, to the purchaser's billing address, if known, or if unknown, to the purchaser's shipping address. If the purchaser's billing and shipping address are unknown, the report shall be sent electronically to the purchaser's last known email address with a subject heading indicating that important tax information is being provided.

4. Provide an annual report to the Pennsylvania Department of Revenue

A remote seller making an election to comply with the notice and reporting requirements must submit an annual report by January 31 of each year to the Department of Revenue that includes the following:

- *The purchaser's name, billing address, delivery address and, if different, the purchaser's last known mailing address.*
- *The total dollar amount of purchases from this remote seller.*

A report required under this section shall be submitted by an officer of the remote seller and shall include a statement made under penalty of perjury by the officer that the remote seller made reasonable efforts to comply with the notice and reporting requirements of this part.

Each failure to comply with the notice and reporting requirements can result in a penalty of \$20,000 per violation, per year, or 20 percent of total Pennsylvania sales during the previous 12 months, whichever is less.



Enforcement Date: August 3, 2017

May 17, 2017
Pennsylvania Sales and Use Tax
No. SUT-17-002
Tangible Personal Property/
Information Retrieval Products

ISSUE:

Are the information retrieval products, as described below, subject to Pennsylvania Sales and Use Tax as tangible personal property?

CONCLUSION:

The information retrieval products, as described below, are subject to Pennsylvania Sales and Use Tax as tangible personal property.

FACTS:

Taxpayer develops and sells information retrieval products in the form of subscriptions to specialized internet-based research services. These information retrieval products are used by professionals in a variety of industries including accounting, tax, finance, and law. The information retrieval products are accessed electronically over the internet using an ID and password. The information retrieval products are provided on a subscription-fee basis for monthly, quarterly or annual periods, with the subscription fees generally being based upon the number of users and/or resources to which a subscriber requests access. Subscribers are subject to certain terms and conditions of an agreement such as "a non-exclusive, non-transferrable, limited license...to use" the ordered information retrieval product. Further, in addition to the agreement, certain general terms and conditions are also applicable to provide certain limitations on the use of the information accessed within the information retrieval products.

Each information retrieval product provides access to resources from primary and secondary sources. Primary sources are sources including Federal, state and local statutes, court opinions, regulatory filings with or from governmental bodies, regulatory guidance from non-governmental bodies, and full-text patents. Secondary sources are sources including information from various non-governmental entities such as businesses, industry associations, and similar organizations.

The information retrieval products are maintained on servers which are located outside of Pennsylvania and accessed by a web browser previously existing on a subscriber's computer or device. As an alternative means of access, the information retrieval products are also available via a mobile phone application available for download free of charge. Such mobile phone application is available to the general public whether or not the person accessing and downloading the application has a subscription to the information retrieval product. The mobile phone application permits access with limited functionality on mobile devices, however no research content or related resources are included within the free mobile application download.

Subscribers typically interact with the information retrieval products through an advanced search function whereby search commands are transmitted by the subscriber's web browser to Taxpayer's servers. Application software on these servers processes the queries and returns the results to the subscriber. Results may be presented, according to the user's preference, in chart or spreadsheet format to make comparisons and facilitate further research. In addition to the above-described access to basic functionality, occasionally, a server hosting an information retrieval product returns information including "executable code" in a programming language designed to be executed by the subscriber's web browser. This executable code is used to provide a more graphically sophisticated user interface.

DISCUSSION:

Article II of the Tax Reform Code (TRC) imposes a six percent tax on "each separate sale at retail of tangible personal property or services, as defined herein, within this Commonwealth." 72 P.S. § 7202(a). The term sale at retail is defined, as "any transfer, for a consideration, of the ownership, custody or possession of tangible personal property, including the grant of any license to use or consume whether such transfer be absolute or conditional and by whatsoever means the same shall have been effected." 72 P.S. § 7201(k)(1). This statutory language demonstrates that not all sales in Pennsylvania are subject to Pennsylvania Sales and Use Tax. Rather, such tax is only imposed upon transactions for tangible personal property unless specifically exempted, services constituting a sale at retail, and services made taxable because of the broad definition of purchase price. 72 P.S. § 7201(g) and (k).

The Pennsylvania sales tax law was recently updated by expanding the statutory definition of "tangible personal property" to expressly include certain specified items including video, books, applications, games, music, audio, canned software, and other specified items. See Act 84 of 2016 (pertinent section at 72 P.S. § 7201(m)(2) effective August 1, 2016). Act 84 of 2016 provides that such items constitute tangible personal property whether "electronically or digitally delivered, streamed or accessed" and "whether purchased singly, by subscription or in any other manner." *Id.* The statement of policy on computer software, hardware and related transactions which the Department adopted on January 7, 2000, does not address all aspects of tangible personal property as that term is now defined under Act 84 of 2016. See 61 Pa. Code § 60.19. For example, tangible personal property now expressly includes "maintenance, updates and support." 72 P.S. § 7201(m)(2). To the extent the statute and the statement of policy at 61 Pa. Code § 60.19 are inconsistent, the provisions of the statute apply. Where consistent however, the statement of policy provides additional guidance including, as relevant to the instant request, the definitions of "canned" and "custom" software. See 61 Pa. Code § 60.19(b).

In applying the above statutory and regulatory provisions to the information retrieval products, both the functionality and the resource content are relevant. When a subscriber interacts with the information retrieval products through an advanced search function, search commands are transmitted by the subscriber's web browser to Taxpayer's servers then application software processes the queries and returns the results to the subscriber. In utilizing the search function of the information retrieval product, the subscriber is exercising a license to access canned computer software. Furthermore, by entering inputs to obtain a certain desired output, the subscriber is exercising power and control over the software. See 72 P.S.

§ 7201(m)(2)(ix); *Graham Packaging Company L.P. vs. Commonwealth*, 882 A.2d 1076 (Pa.Cmwlth. 2005).

Moreover when a subscriber is accessing content of the information retrieval products, the subscriber is accessing tangible personal property as that term is defined under Act 84, 72 P.S. § 7201(m)(2)(iii), (iv) and (x). The resource content constitutes electronic access to taxable tangible personal property such as case reporters and statutory codifications, as well as to periodical articles such as law journals, loose leaf services, and other similar items. 61 Pa. Code § 31.29. Whether or not access to resource content may be limited by the search function is not outcome-determinative because the grant of a conditional license to use tangible personal property is nonetheless a sale at retail under the TRC.

Accordingly, the information retrieval products constitute tangible personal property in that the transactions are comprised of both (i) a license to electronically access and use canned computer software and (ii) the right to electronically access tangible personal property. The transactions are therefore subject to the imposition of Pennsylvania Sales and Use Tax.

Wirth, E., et al, Apts. v. Commonwealth - Nos. 82 - 85 MAP 2012
The Pennsylvania Supreme Court affirmed the commonwealth court's holding that a partnership was subject to personal income tax commensurate with the total debt discharged as a result of a foreclosure, and, therefore, the nonresident limited partners were liable for personal income tax in an amount proportionate with their shares in the partnership. The nonresidents had invested as limited partners in a Connecticut limited partnership, which existed for the sole purpose of owning and operating a skyscraper in the city of Pittsburgh, which went into foreclosure in 2005. Following the property's foreclosure, but prior to the partnership's liquidation, the partnership reported a gain as a result of the foreclosure on its federal and state tax filings that consisted of the unpaid balance of the partnership's principal and the accrued, compounded interest, totaling \$2,628,491,551. The partnership reported each individual limited partner's respective share of that gain. Therefore, and despite their individual investment losses, the Department of Revenue levied income tax against the taxpayers, plus interest and penalties, related to the foreclosure on the property for tax year 2005. The amount taxed was each limited partner's distributive share of the gain associated with the foreclosure. The nonresident taxpayers' challenges to the assessments were denied by the commonwealth court.

<http://www.pacourts.us/courts/supreme-court/court-opinions/>

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SALES AND USE TAX BULLETIN 2021-01

Sales and use tax exemption for non-medical masks and face coverings

Issued: January 20, 2021

Effective Date: October 30, 2020

The Department of Revenue (“Department”) issues this Sales and Use Tax Bulletin to inform persons responsible for charging, collecting and remitting sales tax of the tax treatment of non-medical masks and face coverings.

Medical supplies, including medical and disposable surgical masks, are exempt from Pennsylvania sales tax. 72 P.S. § 7204(17); Retailer’s Information Guide (REV-717). Prior to COVID-19, non-medical masks and face coverings were subject to sales tax because non-medical masks and face coverings were generally classified as ornamental wear or clothing accessories and the use for which consumers purchased non-medical masks and face coverings was not for an exempt purpose. 72 P.S. § 7204(26); Retailer’s Information Guide (REV-717). Retailers were not obligated to determine whether a non-medical mask or face covering would be used for medical purposes because “[t]he determination that purchases qualify for exemptions as...medical supplies and the like, is based essentially upon the use for which the purchase are intended.” 61 Pa. Code § 52.1(a).

On March 6, 2020, pursuant to the provisions of Subsection 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. § 7101, *et seq.*, Governor Tom Wolf issued a Proclamation of Disaster Emergency in response to the COVID-19 pandemic, authorizing “all Commonwealth departments and agencies [to] utilize all available resources...as deemed necessary to cope with this emergency situation.” In response to consumer demand for medical masks outpacing supply and leading consumers to use non-medical masks and face coverings¹ for medical purposes, namely to prevent and control the spread of COVID-19, the department responded with a statement that any non-medical cloth or disposable mask purchased for use as a means of protection against the virus was not subject to sales or use tax. Accordingly, the department will not assess retailers for failing to collect sales tax on purchases of non-medical masks and face coverings. Additionally, consumers who can certify to the department that a cloth or disposable non-medical mask or face covering was purchased and used as a means of protection against the virus can petition the department for a refund of any sales or use tax paid.

As of October 30, 2020, in response to the ubiquitous use of non-medical masks and face coverings, the department recognizes that both cloth and disposable non-medical masks and face coverings are exempt from sales and use tax as everyday wear or clothing.

¹ The Pennsylvania Department of Health, in its November 17, 2020, Updated Order Requiring Universal Face Coverings, defines “face covering” as “covering of the nose and mouth with material that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face.” It can be “made of a variety of synthetic or natural fabrics, including cotton, silk, or linen” and “may be factory-made, sewn by hand, or improvised from household items, including, but not limited to, scarfs, [or] bandanas.”



SALES AND USE TAX BULLETIN 2018-01

Issued: January 26, 2018

Marketplace Sales

Act 43 of 2017 (“Act”) amended the Tax Reform Code of 1971 (“TRC”) to level the retail playing field by establishing marketplace sales tax collection, notice, and reporting requirements. The TRC will be enforced by the Department consistent with the analysis set forth below, and in accordance with applicable state and federal law.

Legal Background

Vendors are required to collect sales tax from purchasers and remit the collected tax to the Commonwealth. 72 P.S. §7202(a). If a taxable sale at retail is made without collection of sales tax, and the purchaser uses the purchased item within the Commonwealth, the purchaser is required to pay use tax directly to the Commonwealth. 72 P.S. §7202(b). Thus, when anyone takes delivery in Pennsylvania of items purchased from a person who maintains no place of business in Pennsylvania, and the items would be taxable if purchased at a store in Pennsylvania, but sales tax is not collected, the purchaser is legally required to accrue and remit use tax directly to the Department. However, it is more efficient and less burdensome for the sales tax to be collected at the time of purchase, and then remitted directly to the Department.

Act 43

Act 43 of 2017 adds Part V-A to Article II, giving certain marketplace facilitators, remote sellers, and referrers the option to either collect and remit the sales tax that is due on taxable sales within the Commonwealth, or elect to notify their customers that use tax may be due, and report to the Department the customers names, addresses, and aggregate dollar amounts of each customer’s purchases. 72 P.S. § 7213 et seq.

“Marketplace facilitators” are defined as persons, including vendors, who list or advertise tangible personal property for sale in any forum, directly or indirectly, collect the payment from the purchaser, and transmit the payment to the marketplace seller. 72 P.S. § 7213(c).

A “marketplace seller” is one who uses a marketplace facilitator to facilitate a sale. 72 P.S. § 7213(d).

A “referrer” receives consideration to advertise a seller’s products, and transfers a buyer to the seller, facilitator, or other party to complete a sale, without collecting a receipt from the purchaser. 72 P.S. § 7213(g).

A “remote seller” is anyone other than a marketplace facilitator, marketplace seller, or referrer, who does not maintain a place of business in Pennsylvania, but who sells tangible personal property that would be subject to sales tax here. 72 P.S. § 7213(h).

On or before March 1, 2018, a remote seller, a marketplace facilitator, or a referrer who is not maintaining a place of business within the Commonwealth, but who had aggregate taxable sales in Pennsylvania worth at least \$10,000 in the prior twelve months, must either file an election with the Department to collect and remit sales tax going forward, or comply with the notice and reporting requirements. 72 P.S. § 7213.1(a).

Only those marketplace facilitators who do not maintain a place of business within the Commonwealth are allowed to elect to collect, or give notice and report. 72 P.S. § 7213.1(c). If the marketplace facilitator maintains a place of business within the Commonwealth, the facilitator already is mandated by the TRC to collect sales tax on sales made on its own behalf, and on behalf of any marketplace seller for whom a sale within Pennsylvania is facilitated. 72 P.S. §§ 7201(b), (p) and 7202. If the marketplace facilitator does not maintain a place of business within the Commonwealth but facilitates for a marketplace seller who does, the burden has been and remains on the marketplace seller to collect sales tax on sales made within the Commonwealth. *Id.* Although not covered by this Act, a Pennsylvania marketplace seller also may contract with an out of state facilitator to collect sales tax on his behalf.

For referrers, the option to elect to collect or report applies only to sales at retail from referrals to marketplace sellers who do not maintain places of business in Pennsylvania, sales directly resulting from referrals to remote sellers, and sales of the referrer’s own products if the referrer does not maintain a place of business here. 72 P.S. § 7213.1(d). A referrer can make differing elections for sales resulting from referrals, and sales of its own products. However, a referrer continues to be required to collect sales tax on sales of its own products if the referrer maintains a place of business in the Commonwealth. 72 P.S. §§ 7201(b), (p) and 7202.

Finally, for remote sellers meeting the threshold level of sales in Pennsylvania, there are no circumstances where an election is not required. If a remote seller makes more than \$10,000 of taxable sales within the Commonwealth, he must collect sales tax from his Pennsylvania customers, or notify the customers that they may owe use tax and report all of the Pennsylvania sales to the Department.

Failure to make the required election is deemed an election to comply with the notice and reporting requirements. 72 P.S. § 7213.1(f). An election to provide notice and report can be switched to an election to collect by filing a new election at any time during the fiscal year the notice and report election is valid. 72 P.S. § 7213.1(e).

Additional procedural and technical guidance, as well as forms, will be published on the Department’s website www.revenue.pa.gov.



**INFORMATION NOTICE
SALES AND USE TAX 2014-02**

Natural Gas Mining

Issued: September 22, 2014

General Overview

The Department of Revenue (the "Department") provides this Sales and Use Tax Information Notice to taxpayers in the natural gas mining industry and related activities. Pennsylvania law exempts the purchase of taxable tangible personal property and services from tax when such property and services are predominantly used directly in mining activities (the "mining exemption") 72 P.S. §§ 7201(k)(8) and (o)(4). The Department's Mining Regulation set forth at 61 Pa. Code § 32.35 governs the scope of the mining exemption. This Information Notice applies the law, the Mining Regulation and other applicable regulations specifically to the natural gas industry and related activities.

Mining activities are defined in the law and regulations as including exploring, extracting, blasting, mining, or drilling for purposes of removing natural resources from the earth or refining natural resources removed from the earth. For natural gas mining, these activities would include cementing (pumping of cement slurry to bond casing or piping to the wall of the bore hole), fracturing (using fluids, a mixture of water and chemicals, to crack the rock formation and the injection of proppants such as sand and ceramic materials into cracks in the formation to open channels through which the gas flows) and acidizing (injecting acid below rock fractures to create flow channels within the rock formation). In this Information Notice these activities will be collectively known as "gas mining".

The mining exemption applies to the purchase or use of tangible personal property or services predominantly used directly in gas mining. Additionally, if a miner is entitled to purchase otherwise taxable property that is predominantly used directly in a gas mining activity exempt from tax, then a third-party vendor performing the same mining activity for the miner is also entitled to the exemption on the purchase of property predominantly used directly in that mining activity. *Commonwealth v. R.G. Johnson Co.*, 433 A.2d 465 (Pa. 1981).

However, the mining exemption does not extend to all property or services used in gas mining. The taxability determination of any property or services used in gas mining is fact-specific and depends on the use of the property or service as it relates to the mining process. The factors that determine whether property or services are directly used and thereby exempt are: (1) physical proximity to the mining operation, (2) temporal proximity to the mining operation, and (3) the existence of an active causal relationship between the use of the property and the mined product. 61 Pa. Code § 32.35(a)(1).

It is important to note that 61 Pa. Code § 32.35(a)(1)(iii) specifically states, in considering the existence of an active causal relationship, "[t]he fact that particular property may be considered essential to the conduct of the business of mining because its use is required either by law or practical necessity does not, of itself, mean that the property is used directly in mining operations". Furthermore, when property is used in two different



activities, one of which is direct-use and the other is not, the property is not considered exempt property unless it is used more than 50% of the time in direct-use activities. 61 Pa. Code § 32.35(a)(2).

The mining exemption only applies to "[m]achinery, equipment, parts and foundations therefor, and supplies which are used in the actual mining production, to transport or convey the product ... [other than vehicles required to be registered under the Vehicle Code], or to handle or store the product during the production." 61 Pa. Code § 32.35(a)(2)(i) (emphasis added).

Consequently, property used prior or subsequent to the actual mining operation, to collect, convey or transport property to a mining activity or to remove the mined product after the final mining operation, and storage facilities or devices used to store property prior or subsequent to actual mining operation are subject to tax. 61 Pa. Code §§ 32.35(a)(3)(iii)(G) and (I). Similarly, property used in non-mining activities is subject to tax even if it is used during the mining operation. 61 Pa. Code § 32.35(a)(3)(iii)(H). For example, monitoring equipment that merely tracks and records drilling data is not exempt property even though it may be used during drilling operations.

A common issue in determining taxability is whether a transaction should be classified as a service or sale at retail of property. The answer often turns on the wording of contracts and invoices. Generally, if a transaction is determined to be a sale at retail of services that are predominantly used directly in exempt activities, then the service fees and any separately-stated charges incurred in conjunction with providing the services (e.g., set-up fees, standby fees, travel costs or additional materials or labor fees, etc.) are also exempt.

If a transaction involves the sale at retail of property (which includes a rental or lease) and the property, such as equipment is furnished with the services of an operator with the charges for each billed separately, it is presumed that the transaction involves a transfer of the right to direct the use of the equipment. 61 Pa. Code § 31.4(a)(1). As such, the transaction is treated as equipment rental and provision of help supply services respectively. Assuming the leased property is taxable because it is not used predominantly and directly in mining, the rental charges are taxable. Furthermore, any additional charges incurred in conjunction with renting the taxable property such as those for set up time, standby time, additional pumping time, travel costs or additional labor or materials are also taxable. On the other hand, if the leased property is nontaxable, any separately stated charges incurred in conjunction with the exempt property (e.g., set-up fees, standby fees, travel costs or additional materials or labor fees, etc.) are also exempt. However, the mining exemption is inapplicable to taxable help supply services. Thus, the separately-stated operator charges remain taxable regardless of the taxability of the rental property.

Also, no exemption is to be given to maintenance facilities or for materials or supplies to be used or consumed in construction, reconstruction, or remodeling of real estate other than exempt machinery, equipment and parts therefor that may be affixed to real estate. 72 P.S. §§ 7201(k)(8) and (o)(4); Pa. Code 61 § 32.35(a). Finally, vehicles required to be registered under 75 Pa. C.S. §§ 101-9909 (the "Vehicle Code").

Based on information currently available to the Department, the taxability of property and services commonly used in or in conjunction with gas mining is as follows:



A. Exploration

"Mining" as defined by law includes exploration for natural gas so otherwise taxable tangible personal property and services are exempt from tax when they are predominantly used directly in exploration. Examples of exempt exploration property and services include:

1. Seismic exploration services.
2. Exploratory well drilling services.
3. Seismic imaging services.
4. Seismic data.

B. Site Preparation & Pre-Production Construction

Generally, the mining exemption does not apply to property or services used in the construction, reconstruction, alteration, remodeling, servicing, repairing, maintenance or improvement of real estate. The mining regulation further states that property used in the removal of trees and clearing of land in preparation for extraction activities is not directly used and therefore taxable.

1. Equipment, parts and materials used in site preparation including, but not limited to, removal of timber, building of access roads and removal of dirt and rocks from the land are taxable, including, but not limited to the following:
 - a. Bulldozer.
 - b. Backhoe/front loader.
 - c. Stone for roads.
 - d. Road fabric.
 - e. Sluice pipe.
 - f. Security fencing.
 - g. Bridges and bridge construction materials.
2. Equipment, parts and materials used in the construction of ponds or any other vessels for storage of fresh water or raw materials prior to their use in drilling or hydraulic fracturing such as liners are taxable.
3. Geosynthetic materials used to store clean water used in the drilling operations are taxable.
4. Equipment, parts and materials used in the construction, reconstruction, alteration, remodeling, servicing, repairing, maintenance or improvement of real estate even if the structure may house or otherwise contain equipment or other facilities used directly in mining are taxable.
5. Equipment, parts and materials used to construct an electrical system used to deliver electricity to exempt property from the point the electricity leaves the local distribution company transmission line to the point immediately prior to the last transformer prior to the exempt equipment are taxable. All property used to deliver electricity from this point to the exempt equipment, including the last transformer, is exempt from tax. If the equipment to which the electricity is delivered is taxable, the materials incorporated into an electrical system, even the last transformer and property between that transformer and the taxable equipment are taxable.



If the equipment the electricity powers is both taxable and nontaxable, predominant use determines the taxability of the materials incorporated into the electrical system. The building of the electrical system is a construction contract. Whatever the use of the equipment to which the electricity is delivered, equipment used to construct the electrical system is taxable if it is not incorporated into the electrical system.

C. Extraction and Production

For purposes of the mining exemption, the actual gas mining process begins with the drilling of the wellbore and ends with the last physical change of the gas prior to it being sold and transferred by the miner to another. Therefore, property and services predominantly used directly during this process are exempt.

1. Exempt

- a. The well pad and the foundation directly under the well pad including, but not limited to materials such as sand, stone, gravel or other similar material directly supporting the well pad and any materials used in the well pad itself such as liners and mats are exempt as pollution control property if the well pad was constructed after April 16, 2012 in accordance with 58 P.S. § 3218.2 (relating to containment for unconventional wells).
- b. Materials, such as liners, sand, gravel, etc. used in the construction of storage ponds or vessels from which fracturing fluids (a mixture of water and chemicals) are pumped into fracturing well holes. The exemption also applies to holding ponds, tanks and other containment vessels for fluids that are pumped from the well hole and reused in fracturing multiple wells.
- c. Digging and extracting equipment, machinery, and tools directly used in gas mining:
 - i. Drilling rig unit.
 - ii. Drilling head.
 - iii. Drilling bits.
 - iv. Drilling extensions.
 - v. Drill string and downhole equipment.
 - vi. Drilling mud.
 - vii. Casing.
 - viii. Cement to encase the casing.
 - ix. Twin cement unit (a system located at the well site that mixes cement to be added to the batch mixer).
 - x. A frack unit (affixed to the back of a truck chassis) and all repair parts and fuel used in running the fracturing unit, not including the licensed chassis.
 - xi. Frack pumps (equipment that injects fluids into a rock formation).
 - xii. Gases, sand and cement used in fracturing.
 - xiii. Pumps used to extract gas from the ground.
 - xiv. Pump down acid equipment (pumping equipment used to perform fracturing, which includes a positive placement pump to expand a



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DEPARTMENT OF REVENUE

- cavity and a boost pump for increasing system pressure of the operation).
- xv. Pump rod (connected to the pump).
 - xvi. Acid pumper (equipment used to pump specially blended acid into the wellbore).
 - xvii. Bath mixer (equipment used at the well site to mix cement slurry).
 - xviii. Sucker pipe (pipe that allows oil to flow to the surface).
 - xix. Cap affixed to the top of the wellhead.
 - xx. Pump jack (provides upward and downward movement to the pump rod directly resulting in the operation of the pump).
 - xxi. Manifold trailer (equipment that attaches piping lines to the well head to facilitate the pumping operation).
 - xxii. Fishing or extracting tools used predominantly to retrieve and remove objects from a drilled hole during the drilling operation.
 - xxiii. Electricity or fuel used to run direct-use equipment.
 - xxiv. Frack tanks predominantly used to hold in-process materials, including flow-back water.
- d. Remote control and accompanying monitoring equipment used to control and operate frack pumps, blenders and liquid additive units during fracturing only if the equipment makes automatic adjustments to the pumps, blenders, etc. during fracturing.
 - e. Lighting equipment and supplies used to light production activities. Protective devices worn by production personnel in their work. Communication devices such as handheld radios used predominantly in mining activities such as work coordination among production employees of equal authority.
 - f. Compression machinery and equipment used up to the last physical change of the gas prior to its being sold and transferred by the miner to another.
 - g. Refining machinery and equipment used to remove water, vapors or hydrocarbons from gas.
 - h. Waste extraction, removal, handling, disposal equipment and machinery used in the course of production operations.
 - i. Half tanks – large open tanks hold drill cuttings during the course of drilling operation.
 - ii. Geotechnical products such as liners used to hold contaminated fracturing water during the course of drilling operation.
 - iii. Pit liner used in the sludge holding ponds to hold sludge during the course of drilling operation.
 - i. Pollution Control Devices
 - i. Equipment, machinery and supplies designed and used to control, abate, or prevent air, water or noise pollution generated in the mining operation, including but not limited to flare stacks.



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- ii. Materials such as liners, sand and gravel used in constructing a pond used predominantly in controlling, abating, or preventing pollution generated in the mining operation.
 - iii. Geosynthetic materials used to prevent contamination generated in the mining operation.
 - iv. Back-up containment systems.
 - v. Erosion control property, such as silt fences, stakes or hay bales, is exempt, only if used to control, abate or prevent air, water or noise pollution generated in the mining operation.
- j. Property to test and inspect the product up to the last physical change of the gas prior to its being sold and transferred by the miner to another party.
 - k. Reclamation machinery, equipment and materials such as bulldozers, graders, fill, seedlings, grass seed, shrubs, stone, concrete and soil nutrients used in backfilling and reclamation of directly used mining facilities only when the backfilling and reclamation is required by law.
 - l. Gyroscopes and the wireline with which a gyroscope is hoisted and lowered into the wellbore when the gyroscopic data is used by the miner to guide and direct equipment used during drilling production.
 - m. Any otherwise taxable property purchased by a nonresident outside of and brought into Pennsylvania for use in the Commonwealth for a period of not more than seven days.

2. Taxable

- a. Equipment used to construct well pads.
- b. Equipment used to construct ponds or other vessels for storage of fresh water, raw materials or in-process fluids.
- c. Property, including liners, used in constructing ponds for storage of water prior to its use in drilling.
- d. Property used in water transportation system that pumps water from a body of water to the water storage pond.
- e. Property used in construction, reconstruction, alteration, remodeling, servicing, repairing, maintenance or improvement of real estate even if the structure may house or otherwise contain equipment or other facilities used directly in mining.
- f. Erosion control property, such as silt fence, stakes, hay bales, is taxable if such property is not used to control, abate or prevent air, water or noise pollution generated in the mining operation.
- g. Pipe racks/pipe boats for pipe storage.
- h. Fuel storage unit.
- i. Sand or gravel storage unit.
- j. Tanks predominantly used to store raw materials prior to use in a mining operation.



- k. Mine management and administration.
 - i. Office furniture, supplies and equipment, textbooks and other educational materials, books and records and other property used in mining recordkeeping and other administrative and managerial work.
 - ii. Property, including but not limited to supplies used to record the quality and quantity of work in production or goods in storage, the flow of work, the results of inspection, or to instruct workers in routing work or other production activities.
 - iii. Property used to record the volume and pressure of gas coming from the wellhead.
 - iv. Communication devices used for managerial direction and supervision.

D. Transport

Machinery, equipment, parts and foundations therefor, and supplies used to transport or convey extracted product during production are directly-used in mining and therefore exempt.

1. Exempt

- a. Transportation devices and equipment such as gathering lines used to transport gas from the wellhead to the miner's compression or refinery operations up to the last physical change of the gas prior to its being sold and transferred by the miner to another.
- b. Pump and power for pump used to move the gas through a pipeline prior to the last change.
- c. Pipes and any foundation materials directly under the pipes, such as sand, stone or other similar materials.

2. Taxable

- a. Vehicles required to be registered under 72 Pa. C.S. §§ 101-9909 (the "Vehicle Code"), supplies, repair parts and repair services for the vehicles.
 - i. Truck chassis to which a drilling unit, frack unit, or service rig is affixed.
 - ii. Acid transport (a tractor trailer used to move raw or blended acid to well sites).
 - iii. Bulk truck (a truck that transport dry products to the batch mixer).
 - iv. Vehicles and trailers registered under the International Registration Plan ("IRP") as they are required to be registered under the Vehicle Code.
 - v. Cargo trailer such as an enclosed utility trailer that transports testing equipment.
 - vi. Chemical liquid additive tractor trailer that transports chemicals to be used at well sites. The unit maintains the temperature of the chemicals in transit.
 - vii. Chemical transfer tractor trailer used to transport the chemical liquid additive unit to well sites.



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- viii. Mechanic service truck.
- ix. Crew bus.
- x. Data van (a van used to house remote control equipment).
- xi. Frack Iron float (a tractor trailer that transports piping to the well site to connect the manifold and wellhead).
- xii. Hydration unit (a tractor trailer hydration unit that mixes and retains fluids on the surface for polymers to hydrate).
- xiii. Mobile food trailers.
- xiv. Pick-up trucks.
- xv. Sand conveyor (a trailer-mounted belt used at well site to transport sand from sand storage bins to the blender).
- xvi. Sand storage bins (a mobile trailer storage bin with multiple compartments that delivers sand to the sand belt or directly to the containers for sand).
- xvii. Sand transport (a tractor trailer used to transport sand from the bulk plant to the well site).
- xviii. Equipment used to build the pipelines such as bulldozers, front loaders, or road fabric, except for equipment used in reclamation.

E. Vehicles and Special Mobile Equipment ("SME")

The mining exemption does not apply to any vehicles required to be registered under The Vehicle Code. Under the Vehicle Code, non-self-propelled SME are exempt from registration. Thus, such SME is eligible for the mining exemption if it is predominantly used directly in mining.

1. Exempt

- 1. Non-self-propelled equipment with an SME-plate issued by the Pennsylvania Department of Transportation ("PennDOT") if used predominately and directly in gas mining.
- 2. Non-self-propelled equipment without a SME-plate only if it is:
 - i. Not designed for or used in transportation of property other than tools or parts for the equipment,
 - ii. Primarily for off-highway use and only operates incidentally on the highway, and
 - iii. Used predominantly and directly in gas mining.

NOTE: The burden of proof is on the person who claims that equipment is an SME not required to be registered under the Vehicle Code. This burden will be met if the person obtains a written PennDOT determination that the equipment qualifies as a non-self-propelled SME, e.g., frack tank trailers.

2. Taxable

- 1. All self-propelled SME.
- 2. Mobile dormitories and offices.



F. Gas Storage

The definition of "mining" includes the extraction of natural resources from stockpile. As such, the withdrawal of gas from gas storage is considered an exempt mining activity. Consequently, equipment predominantly used directly in withdrawing natural gas from a storage facility is exempt. On the other hand, equipment used to inject gas into storage, storage equipment and facilities for finished product are taxable.

G. Distribution

Meters used to measure gas usage of the property owner are taxable unless used by a public utility.

H. Research

Property used directly in research activities with the objective of producing a new or improved product or method of producing a product is exempt whereas property used in market research or in other research that is conducted with the objective of improving administrative efficiency is taxable.

I. Services

1. Maintenance, repair and cleaning services on exempt property are exempt, as are repair or replacement parts for exempt machinery and equipment. Operational supplies such as fuel, lubricants, paint, etc. are exempt if actively and continuously used in the operation of exempt machinery and equipment.
2. Maintenance, repair and cleaning services on taxable property are taxable. Also taxable are repair or replacement parts for taxable machinery and equipment.
3. The purchase or rental of property used to perform maintenance, repair and cleaning services are taxable regardless of the taxability of the property on which the services are performed. Equipment and supplies used in general cleaning and maintenance of mining property such as soaps, cleaning compounds, brushes, brooms, mops and similar items are also taxable.
4. Services, other than cleaning services, which do not alter the property on which the service is performed, such as calibration, inspection or testing, are exempt.
5. The other enumerated taxable services in the statute, including lobbying, adjustment services, collection services, credit reporting services, secretarial or editing services, disinfecting or pest control services, building maintenance or cleaning services, employment agency or help supply services, lawn care services or self-storage services are taxable even if directly used in a mining activity.



SALES AND USE TAX BULLETIN 2012-01

Revised: November 15, 2013

Sales/Use Tax Issues for Mining Site Preparation

The Department of Revenue offers this sales and use tax guidance to taxpayers who clear land and prepare a site in anticipation of mining operations to be conducted at that site. This guidance is necessary because the Department's mining regulation, 61 Pa. Code § 32.35, details the application of the sales and use tax law as applied to traditional and strip mining, but is not as specific concerning modified or enhanced mining processes, such as hydraulic fracturing used in unconventional oil and gas well development. Although much of the work done for mining site preparation does not qualify for the mining exclusion, the exclusion is available for certain site work.

Pennsylvania law excludes from sales and use tax machinery, equipment, parts and foundations therefor, and supplies that are predominantly used directly in mining operations. 72 P.S. § 7201(k)(8); 61 Pa. Code § 32.35(a). Even if property may be considered essential to the conduct of the business of mining because its use is required either by law or practical necessity, that does not necessarily mean that the property qualifies for the tax exclusion. 61 Pa. Code § 32.35(a)(1)(iii). For example, property used prior to the actual mining operation, such as property used to store raw materials prior to their use in the mining operation, is not considered to be directly used in mining and is subject to tax. 61 Pa. Code § 32.35(a)(3)(iii)(G). Also, "property used for waste handling and disposal of pollutants other than in the course of production operations" is taxable unless the equipment, machinery and supplies are designed and used to control, abate or prevent air, water or noise pollution generated in the mining operation. 61 Pa. Code §§ 32.35(a)(2)(ii) and (a)(3)(iii)(J).

The regulation specifically states that the mining exclusion does not apply to property or services used in the "construction, reconstruction, alteration, remodeling, servicing, repairing, maintenance or improvement of real estate." 61 Pa. Code § 32.35(a)(3)(i). That clause further states that "property used to remove trees and clear ground preparatory to extraction activities is not deemed to be directly used" and therefore not covered by the mining exemption. *Id.*

Beginning April 16, 2012, if the rigging pad is constructed in accordance with 58 P.S. §3218.2 (Containment for Unconventional Wells, effective April 16, 2012) to control or abate pollutants generated in the mining operation, the materials used in the construction of the rigging pad, such as liners, sand and gravel, would be excluded from tax as a pollution control device.

Generally, equipment and parts used in site preparation – including, but not limited to, removal of timber, building of access roads and removal of dirt and rocks from the land – are taxable as pre-mining activities. However, the foundation directly underneath the drilling rig is excluded from tax. Therefore, although equipment used to build rigging pads is taxable, any foundation material supporting the drilling rig, such as sand, stone or other similar material, would be excluded from tax as foundation material for exempt mining equipment.

The construction of ponds or any other vessels for storage of fresh water or raw materials prior to their use in drilling or hydraulic fracturing is not a mining activity. Therefore, equipment used to construct these ponds and the actual materials used in the ponds, such as liners, are taxable pre-mining property. Ponds to be used to control or abate pollution generated in the mining operation, however, are excluded from tax. Therefore, although equipment used to build such ponds is taxable, any materials used in that construction, such as liners, sand and gravel, would be excluded from tax.

BOARD OF FINANCE AND REVENUE

INTERIM OPERATING RULES

CHAPTER 1. GENERAL PROVISIONS

Subchapter A. OVERVIEW

§ 1.1. Scope of Interim rules.

(a) These interim rules, as may be amended, govern the practice and procedure before the Board.

(b) The interim rules, as may be amended, will govern until such time as regulations are promulgated that will supersede the applicability of 61 Pa. Code, Part 4, Board of Finance and Revenue, Chapter 701, and, to the extent applicable, 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

§ 1.2. Liberal construction.

(a) The interim rules shall be liberally construed to secure the just, speedy and inexpensive determination of every Proceeding before the Board. The Board at any stage of a Proceeding may disregard an error or defect of procedure that does not affect the substantive rights of the Parties.

(b) The Board at any stage of a Proceeding may waive a requirement of these interim rules, including a deadline, when necessary or appropriate, if the waiver does not adversely affect a substantive right of either Party.

§ 1.3. Definitions.

Subject to additional definitions contained in subsequent sections which are applicable to specific chapters or subchapters, the following words and terms, when used in this subpart, have the following meanings, unless the context clearly indicates otherwise:

Board - The Board of Finance and Revenue.

Business day - A day on which the Board's office is scheduled to be open excluding Saturdays, Sundays, or legal holidays.

Chairman - The State Treasurer or the State Treasurer's designee.

Confidential proprietary information - As defined in the Section 102 of the Act of February 14, 2008 (P.L. 6, No. 3) known as the Right-to-Know Law, codified at 65 P.S. § 67.102, Commercial or financial information received by an agency:

(1) that is privileged or confidential; and

(2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

Department – The Pennsylvania Department of Revenue.

Electronic delivery – A method of dispatching or receiving a submittal via electronic means such as email or facsimile, or the Board's electronic filing system.

Order—A decision by the Board that becomes final unless a timely request for reconsideration is filed by a Party and is timely granted by the Board.

Party—A person who appears in a Proceeding before the Board. The term includes both a taxpayer and the Department, or in appeals filed under 72 P.S. § 503, the claimant and the opposing governmental agency.

Personal financial information - An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual's personal finances.

Petition – An application to the Board in which Petitioner seeks relief or remedy.

Petitioner— A taxpayer or other claimant.

Proceeding – Any matter before the Board, including a petition, hearing or claim.

Secretary —The Secretary of the Board of Finance and Revenue, who is the Board officer with whom documents are filed and by whom official records are kept.

Staff—The attorneys, non-attorney tax petition reviewers and administrative personnel employed to support the Board in the performance of its duties and responsibilities.

Trade secret—Information identified by the Petitioner as and that meets the definition of a trade secret or confidential proprietary information as defined in Section 102 of Act of February 14, 2008 (P.L. 6, No. 3) known as Right-to-Know Law.

§ 1.4. Filing generally.

(a) Documents filed with the Board should be submitted in one of the following manners:

(1) In person or by mail:

Secretary of the Board
Pennsylvania Board of Finance and Revenue
1101 South Front Street, Suite 400
Harrisburg, Pennsylvania 17104-2539

(2) Electronically, at bfr@patreasury.gov.

(3) By facsimile at 717.783.4499

(b) When the Board is of the opinion that a submission for filing does not sufficiently set forth required material or is otherwise insufficient, the Board may accept it for filing and advise the person submitting it of the deficiency and require that the deficiency be corrected.

(c) The Petitioner bears the responsibility for the readability of any documents filed with the Board. The Petitioner accepts the risk that any delay, disruption, or interruption of any document filed with the Board by means Electronic Delivery may not be properly or timely filed.

§ 1.5. Board office hours.

Unless otherwise directed by the Chairman, the Board offices will be scheduled to be open from 8:00 a.m. until 4:30 p.m. on Business Days.

§ 1.6. Oaths.

A Board member or the Secretary will have the power to administer oaths or affirmations with respect to any Proceeding.

§ 1.7. Formal rules of evidence do not apply.

Formal rules of evidence do not apply to matters before the Board.

§ 1.8. Subpoenas.

The Board does not possess the power to issue subpoenas.

Subchapter B. TIME

§ 1.11. Date of filing.

(a) Whenever a Party's submission is required or permitted to be filed, it will be deemed to be filed on the earliest of the following dates:

(1) On the date actually received by the Board.

(2) On the date deposited with an IRS-designated private delivery service (as set forth in an IRS Notice - currently 2004-83), as shown on the delivery receipt attached to or included within the envelope containing the document.

(3) On the date deposited in the United States Mail as shown by the United States Postal Service stamp on the envelope or noted on a United States Postal Service Form 3817 certificate of mailing. A mailing envelope stamped by an in-house postage meter is insufficient proof of the date of mailing.

(4) When a document is submitted via Electronic Delivery on a day other than a Business Day, the document will be deemed to be filed on the next Business Day.

§ 1.12. Computation of time.

Except as otherwise provided by statute, in computing a period of time prescribed by law, the day of the act, event or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is not a Business Day, in which event the period shall run until the end of the next Business Day.

Subchapter C. REPRESENTATION BEFORE THE BOARD

§ 1.21. Representation.

(a) *Representative.* Appearances in Proceedings before the Board may be by the Petitioner or by an attorney, accountant or other representative provided the representation does not constitute the unauthorized practice of law as administered by the Pennsylvania Supreme Court.

(b) *Power of attorney.* The Board may require in any Proceeding that a power of attorney, signed and executed by the Petitioner, be filed with the Board before recognizing any person or persons as representing the Petitioner.

(c) *Notice of Petitioner's Representative.* A Petitioner or his designated representative shall file with the Secretary a Petition that includes the name of the Petitioner, and if applicable, Petitioner's representative, which will serve as notice of appearance. The Department will be deemed to be served electronically when the Board docketed the case onto the Department's appeal system.

(d) *Designated representative after petition filed.* If a Petitioner authorizes a representative after the Petition is filed, the Petitioner shall file with the Secretary a form prescribed by the Board or a letter on the Petitioner's letterhead naming the representative.

(e) *Change in representative.* A change in representative that occurs during the course of a Proceeding shall be reported promptly to the Secretary.

(f) *Change in address.* A change in address that occurs during the course of a Proceeding shall be reported promptly to the Secretary.

(g) *Withdrawal of representative.* Representation continues until a Petitioner or Petitioner's representative notifies the Secretary in writing that the designation of representation is rescinded.

§ 1.22. Limited practice before the Board.

(a) The Board may deny, temporarily or permanently, the privilege of representing a Petitioner before it in any way to a person who is found by the Board, after notice and opportunity for hearing in the matter, to have done one or more of the following:

(1) Lacked the requisite qualifications to represent others.

(2) Engaged in unethical, contemptuous or improper conduct with respect to any matter before the Board.

(3) Repeatedly failed to follow Board directives.

Subchapter D. EX PARTE COMMUNICATIONS

§ 1.31. Definitions.

The following words and terms, when used in this subchapter, have the following meaning, unless the context clearly indicates otherwise:

Communications – Any verbal, written or electronic communication by a Party or its representative with the Board or the Staff.

Ex Parte Communication – A Communication regarding the merits of a Petition that takes place outside of a public hearing by one Party with respect to which the other Party was not provided notice and an opportunity to participate in said Communication unless the other Party has previously provided a Waiver of its right to participate in and thereafter object to the Communication.

Waiver – An acknowledgement to the Staff by a Party or its representative that the Party chooses not to participate in a Communication between the Staff and the other Party and agrees not to thereafter object to such Communication. Failure of a Party or its representative to participate in a Communication, for which the Party was provided notice and an opportunity to participate, shall be deemed a waiver by that Party of its right to object to such Communication. The Waiver shall be in a format as designated by the Board and published on the Board's website.

§ 1.32. General rules.

(a) *Communication with Board Members.* The Board members shall not participate in any Communications with a Party concerning the merits of a Petition pending before the Board, outside of a public hearing.

(b) *Communication with Staff.* The Staff may not participate in any Ex Parte Communications.

(c) *Written and electronic submission.* Any written or electronic submission provided to the Board or Staff by a Party must be promptly provided to the other Party.

(d) *Notification.* The Staff will make every reasonable effort to avoid Ex Parte Communications, and promptly upon discovery of an Ex Parte Communication, will notify the other Party. The Board may take any reasonable measures deemed necessary to remedy an Ex Parte Communication.

CHAPTER 2. TAX AND OTHER APPEAL PROCEEDINGS

Subchapter A. SUBMISSIONS.

§ 2.1. Petitions generally.

(a) *General requirements.* Petitions for relief must be in writing, state clearly and concisely the interest of the Petitioner in the subject matter, the facts, and the basis for relief sought.

(b) *Petition Form.* A Petition must be filed using the Board's designated petition form or otherwise conform to the format of the Board's designated form located on the Board's website.

§ 2.2. Petition content.

(a) *General.* A Petition shall include, at a minimum, all of the following that are applicable:

- (1) The Petitioner's name, address, telephone number and electronic mail address.
- (2) The name, address, telephone number and electronic mail address of the Petitioner's representative.
- (3) The Board of Appeals docket number.
- (4) The Petitioner's appropriate identifying designation, such as license number, Social Security Number, claim number, file number, or corporate box number.
- (5) The appeal type and relevant periods for review.
- (6) The amount of tax or other amounts Petitioner claims to have been erroneously assessed or to have been overpaid.
- (7) The basis upon which the Petitioner claims that an assessment is erroneous or a refund is due.
- (8) A statement of the relevant facts.
- (9) A statement indicating whether a hearing before the Board is requested.

(b) *Accuracy of Address for Board Correspondence.* The Board shall be permitted to rely upon the accuracy of the physical or email address provided by the Petitioner. It shall be the duty of the Petitioner to notify the Board if there is any change in an address provided to the Board.



INFORMATION NOTICE CORPORATION TAXES 2014-0X

Discussion Draft: June 16, 2014

I. PURPOSE

For purposes of determining the appropriate net income and capital stock franchise tax apportionment factors, this notice provides taxpayers with guidance on sourcing the sales of services to this Commonwealth, as defined in Act 52 of 2013, 72 P.S. § 7401(3)2.(a)(16.1)(C). Note that sales of services are no longer subject to the income-producing activity and cost of performance rules found in subparagraph (17).

II. STATUTORY AMENDMENT

72 P.S. § 7401(3)2.(a)(16.1)(C)

Rule #1 Sales from the sale of a service are considered to be in this state, if the service is delivered to a location in this State. If the service is delivered both to a location in and outside this State, the sale is in this State based upon the percentage of total value of the service delivered to a location in this State.

Rule #2 If the state or states of assignment under Rule #1 cannot be determined for a customer who is an individual that is not a sole proprietor, a service is deemed to be delivered at the customer's billing address.

Rule #3 If the state or states of assignment under Rule #1 cannot be determined for a customer, except for a customer under Rule #2, a service is deemed to be delivered at the location from which the services were ordered in the customer's regular course of operations. If the location from which the services were ordered in the customer's regular course of operations cannot be determined, a service is deemed to be delivered at the customer's billing address.

III. APPLICATION OF THE STATUTE

1. Overview

72 P.S. § 7401(3)2.(a)(16.1)(C) provides the rules for sourcing service income for purposes of Sales Factor Apportionment. Historically, the Sales Factor represents a taxpayer's marketplace, serving as a counterbalance to the Property and Payroll Factors, which are associated with the location of production and labor. Therefore, the Sales Factor must identify the state or states in which the taxpayer has a market for the services, *i.e.*, a place where the services may be used. Moreover, identification of the market state or states in which the



services are delivered requires knowing where the users of the service are located.

2. Delivery

While Rule #1 requires sales of services be sourced to PA if the services are delivered to a location in this State, the statute does not define the word "delivered." The Department of Revenue ("Department") defines "delivery" as occurring at a location where a person or entity may use the service. This construct is necessary to avoid scenarios where a service is "delivered" to a location that merely serves as a transit point not representative of the market state where the service is used. Further, note that the party who actually pays for a service need not be the party to whom a service is delivered. Accordingly, the passage of a service from a provider to a user constitutes delivery of the service; the passage of a service from a provider to an intermediate party does not.

This definition of "delivery" is further supported by the context of subparagraph (16.1)(C), which requires that Rule #1 be employed if at all possible before resorting to Rule #2 or Rule #3. This means Rules #2 and #3 are used to default the delivery location to a purchasing or billing address, neither of which may represent the true marketplace for the service.

3. Third Party Delivery

It is not uncommon for a service to be delivered to the location of the customer by a third party. For example, an original service provider may find it cost effective to hire a third party to complete ultimate delivery of the contracted service to the customer. In this situation, delivery of the service from the customer's perspective occurs at the ultimate location where the customer can use the service.

Accordingly, whenever a customer contracts with a service provider to have services delivered directly to the customer, the service provider shall source its receipts to the customer's location of use, regardless of whether the service provider contracts with a third party to complete final delivery to the customer.

4. Electronic Delivery

Apportionment of services delivered electronically to locations in PA and one or more other states may be accomplished by using IP address records or other network data where individual street addresses of customers are not available. However, network data should be used only if it corresponds reasonably well to the estimated locations where individual customers use the service.

Note that services delivered to an electronic address (*e.g.*, an email address, FTP account or IP address) are delivered to PA if the user of the electronic service is in PA. If the user of the electronically-delivered service is both in PA and at least



one or more other states, the service is delivered to PA according to the relative proportion of use of the service in PA compared to other states.

5. Apportionment by Jurisdiction

If use of a service can occur in PA and outside of PA, it may be necessary to apportion the service to each state. In the event a service is apportioned, a reasonable and consistent method must be used. For example, apportionment may be based on "expected usage" or "actual usage" or "value of the usage;" however, whichever method is selected, the taxpayer must be consistent in using the selected method for all receipts.

IV. GUIDELINES FOR CERTAIN TYPES OF SERVICES OR SERVICE INDUSTRIES

1. Individuals Present in PA

If a service is provided to a purchaser who is an individual who is physically present in this state at the time the service is received, the service is delivered to PA.

2. Personal and Professional Services for Individuals

If a service is received in this state and is in the nature of personal services (e.g., consulting, counseling, personal advice, training, speaking, and providing entertainment) that are typically conducted or performed first-hand, on a direct, one-to-one, or one-to-many basis, the service is delivered to PA, even if the service is provided from a remote location and/or delivered via electronic means.

3. Trade or Business Services

Services provided to a trade or business that are used by the trade or businesses are delivered to the location(s) where they are actually used. The term "trade or business" as used in this document shall include the administration, management, business processes, marketing, sales, manufacturing, distribution, and all other operations that support the trade or business itself. Trade or business services do not include services paid for by a trade or business that are used only by employees for reasons not related to the conduct of the trade or business.

If a service is provided to a purchaser engaged in a trade or business in PA and relates only to the trade or business of that purchaser in PA, the service is delivered to PA. If the service is provided to a purchaser engaged in a trade or business in PA, and one or more other states, and the service relates to the trade or business of that purchaser in PA and in one or more other states, the service is delivered in PA to the extent that it relates to the trade or business of the purchaser in PA.



4. Franchise and Service Fees

If a taxpayer receives payment for services provided to a franchisee, then the franchise fee receipts should be sourced to the location of where the franchisee used the services. Any separately stated charges for the use of intangible property such as trademarks should be sourced under the provisions of Section 401(17). If a franchise fee is a lump sum amount including both services and intangibles, and it is not possible to separately identify and value each intangible or service included in the fee, then the franchise fee should be sourced as a service and apportioned using an equivalent arms-length transaction, as if the taxpayer sold its service on the open market.

5. Employee Services

If a service is provided to employees of a company and the service is used by the employees for each employee's own personal benefit (*i.e.*, not primarily related to the trade or business of the company) such service is delivered in PA following the guidelines above for delivery of Personal and Professional Services for Individuals. If it is not possible for the taxpayer to ascertain or provide a reasonable estimate of the value of services delivered to employees in PA, then the delivery location of the services shall be apportioned to PA based on the number of employees assigned to PA by the purchasing company.

6. Brokerage Services

The service is delivered to PA if the home address of an individual purchasing the service is in PA. The service is delivered to PA if the principal business address of a business purchasing the service is in PA.

7. Package Delivery and Courier Services

Receipts from a delivery service are sourced to PA by a delivery service or courier when the package is delivered to an address in PA, unless the taxpayer is otherwise subject to the special apportionment rules of 72 P.S. § 7401 (3)2.(b).

8. Subscription Services

A subscription service is delivered to a location in PA if the subscription customer who actually uses the service is located in PA. If the actual physical locations of users of the subscription service cannot be easily determined, delivery of the service may be sourced, proportionately, to each state based on the number of subscribers in each state.

9. Mortgage Lending

The mortgage and any other related services shall be sourced to PA if the property subject to the mortgage is located in PA. If the property subject to the mortgage is located in PA and one or more other states, the mortgage lending



service is delivered in PA to the extent that it relates to the property located in PA.

10. Sale, Lease, Rental, or Other Use of Real Property

Sourcing of receipts for sale, lease, rental, or other use of real property shall be sourced under (16.1)(A).

11. Advertising

The act of creating an advertisement itself should be considered the creation of tangible personal property. However, the distribution and delivery of an advertisement to a target audience is considered a service. Delivery of an advertisement to a target audience is considered complete only when it reaches its intended target audience. Delivery to a target audience may follow these guidelines:

- a) To the extent that an advertisement specifically targets audiences in PA, the advertisement service is considered delivered to PA.
- b) To the extent that an advertisement specifically targets audiences in another state, the advertisement service is not delivered to PA.
- c) To the extent an advertisement is targeted to multiple states or the location of the target audience cannot be ascertained, then a representative portion of the advertisement service is delivered to PA based on reasonable estimates of the location of the target audience.

12. Data Processing, Internet Access, Data Streaming, Data Storage and Information Services

Data processing and information services, such as streaming audio or video, access to stored data, or corporate shared services are delivered to the location of the user of such services.

Delivery of data services to a server, "the cloud," or other data storage device does not constitute delivery of these types of services. Rather, such services are considered delivered to the location of the user.

If the users of stored data are third parties, such as public web site users whose physical addresses are unknown to the cloud storage company, receipts may be sourced using IP addresses or other network data.

Receipts from providing Internet access service are sourced to PA to the extent the access service is used by a customer in PA.



13. Computer Software

Computer software, whether it involves tangible personal property, canned software, custom software, or a license to use a type of software, is sourced to PA if the user of the software is located in PA.

The development of computer software for a purchaser is considered a service if the purchaser provides specifications that make the resulting software unique to that purchaser. Such service is delivered to PA if the purchaser uses the software in PA, regardless of whether the software resides on an Internet or email server, hard medium such as a DVD, flash drive, or other physical device, or on "the cloud" and is located outside of PA. If the service is utilized both in PA and another state, the software is delivered to PA to the extent it is used in this state relative to use in other states.

14. Construction Services, Landscaping Services

If a service relates to real property that is located entirely in this state then the service is sourced to PA. If the service relates to real property that is located in this state and in one or more other states, the service is delivered to PA to the extent that the real property is located in PA.

15. Transportation

Railroads, motor carriers, bus lines, airlines, and other transportation companies shall continue to apportion income under the rules of 72 P.S. § 7401 (3)2.(b).

16. Pipeline or Natural Gas Companies

Pipeline or natural gas companies shall continue to apportion income under the rules of 72 P.S. § 7401 (3)2.(c).

17. Water Transportation Companies

Water transportation companies shall continue to apportion income under the rules of 72 P.S. § 7401 (3)2.(d).

18. Telecommunications

Companies with receipts subject to the federal Mobile Telecommunications Sourcing Act (MTSA) shall source those receipts in accordance with MTSA rules, which sources the receipts to the "place of primary use," which is often the billing address of the customer. Telecommunications companies not subject to the federal MTSA and CATV companies, are delivered to a location in this Commonwealth if the service address of the account is in this Commonwealth. If the service is delivered to an individual or business with service accounts in the Commonwealth and at least one other state, the service is delivered in this



Commonwealth based on the proportion of service locations in this Commonwealth compared to service locations in other states.

19. Utilities

This general utility rule applies only to utilities not identified elsewhere in this Notice. Delivery of a utility service occurs in PA if the service address is in PA. The transportation of a tangible item related to such service may be considered a separate service if separate receipts are provided for the actual transportation of the tangible and for the physical amount of the tangible delivered to a customer's service address.

V. EXAMPLES, BY RULE NUMBER

NOTE: The examples below are for general guidance only and are binding on neither the Commonwealth nor a particular taxpayer.

Rule #1

- a) Example: Taxpayer constructs a building in New Jersey for a PA-based customer. No receipts are sourced to PA.
- b) Example: PA-based Taxpayer provides internet access to a customer's PA-based location. All receipts are sourced to PA.
- c) Example: Taxpayer develops and analyzes X-Ray film in Kansas for delivery to a doctor in PA. All receipts are sourced to PA.
- d) Example: Taxpayer conducts Research and Development activities in Idaho for a PA company's use in PA. All receipts are sourced to PA.
- e) Example: PA-based Taxpayer performs R&D for Customer, who has affiliates in PA, Ohio, and 15 other states. The R&D report is ordered by, billed to, and physically delivered to the Ohio purchasing office, which does not engage in any activities related to R&D. Taxpayer's receipts are sourced to PA to the extent the value of the reports is used in PA. If it is impossible for Taxpayer to reasonably estimate the service value delivered to any particular state, then Taxpayer's receipts are sourced according to Rule #3.
- f) Example: Taxpayer, based in PA, operates beauty salons in PA and New Jersey. Receipts from salon services performed at Taxpayer's locations in PA are sourced to PA. Receipts from salon services performed in New Jersey are sourced to NJ, where customers receive the service.
- g) Example: Taxpayer provides office cleaning services to a customer who has one location in PA and two locations in Ohio. The sales contract provides one charge for cleaning the three locations. Receipts are sourced to PA by a fraction,



which is service value at the PA location divided by total service value for the three locations.

h) PA-based Drake's Dry Cleaners provides cleaning services for shirts, dresses, pants, and coats. However, Drake outsources the cleaning of leather coats to Ohio-based Lenny's Leather Cleaners. Customer Carl comes to Drake with a leather coat in need of cleaning. Drake delivers the leather coat to Lenny for special cleaning. Lenny cleans the coat, returns it to Drake, and bills Drake for the service. Carl picks up his cleaned leather coat at Drake's store and pays Drake for the cost of cleaning the coat. Drake sources the receipt from Carl to PA, the location where Carl took possession. Lenny sources his receipt from Drake to PA because his contract was with Drake and he completed his service and delivery by delivering it to Drake in PA.

i) Example: PA-based Customer orders a service from Taxpayer based in Virginia. Customer's purchase office in New Jersey actually places the order on behalf of the PA Office. Taxpayer delivers the service output to Customer's New Jersey Office. Customer's New Jersey Office delivers service output to the PA Office. The service receipts are sourced to PA.

j) Example: Taxpayer is a New York-based investment & mutual fund company. Taxpayer provides a common, uniform benefit program for the employees of PA-based A Corp. Two-thirds of A Corp's employees reside in PA and one-third resides in Ohio. Two-thirds of Taxpayer's gross receipts are sourced to PA.

k) Example: Taxpayer is a PA-based law firm. Taxpayer prepares a PA property deed for Company A, a multi-state company commercially domiciled in PA. Taxpayer mails the property deed to an office of Company A in Delaware. The receipts from this service will be assigned to PA despite the property deed having been mailed to a Delaware address, because the services are of value only in PA.

l) Example: Taxpayer is a PA-based CPA firm that provides tax preparation services to Company A, who is also based in PA. Company A has income from services performed in New Jersey. Taxpayer prepares a New Jersey State Income Tax return for Company A. Receipts for this service are sourced to PA.

m) Example: Taxpayer is a provider of third-party payroll processing services for Company A. Half of Company A's employees are located in PA and half are located in New York. Company A's headquarters and human resources functions are located in PA. Taxpayer sources all of the payroll services to PA. Note in this example that payroll services are really used by the corporation and not the employee because the service is designed to meet the needs of the company, and it is the company that uses the processing service, not the employee.



Rule #2

Example: Taxpayer provides worldwide traveler emergency and advice service via phone to individuals located throughout the United States. Customers may call for assistance from any phone in the world. Taxpayer sources service receipts to PA for all customers with PA billing addresses.

Rule #3

Example: Taxpayer provides phone and Internet-based drug and alcohol crisis and rehabilitation services to employees of Company A, whose headquarters is in Ohio but who has 40% of its employees in Ohio and 60% in PA. Employees may request counselling by calling a phone number or logging in to a Web Page. Employees may use the service anonymously, and are not charged an individual fee to use the service. Company is charged an annual service fee by Taxpayer. None of Taxpayer's receipts are sourced to PA.

VI. APPORTIONMENT OF INTANGIBLES

1. Intangible Property

Intangible property means any of the following.

- Patents, copyrights, trademarks, and trade names.
- Money and instruments representing the ownership of money.
- Equity or debt securities, such as stocks and bonds, and derivatives of such securities.
- Credits such as tax credits, energy credits, and billing credits.

Receipts from intangibles include any of the following.

- Royalties for the use of intangible property.
- Interest, capital gains or dividends arising from the ownership, sale, exchange or other disposition of intangible property.

In cases where it is uncertain whether a receipt represents income from an intangible or from a service, and in cases where a receipt contains both items related to services and items related to intangibles, the receipt should be sourced according to the sourcing of services rules provided in 72 P.S. § 7401(3)2.(a)(16.1)(C).



2. Application of Income Producing Activity Law

Section (17) of 72 P.S. § 7401 has been amended to restrict the use of "income-producing" activity apportionment to receipts from intangibles only:

(17) Sales, other than sales under paragraphs (16) and (16.1), are in this State if:

(A) The income-producing activity is performed in this State; or

(B) The income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other state, based on costs of performance.

Intangibles income will continue to be apportioned to PA if the income producing activity is performed in this state, using Subparagraph (17)(a). While Pennsylvania law does not define the term "perform," the common meaning of the term is defined in Black's Law Dictionary as "[t]o perform an obligation or contract is to execute, fulfill or accomplish it according to its terms." Black's further defines "performance" as "[t]he fulfillment or accomplishment of a promise, contract, or other obligation according to its terms." Accordingly, performance of the income producing activity occurs when the performance is accomplished or fulfilled. The department has consistently applied the income producing activity rule focused on fulfillment of the sale to the customer. Such application has been uniform for both PA-based and non PA-based taxpayers.

In instances where the income producing activity of a single transaction takes place in more than one state, then it may be necessary to use the costs of performance method (17)(b) for assigning the sales activity to a particular state. In calculating the costs of performance in each state, the taxpayer may include only those costs related to income-producing activities that are directly responsible for income generation in PA. The taxpayer must specifically identify each claimed income producing activity and must justify how each income producing activity directly affects the production of income in PA.

Finally, if a taxpayer cannot establish the location of the income producing activity, the income producing activity will be assumed to have occurred both within PA and outside of PA, with the greater proportion of the costs of performance occurring in PA.

Example

Taxpayer is a Maryland-based restaurant chain that grants franchises to individuals in specific locations throughout Maryland and Pennsylvania. In exchange for granting a franchise to an individual, Taxpayer leases its trademarks and patented food-processing techniques to its franchisees. The leases are paid annually and entitle the franchisee to use those intangibles in



specific restaurants throughout Pennsylvania and Maryland. The receipts from intangibles leased to Pennsylvania-based franchisees are sourced to Pennsylvania because the income-producing activity (use of the intangible) occurs in Pennsylvania.