



TaxNewsFlash

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KPMG reports: Arkansas (marketplace facilitators); Arkansas and Colorado (sales tax, food tours); Illinois (sales tax refunds); Massachusetts (pass-through entity tax); Texas (taxable information services)

KPMG's This Week in State Tax—produced weekly by KPMG's State and Local Tax practice—focuses on recent state and local tax developments.

- **Arkansas:** A legal opinion from the Department of Finance and Administration responded to a request for guidance from a taxpayer that maintained an online platform used by government entities to sell surplus items. The legal opinion concludes that when the taxpayer acted as a marketplace facilitator by facilitating a taxable sale by a government body, the sale became the sale by the marketplace, and the marketplace (i.e., taxpayer) was required to collect and remit the tax. The legal opinion next confirms that for purposes of computing the economic nexus threshold for a marketplace facilitator, sales in which the marketplace did not collect and transmit payment to the marketplace seller were not counted in calculating the threshold.
- **Arkansas:** The Arkansas Department of Finance and Administration in a letter describing the sales and use tax consequences of food tours addressed whether a food tour company was required to collect and remit sales tax on tickets. The taxpayer organized tours of four to six restaurants over a three-hour tour. The cost of a ticket included the food consumed at the restaurants. The Department determined that the taxability of the tickets hinged on whether the food tour was a bundled transaction consisting of the sale of food and the service of the tour, or whether the food tour was purely a service. In the Department's view, because the tour operator paid the restaurants for the food consumed by guests, the ticket was not a bundled transaction but was a service and as such was not subject to sales tax. However, the taxpayer was responsible for collecting and remitting the 2% Arkansas tourism tax on its sales of tickets.
- **Colorado:** The Department of Revenue issued a general information letter addressing whether: (1) guided walking tours were subject to the state's sales and use tax when food and beverages

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were **not** included in the cost of the tour; (2) guided walking tours were subject to sales and use tax when food and beverages **were** included in the cost of the tour; and (3) a resale certificate could be used to purchase food for guests during a guided walking tour. The Department first noted that guided walking tours are not explicitly subject to the sales and use tax. However, without directly answering the taxpayer's question, the Department cautioned that a service may be subject to sales and use tax if the service also includes the sale of taxable property or services. A retailer's purchase of food or drink would be considered nontaxable if the retailer sells the food to a customer in a later separate transaction. The retailer's original purchase would be treated as a tax-free wholesale purchase, and the subsequent sale to the consumer would be the taxable sale.

- **Illinois:** A state appellate court held that a taxpayer using the cash basis method of accounting was entitled to a refund of sales tax when its customers defaulted on their installment contracts. The taxpayer used the cash basis method of accounting and therefore was prohibited from taking a federal bad debt deduction. Accordingly, the Department denied the taxpayer's refund claim for sales tax that had been remitted upfront on cars purchased through installment contracts when the cars were later repossessed due to customer default. The court concluded that purpose of the bad debt statute was to allow refunds to retailers of sales tax prepaid on defaulted goods, and that the legislature did not intend for cash basis taxpayers to be prohibited from obtaining such refunds.
- **Massachusetts:** The Department of Revenue issued guidance as a set of "frequently asked questions" (FAQs) on the new pass-through entity tax election that is effective for tax years beginning on or after January 1, 2021. The FAQs answer questions about how to elect into the pass-through entity tax, compute the tax, and pay the tax and estimated payments.
- **Texas:** The Comptroller issued a private letter ruling concluding that a taxpayer selling information on prospective students to higher education institutions was providing a taxable information service. Although the sale of information compiled on behalf of a particular client was not taxable if the information was not sold to others, in this instance, the information from each prospective student could be, and often was, shared with multiple clients. Therefore, it was not proprietary in nature.

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