

TaxNewsFlash

United States



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KPMG reports: Mississippi (digital photography service); Tennessee (sales of subscriptions to electronic publications); Texas (web-based weather forecasting service); multiple states (nexus)

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.

- **Mississippi:** The Supreme Court held that a taxpayer's sales of wedding photography packages were not subject to sales and use tax. Every photo package was transferred to customers via a DVD, flash drive, or a tablet. The Mississippi Department of Revenue assessed sales and use tax on the basis that the taxpayer's customers were receiving their photos in tangible form through the flash drive or disk. The court disagreed, however, finding that receipt of the flash drive and disk were incidental to the taxpayer's photography service. In the court's view, the customers were paying for the digital photographs of their wedding, not the tangible property. The court further noted that the sales of digital images were not taxable specified digital products, as the definition of the term does not include still digital images.
- **Tennessee:** In a private letter ruling, the Department of Revenue concluded that the taxpayer's provision of access to databases and other electronic publications was properly classified as an information service that was not subject to Tennessee sales and use tax. Although access to the electronic publications and databases occurred by use of software, in the Department of Revenue's view, because of the limited functionality of the software, it was merely incidental to the nontaxable information services.
- **Texas:** Two administrative decisions address the taxability of information services. Under Texas law, information services are generally taxable; however, there is an exception for the "sale of information primarily derived from laboratory, medical, or exploratory testing or experimentation or any similar method of direct scientific observation of physical phenomena." The Texas Comptroller determined that a web-based weather forecasting service was not a taxable information service because the taxpayer primarily derived its service from the direct scientific observation of physical phenomena.

- **Multiple states:** There are several cases pending right now in courts across the country that address sales and use tax nexus for years both before and after the *Wayfair* decision.
 - **Arizona:** An Arizona-based online bead seller appealed to the Fifth Circuit Court of Appeals the dismissal of its lawsuit challenging the constitutionality of Louisiana's locally administered sales tax regime. The federal district court had determined that it lacked jurisdiction over the case under the "Tax Injunction Act."
 - **Massachusetts:** Oral arguments in a case addressing "cookie nexus" and whether the holding in *Wayfair* applied retroactively will be held before the Massachusetts Supreme Judicial Court on November 4, 2022.
 - **Pennsylvania:** The Department of Revenue announced that it was not going to appeal the Commonwealth Court's recent decision in holding that merchants that sold through a fulfillment program lacked the requisite due process clause contacts to establish nexus with the Commonwealth.
 - **South Carolina:** In another case addressing pre-*Wayfair* sales, the litigation in South Carolina over whether a company was required to collect and remit sales tax on its facilitated sales will remain pending at the court of appeals and will not be transferred to the state's highest court.

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