

## 5 KEY TAKEAWAYS

# Council On State Taxation (COST) Regional State Tax Seminar

Kilpatrick's [Samantha Breslow](#), [Jordan Goodman](#), [David Hughes](#), and [Jeffrey Reed](#) presented "Discussion of State Tax Cases, Issues & Policy Matters to Watch" and "Where's Waldo? Sales Sourcing in Today's SALT World" during the **Council On State Taxation Regional State Tax Seminar** in Omaha on July 31, 2024. Key Takeaways from their presentations include:

1

**Public Law 86-272 and Internet Activities:** Enacted in 1959, Public Law 86-272 is a federal law that prohibits states from imposing a net income tax on sellers of tangible property whose only connection with a state are salespeople who solicit orders that are accepted and fulfilled outside the state. The Multistate Tax Commission, a quasi-governmental agency that seeks to promote uniform tax rules for states, recently issued its revised interpretation of P.L. 86-272. Under this revised interpretation, any seller with an interactive website – such as a website that provides online repair or technical assistance to customers – loses its P.L. 86-272 protection because such activity exceeds the solicitation of orders. This is an expansive reading of the federal law that has not been endorsed by any state or federal court.

2

**Determining Where a Sale Takes Place:** Determining where a sale takes place can be a challenge for income tax and sales tax purposes. This is especially true for sales of services. For income tax, states historically used an "income producing activity rule" that essentially assigned sales to the state where the service provider was located. Today, most states have moved away from this rule and instead assign sales to the state where the customer or client is located (the "market" state). While this was believed to be an easier rule to apply, it has proven challenging in practice. Some of the issues that taxpayers and states face is determining where a customer/client receives the benefit of a service and determining whether to assign sales to the location of the customer's customer.

3

**Will States Adopt a Wealth Tax?:** The United States Supreme Court recently decided a case (Moore v. U.S.) that could impact the ability of the federal and state governments to adopt a "wealth" tax (a tax on the unrealized income from the appreciation of intangible assets such as stock). In Moore, the US Supreme Court upheld the federal; "mandatory repatriation tax" that was adopted as part of the Tax Cuts and Jobs Act. This tax was imposed on the earnings and profits of overseas businesses that had not yet been distributed to U.S. shareholders. Although the Court acknowledged that the U.S. shareholders had not realized the income, their foreign businesses did, which was enough for the Court to uphold the tax.

4

**Sales Tax on Software:** Many states impose sales tax on canned software that is sold on a physical medium (such as a disc) or that is downloaded to a user's computer. Some states also tax software as a service and cloud computing. What if a service that was traditionally performed manually is now available electronically through software? Should such a service be subject to the sales tax? According to a recent decision from the Arizona Supreme Court concerning ADP, the answer is yes. When ADP performed its payroll processing services manually, it was not subject to sales tax. But when it switched to a software-based service that allowed clients to input data electronically via software, the Supreme Court ruled that ADP's services became the taxable license of software.

5

**Tax Issues with Bundled Sales:** Many sales tax issues arise when a seller "bundles" taxable and nontaxable items in the same sale, especially when the invoice does not itemize the various products and services in the bundle. In this situation, many states will try to determine the buyer's "true object" of the sale. If the true object is a taxable item, then the entire bundled package is taxable. Another issue that arises with bundled sales is a taxable item (such as a cellphone) that is sold at a discount as part of a larger package that includes nontaxable services (such as a cell phone service plan). Many states – some successfully – have argued that the seller is required to charge tax on the full retail selling price (as opposed to the discounted price) of the taxable item.