

Colorado Sales and Use Tax: Changes and Continuities

BY MARK KOZIK AND BRUCE M. NELSON, CPA



It is safe to say that the *Wayfair* decision¹ has impacted all 45 states that impose a sales and use tax.² However, its impact in Colorado is particularly complex, both substantively and procedurally, because of the number of different taxing jurisdictions that must be considered and, because while the sales and use tax bases in some of the state's local jurisdictions tend to follow the state-level sales and use tax bases, in others they do not. Plus, some 72 local jurisdictions in the state are "home-rule" cities/towns that have their own substantive and procedural rules that are largely independent of the state-level rules. Finally, in addition to providing an economic presence threshold for sales tax collection, legislation enacted in 2019 also provides new sourcing requirements, with different rules which apply depending on whether the seller meets a \$100,000 Colorado-sales threshold. Welcome to Colorado!

While the sales and use tax bases in some of the state's local jurisdictions tend to follow the state-level sales and use tax bases, in others they do not.

From a jurisdictional perspective, a sale to a Colorado customer must be analyzed at five levels:

- State;
- County;
- State-administered city/town (if any);
- District (if any); and
- Home-rule city/town (if any).

The county, city/town, and district levels are commonly referred to as the "local" jurisdictions. These jurisdictions fall into one of two buckets—those whose sales tax bases generally "piggyback" off the state sales tax base and whose sales tax is administered by the Colorado Department of Revenue (commonly referred to as the "state-administered" or "statutory" local jurisdictions), and those whose sales tax base and administration are

largely independent from the state-level tax base and Department of Revenue (commonly referred to as the "home-rule" jurisdictions).

Although the state-administered local sales tax bases generally follow the state-level sales tax base, there are presently 16 potential exceptions, where the sales tax base for each state-administered county, city, and town may, or may not, depart from the state-level sales tax base. The treatment of each of these 16 potential exceptions in each of the state-administered counties, cities, and towns is lined out in Colorado Department of Revenue Form DR 1002 (DR 1002), cryptically titled "Colorado Sales/Use Tax Rates." Unlike the state-administered counties, cities, and towns, the sales tax base for special districts is generally identical to that at the state level.

With regard to use tax, the tax base in state-administered counties, cities, and towns is limited to motor vehicles and building materials, and it is not administered by the Department of Revenue. However, the use tax base in the special districts generally follows the state-level use tax base, and it is administered by the Department of Revenue.

Home-rule jurisdictions (all cities/towns, including the City and County of Denver and the City and County of Broomfield), on the other hand, have almost complete autonomy with regard to their own sales and use tax, and each has its own licensing, registration, forms, and, most importantly, a separately defined tax base.³ The differences can be frustrating, sometimes mind-boggling, to even the most experienced practitioner.

STATE-ADMINISTERED LOCAL JURISDICTIONS—SOME DETAILS

The state has 269 "state-administered" local tax jurisdictions that impose a sales tax, a use tax, or both. As noted previously, these jurisdictions are also sometimes referred to as "statutory" jurisdictions. They include 173 cities/towns (mostly on the smaller side), 62 of the state's 64 counties, and 34 special districts (such as the Regional Transportation District and the Scientific and Cultural Facilities District). The two "missing" counties are Denver and Broomfield, each of which is a combined city and county (the "City and County of Denver" and the "City and County of Broomfield"). Of the 62 counties noted, 52 impose a sales tax. Ten do not.

DR 1002 provides a listing of all the state-administered local jurisdictions, along with their sales tax rates and information about those 16 instances where the sales tax base in a state-administered county, city, or town can differ from the state-level sales tax base. These items range from manufactur-

¹ *South Dakota v. Wayfair, Inc.*, 585 US ____ (2018), 138 Sct 2080.

² In brief, in *Wayfair*, the U.S. Supreme Court held that physical presence was not a prerequisite to a state requiring a remote seller to collect sales/use tax on sales to customers in that state. In that case, South Dakota required remote sellers to collect sales tax if they met a threshold that was based on \$100,000 in annual sales or 200 separate sales transactions of any amount. Forty-five states impose sales and use tax. The only states that do not are Alaska, Delaware, Montana, Oregon, and New Hampshire. However, numerous Alaska cities and towns do impose sales tax, some of which have formed the Alaska Remote Seller Sales Tax Commission to enact an economic presence standard for requiring remote sellers to collect and remit.

³ There is some state-wide uniformity imposed on the home-rule cities by state statute. For example, these cities are subject to certain uniform rules regarding the time for protesting assessments and refund denials, and also regarding the protest/appeal process. See CRS §29-2-106.1.

ing machinery and machine tools to beetle wood products, and all of them are exempt from the state-level sales tax. However, they are subject to sales tax in each state-administered county, city, and town unless that jurisdiction affirmatively elects to follow the state-level exemption.⁴

DR 1002 also provides information as to whether a particular state-administered county, city, or town imposes use tax on motor vehicles, building materials, or both, and the related use tax rates.

Finally, DR 1002 provides the tax rates for the special districts. However, unlike the state-administered counties, cities, and towns, the sales and use tax bases for the special districts do follow the state-level sales and use tax bases. Also, the Department of Revenue administers both the special district sales and use taxes.

If you are interested in going beyond DR 1002 in determining or documenting any of these issues for a state-administered local jurisdiction, you must go to the controlling authority for the local jurisdiction. However, depending on the jurisdiction, that information may or may not be readily available either on a commercial research database or the jurisdiction's website.

As would be expected, there are sometimes questions about which local jurisdiction(s) are involved in a given transaction. For example, it may or may not be clear whether something in Adams County is east or west of Box Elder Creek. If it is on the west side, it is in the Regional Transportation District (1% district-level sales and use tax). If it is on the east side, it is not in the Regional Transportation District.⁵

Sales tax registration with the Department of Revenue includes any relevant state-administered local jurisdictions, and state-ad-

ministered local sales tax is reported to the appropriate local jurisdiction as part of the state-level sales tax reporting. The sales tax due to state-administered local jurisdictions is remitted along with the state-level tax to the Department of Revenue, which then passes the tax along to the appropriate local jurisdiction.

The Department of Revenue also audits the appropriate state-administered local jurisdictions as part of their state-level sales tax audits. These jurisdictions do not independently undertake sales tax audits.

As noted previously, the state-administered counties, cities, and towns can also impose use tax but, unlike with their sales tax base, their use tax base is limited to the storage, use, or consumption of motor vehicles and the use or consumption (no provision for storage) of building materials.⁶ Also unlike for sales tax, the Department of Revenue does not administer the reporting and payment of use tax in these jurisdictions. Rather, the use tax is administered at the local level. For motor vehicles, state and local-level use tax is assessed at the time a vehicle is registered. For building materials, it becomes more confusing. State and special district use tax is generally paid on the contractor's use tax return filed with the Department of Revenue. However, use tax for most of the state-administered counties, cities, and towns that impose a local-level use tax on building materials is generally assessed in the building permit process.⁷

HOME-RULE JURISDICTIONS—SOME DETAILS

Aside from navigating the sales and use tax base, collection, reporting, and remittance rules and procedures for the state and pertinent state-administered local jurisdictions, taxpayers must also take into account the state's "home-rule" jurisdictions. So, if the

preceding isn't confusing enough, the state has 96 "home-rule" jurisdictions, 72 of which independently administer their own sales and use tax ordinances (generally referred to as "self-collecting" home-rule cities). Included in this group are the two home-rule "city and county" jurisdictions, that is, the City and County of Denver and the City and County of Broomfield (otherwise, counties are state-collected local jurisdictions). The 24 home-rule cities/towns that are not self-collecting are "state-administered," "state-collected," or "statutory" home-rule cities/towns and follow the state-administered local jurisdictions rules already discussed.⁸

Each self-collecting home-rule jurisdiction imposes its own sales and use tax according to its own ordinance, regulations, and other guidance, with separate registration, licensing, forms, filing requirements, payment procedures, and audit/appeal processes. They do so under the authority of the Colorado Constitution Article XX, which authorizes such municipalities to impose, administer, and enforce their own individual sales and use tax statutes.⁹

There is no limit to the differences between the tax base in one self-collecting home-rule jurisdiction and that in another, or that at the state level. For example, the City and County of Denver, the City of Boulder, the City of Fort Collins, and the state of Colorado all define and tax software differently. The same is true with respect to registration and compliance in these home-rule jurisdictions. Each one must be dealt with independently from all the others, and from the state. Also, each of these jurisdictions handles its own audits and, to a degree, has its own protest/hearing procedures and requirements, subject to some overriding consistency

CONTINUED ON PAGE 20

⁴ The current list shown in DR 1002 includes food for home consumption; certain machinery and machine tools; gas and electricity for residential use; occasional sales by charitable organizations (as defined); farm equipment (as defined); pesticides (generally before July 1, 2012); food sold in vending machines; low-emitting vehicles that are over 10,000 pounds; renewable energy components (as defined); beetle wood products; certain school-related items; biogas production systems components (detailed definitions); property used in space flight; certain machinery and machine tools used for processing recovered materials (see Public Health and Environment list); marijuana and marijuana-related products; and manufactured homes.

⁵ According to a state audit, the Department of Revenue failed to properly register businesses within the correct taxing location 11% of the time. Taxpayers and software companies often fare no better. See Colorado Office of the State Auditor, Department of Revenue Local Sales Taxes Performance Audit (November 2015).

⁶ See CRS §29-2-109. It is thought that one reason for the growth in the number of home-rule jurisdictions is the limitation on use tax for state-collected cities.

⁷ This is also true for most of the home-rule cities—for example, when a general contractor pulls a building permit in the home-rule city of Fort Collins, the local city and county tax is paid at that point as a use tax. While most cities collect use tax when the building permit is issued, there are a few exceptions, primarily the cities of Denver and Colorado Springs. Most of the cities require a reconciliation of a contract's actual costs to the building permit estimate prompting either a refund, or more commonly, additional tax due. Material differences may prompt home-rule cities to perform a field audit. Statutory cities resolve the differences through office reviews.

⁸ The 24 home-rule cities for which the state collects include Alamosa, Basalt, Burlington, Cedaredge, Dillon, Fort Morgan, Fountain, Fruita, Georgetown, Hayden, Holyoke, Johnston, Kiowa, Manitou Springs, Minturn, Monte Vista, Morrison, Mountain View, New Castle, Ouray, Parachute, Rico, Silt, and Ward. A list of all Colorado cities and towns by type is available at the Colorado Department of Local Affairs website: <https://dola.colorado.gov/lgis/municipalities.jsf>.

⁹ See *Berman v. Denver*, 400 P2d 434 (1965). Each city's statutory and regulatory authority can be found online at the respective city's website.

CONTINUED FROM PAGE 19

provisions set out in the state statute.¹⁰ Perhaps the best way to think of self-collecting home-rule cities is that from a sales and use tax viewpoint, they are just like other states, only they are all within the state of Colorado.

All told, someone making sales to Colorado customers can face up to 756 sales tax combinations.¹¹

NEXUS/DOING BUSINESS

Whether a seller must collect and remit sales tax on a sale to a Colorado customer depends on whether it is “doing business” in Colorado for sales tax purposes. However, the requirement to collect and remit is further limited by whether the seller has “nexus” with Colorado. “Doing business” is defined in the Colorado statutes. “Nexus” is determined under the federal constitution, along with the related judicial interpretations.

Historically, nexus contemplated some level of physical presence in a state that sought to impose a sales tax collection and remittance obligation on a seller. However, several states enacted legislation that imposed an obligation to collect sales tax solely on the basis of the seller making sales to in-state customers in excess of specified dollar limits. One of those states was South Dakota, and its economic presence statute was the one that reached the U.S. Supreme Court in *Wayfair*.

The U.S. Supreme Court decision in *Wayfair* opened the door to states requiring sellers to collect and remit sales tax in the absence of physical presence if they have sufficient economic presence in the state. Nearly all of the states that impose a sales tax have now enacted legislation requiring sellers to collect and remit if they have economic presence similar to that which existed in the *Wayfair* case, that is, sales to in-state customers and/or number of transactions with in-state customers in excess of defined threshold amounts. Colorado enacted such

legislation (although ultimately without the number-of-transactions element) effective June 1, 2019. The legislation passed notwithstanding that the sales tax environment in the state bears little resemblance to that approved by the U.S. Supreme Court in *Wayfair*.¹²

SOURCING SALES FOR THE STATE AND STATE-COLLECTED JURISDICTIONS

Emergency Regulation §39-26-102(9) (issued along with the initial economic presence Emergency Regulations originally scheduled to take effect Dec. 1, 2018, and subject to the Department of Revenue’s grace period through May 31, 2019) provided new sourcing rules for sales/use tax purposes.

Colorado House Bill (HB) 19-1240, which provides the economic presence rules, also amended CRS §39-26-104 to incorporate these sourcing rules effective June 1, 2019. These rules were based almost word for word on the model sourcing language discussed and adopted by the Streamlined Sales Tax Project Sourcing Issue Paper.¹³ Specifically, “for purposes of determining where a sale of tangible personal property, commodities, or services is made,” the following rules apply effective June 1, 2019¹⁴:

First, “if tangible personal property, commodities, or services are received by the purchaser at a business location of the seller, the sale is sourced to that business location.”¹⁵

Second, “if tangible personal property, commodities, or services are not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser occurs, including the location indicated by instructions for delivery to the purchaser, if that location is known to the seller.”¹⁶

Third, if neither of the first two rules apply, then “the sale is sourced to the

location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller’s business, when use of this address does not constitute bad faith.”¹⁷

Fourth, if none of the first three rules apply, then “the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including, if no other address is available, the address of a purchaser’s payment instrument, when use of this address does not constitute bad faith.”¹⁸

Fifth, if none of the first four rules can be applied, then “the sale is sourced to the location indicated by the address from which the tangible personal property, commodity, or service was shipped.”¹⁹

These provisions became effective June 1, 2019.²⁰

For leases of tangible personal property that are not covered by special rules and that have recurring payments, the first payment generally is sourced according to the preceding rules. The second and subsequent payments generally are sourced to the property’s primary location for each period covered by the payment as provided by the lessee and available to the lessor in the ordinary course of business. The primary location is not altered by “intermittent” use of the property at other locations.²¹ If the lease or rental does not require periodic payments, the payment is sourced under the rules applicable to sales, as described above.²²

Special rules apply for the lease or rental of motor vehicles, trailers, semi-trailers, and aircraft that do not qualify as “transportation equipment.”²³ Other special rules apply to leases of “transportation equipment” (which includes items such as certain locomotives,

¹⁰ See CRS §29-2-106.1, discussed below.

¹¹ See the Colorado Department of Revenue report at https://leg.colorado.gov/sites/default/files/images/committees/2017/170711sales_and_use_tax_simplification_task_force_presentation_colorado_department_of_revenue.pdf.

¹² House Bill (H.B.) 19-1240.

¹³ See https://www.streamlinedsalestax.org/docs/default-source/issue-papers/sourcing.pdf?sfvrsn=ece9b090_4.

¹⁴ H.B. 19-1240, Section 17.

¹⁵ CRS §39-26-104(3)(a)(I).

¹⁶ CRS §39-26-104(3)(a)(II).

¹⁷ CRS §39-26-104(3)(a)(III).

¹⁸ CRS §39-26-104(3)(a)(IV).

¹⁹ CRS §39-26-104(3)(a)(V).

²⁰ H.B. 19-1240, Section 17.

²¹ CRS §39-26-104(3)(b)(I)(A).

²² CRS §39-26-104(3)(b)(I)(B).

²³ See CRS §39-26-104(3)(b)(II).

railcars, trucks, truck-tractors, trailers, semi-trailers, passenger buses, aircraft, and containers).²⁴

While the legislation attempts to put both in-state and out-of-state sellers on an equal and level playing field, it fails, if ever so slightly for the very smallest of retailers. If a seller does not meet the \$100,000 economic presence threshold, it sources its sales to its business location regardless of where the purchaser receives the property or service (unless such sale would be sourced to a location outside Colorado under CRS §39-26-104(3)(a) (discussed above), in which case the sale is simply exempt from state- and state-administered local sales tax).²⁵ Thus, an in-state retailer with less than \$100,000 in sales would collect state and state-administered sales tax for its business location in Colorado on a sale to a Colorado customer, while an equally small out-of-state remote seller would not have to collect any state or state-administered tax at all on that same sale.

For example, an Iowa seller making a Colorado sale would not have to collect any Colorado state or state-administered taxes because it is below the threshold (assuming it did not otherwise have nexus, such as through physical presence) and would not have to collect any Iowa sales tax assuming the sale is an out-of-state sale for Iowa sales tax purposes.

This inequality may be only temporary. Once the state has implemented an online geographic information system (GIS) that will determine the taxing jurisdiction and applicable rate, all sales will be sourced according to the new rules.²⁶ In that event, the old “place of business” sourcing for sales into state-administered local jurisdictions will be completely gone.

Can a retailer avoid following the new sourcing rules by simply requiring that all sales be FOB shipping point and that all risk of loss, etc., transfers to the buyer at the retailer’s store or dock? In short, that the sale is consummated in all circumstances at the store or dock? It seems not. The new sourcing rules provide that “receipt” or “receive” for the buyer “means taking possession of tangible personal property or commodities ... but does not include possession by a shipping company on behalf of the purchaser.”²⁷

It appears that the taxable situs of the sale is where the buyer takes possession of the goods regardless of the language of the sales contract.

As for the home-rule jurisdictions, their sourcing rules for sales tax are unaffected by HB 19-1240. While uniformity between the state and the home-rule cities on taxable presence may be an insurmountable obstacle, there may be some hope that the cities

physical and economic nexus standards, and sourcing rules, we believe we know the answer. ▲

** This article does not necessarily represent the opinions of the authors’ employers, should not be considered the rendering of tax or legal advice, and is not intended to provide specific guidance or advice for any issue in any particular jurisdiction.*

Taxpayers and tax practitioners often argue over which state, Alabama, Colorado, or Louisiana, has the most complicated sales and use tax Compliance. We think we know the answer.

will adopt the state’s sourcing rules for sales tax. That hope rests on the fact there may be an economic incentive for the home-rule cities to adopt the new rules. Currently, for example, it is unlikely that a customer in Fort Collins, Colorado remits city use tax on an online purchase from a Denver seller. The transaction is not subject to tax in Denver because it is a sale shipped outside the city. And while the customer owes Fort Collins use tax on the sale, it is unlikely that Fort Collins will ever see that tax.

If Denver and Fort Collins both adopted the state’s destination sourcing rules, that uncollected use tax would be captured as a Fort Collins sales tax collected and remitted by the seller. Whether that is enough incentive for the home-rule cities to do so remains to be seen.

SUMMARY

Taxpayers and tax practitioners often argue over which state, Alabama, Colorado, or Louisiana, has the most complicated sales and use tax compliance. Given Colorado’s state-administered and home-rule jurisdictions, different tax bases, multiple licensing, registration, and filing requirements,

Mark Kozik is Of Counsel with Holland & Hart, LLP, Denver, Colorado. **Bruce M. Nelson, CPA**, is a frequent COCPA author/instructor with more than 35 years’ experience in state and local tax. He is the Editor-in-Chief of the *Journal of State Taxation*. An earlier version of this article appeared in the Spring 2020 edition of the *Journal of State Taxation*, Vol. 38, No. 2. For a copy of the entire article, as originally published, email Bruce Nelson at bruce.nelson@brucenelsoncpa.com.

²⁴ CRS §§39-26-104(3)(b)(III) and -104(d)(3)(III).

²⁵ CRS §39-26-104(3)(c).

²⁶ CRS §39-26-104(3)(c)(III)(A) and (B). Note that legislation introduced during the 2020 legislative session would, if passed, make the “small seller” rule permanent. See S.B. 20-099.

²⁷ CRS §39-26-104(3)(d)(III) and Regulation §39-26-102.9(3).