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**Tax Policy**

The economic advantages and efficiencies of cloud computing challenge the use of conventional sales and use tax rules, and in taxing access to remote software, many states continue to view cloud computing services as a license or delivery of prewritten software. In this article, Scott Smith reviews the state tax considerations related to these computing services and argues that the problem lies with how states define transactions that provide software as a service.

## **Peering Through the Clouds of State Taxation: Software as a Service (“SaaS”) Does Not Quite Fit Existing State Tax Regimes**

By SCOTT D. SMITH

**C**loud computing, which grants users the ability to access third-party software and services remotely, is becoming a leading means for enterprises and individuals to access information technology (IT). Enterprises, especially, see its economic advantages and efficiencies, and while growth forecasts for the cloud vary, the graph lines move consistently from the lower left corner to the upper right, with cloud computing projected to claim a greater and growing share of IT spending. Conversely, IT spending for “on-premises” infrastructure will likely fall. These trends, which should accelerate as the use of mobile applications and social platforms grow, present important ramifications for state taxation.

Recent state tax rulings demonstrate the challenge of applying conventional sales and use tax authorities to “cloud computing” transactions. States attempting to fit

cloud computing into existing tax regimes, designed for floppy disks, dial up, and downloads of another time, subject vendors and users to varied tax treatment and compliance obligations that will influence the cloud as much as any governance, security, and privacy concerns.

Cloud computing vendors and users should expect state sales and use tax treatment of cloud computing to continue to change and evolve, but clarity and uniformity may not be achievable in the near term. In addition, cloud vendors must also navigate developing state income tax and international income tax treatment of their infrastructure, transactions, and services.<sup>1</sup>

This article summarizes cloud computing and then focuses on the developing sales and use tax landscape for cloud vendors and users, including nexus and sourcing considerations.

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<sup>1</sup> For instance, as will be seen below, just as states are struggling to decide if cloud computing is a service or delivery of tangible computer software for sales tax purposes, their decisions should affect income tax determinations, such as the sourcing of licensing vs. service receipts for income apportionment, income tax nexus determinations, and other tax base issues. Likewise, federal U.S. source and foreign source income regulations applicable to “certain transactions involving computer programs,” under Treas. Reg. §1.861-18, date to 1998, and are unsatisfactory for cloud computing in the international environment. In addition, income sourcing, cloud server infrastructure, permanent establishment rules, transfer pricing, income characterization, and other issues will all have an impact on global cloud computing.

## I. What is “Cloud Computing”?

“Cloud computing” is the delivery of computing as a service, rather than as a product.<sup>2</sup> At its simplest, cloud computing involves the delivery of web-hosted services over the internet to multiple external users. Users access “cloud-based” applications through a web browser or a light-weight desktop or mobile app while the software and data are stored or “hosted” on servers at a remote location.

### A. Service Models

There are generally three service models for cloud computing—software as a service (“SaaS”), infrastructure as a service (“IaaS”), and platform as a service (“PaaS”). Each can be described generally, as follows:

SaaS - a vendor provides one or more applications and the computational resources to run them for use on demand as a complete, ready-to-use “turnkey” service. “Its main purpose is to reduce the total cost of hardware and software development, maintenance, and operations.”<sup>3</sup>

IaaS - a vendor provides the basic computing infrastructure of servers, software, and network equipment as an on-demand service upon which a platform can be established to develop and execute applications. “Its main purpose is to avoid purchasing, housing, and managing the basic hardware and software infrastructure components, and instead obtain those resources as virtualized objects controllable via a service interface.”<sup>4</sup>

PaaS - a vendor hosts a computing platform as an on-demand service upon which applications can be developed and deployed. “Its main purpose is to reduce the cost and complexity of buying, housing, and managing the underlying hardware and software components of the platform, including any needed program and database development tools.”<sup>5</sup>

SaaS has become a common service model for business applications, such as accounting and collaboration, software for customer relationship management (“CRM”), enterprise resource planning (“ERP”), human resource management, content management, and service desk management.

### B. Deployment Models

There are two primary deployment models for cloud computing - public clouds and private clouds.<sup>6</sup> A public

<sup>2</sup> The National Institute of Standards and Technology (NIST) has defined cloud computing as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or cloud provider interaction.” National Institute of Standards and Technology, U.S. Department of Commerce, Special Pub. 800-144, Guidelines on Security and Privacy in Public Cloud Computing, (December 2011), at 3 (hereinafter, “NIST Pub. 800-144”).

<sup>3</sup> NIST Pub. 800-144, at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> There are also “community” and “hybrid” clouds. Briefly, a “community” cloud is similar to a private cloud, but its infrastructure and computational resources are exclusive to two or more organizations, rather than a single organization. A “hybrid” cloud is comprised of two or more private, public, or

cloud comprises infrastructure and computational resources that are made available to the general public over the internet.<sup>7</sup> A single provider owns and operates the cloud infrastructure and resources to deliver cloud services to the users. “A private cloud is one in which the computing environment is operated exclusively for a single organization.”<sup>8</sup> The cloud may be managed by the organization or a third party, and the infrastructure and resources may be hosted by the organization or a third party, but it is exclusive to the organization.<sup>9</sup>

### C. Service Agreements and Fees

The user and cloud provider enter into service agreements (master services agreements, master subscription agreements, or service level agreements) or software licenses that define the terms and conditions for access and use of the services offered by the cloud provider. The user may be charged fees for services accessed, periodic subscription fees, and/or fees based on the number of users accessing the cloud. Service agreements may or may not include a license to use the service or software. In general, the type or classification of agreement (*i.e.*, services agreement v. license) is not relevant for state sales and use tax purposes, nor is the type of fee charged.<sup>10</sup>

## II. Conventional Sales and Use Tax Principles Applied to Software Transactions

Traditionally, states made a distinction for sales and use tax purposes between “canned” or “prewritten” software, and “custom” software. In the vernacular, canned or prewritten software is computer software that is not designed or developed to the specifications of a specific purchaser or customer. In contrast, custom software is designed or developed to the specifications of a specific purchaser or user. Generally, states treat prewritten software as tangible personal property, subject to sales and use taxes when sold or licensed.<sup>11</sup> Custom software, on the other hand, is treated as a nontaxable service or as intangible property, the sale or license of which generally is not subject to sales and use taxes.

A number of states did, and some still do, exempt from sales and use tax the sale or license of custom software or of prewritten software that is delivered electronically (*i.e.*, delivered to the purchaser by means

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community clouds. Each member of the cloud is bound to the others through standardized or proprietary technology that enables application and data portability among the members. See NIST Pub. 800-144, at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> For state sales and use taxes, there may not be any distinction between public clouds and private clouds. In general, these taxes also apply to transactions between related parties and affiliated corporations.

<sup>10</sup> This should not be taken to mean that the agreement and fee are never relevant for state sales and use tax purposes. For example, in a Massachusetts Letter Ruling 11-4, (April 12, 2011), there was no software license, and the per-user fee was not a charge for the use of software. Thus, although SaaS transactions are specifically taxable under the Massachusetts sales and use tax, the nature of the agreement and fee rendered this SaaS transaction a nontaxable database access service.

<sup>11</sup> Most states include a license in their definition of “sale” for sales tax purposes.

other than tangible storage media). This would include a “load and leave” transaction where software is delivered to the purchaser by use of tangible storage media, but the media is not physically transferred to the purchaser. These distinctions, however, are waning.

For example, the Streamlined Sales and Use Tax Agreement (“SSUTA”)<sup>12</sup> includes prewritten software in its definition of “tangible personal property,” but allows a signatory state to exempt sales or licenses of prewritten software delivered electronically or by a load and leave transaction.<sup>13</sup> As a general rule, SSUTA prohibits a member state from including “any product delivered electronically in its definition of ‘tangible personal property,’” but then excludes computer software from the scope of “products delivered electronically.”<sup>14</sup>

### III. Non-Uniform Approaches to the Taxation of SaaS Transactions

For the most part, states apply their conventional tax or exemption rules for computer software to SaaS transactions. While some states specifically target SaaS transactions and subject them to sales tax by statute, most states attempt to fit SaaS taxability or exemption into existing regimes. In addition, what may be factually relevant to satisfy one state’s sales tax exemption could render that same SaaS transaction taxable in another state. For example, while some states will exempt a SaaS transaction as the equivalent of electronically-delivered software, another state will impose sales tax on software that is electronically delivered and tax a SaaS transaction accordingly.

Further, all is not well even in those states that should exempt most SaaS transactions from sales and use taxes, as the reasoning applied by a state taxing agency to support an exemption in one case could be the same reasoning that triggers taxation under slightly modified facts and circumstances.

#### A. Definitional Problems

The crux of the state sales and use tax problem for cloud vendors and users is the definition tied to the SaaS transaction by a state tax agency. Unless the vendor or user is dealing with a state that rightly characterizes SaaS as a service transaction, each will need to contend with state tax definitions of “tangible personal property,” “prewritten software,” and “electronically-delivered,” among other conventional paradigms. And regardless of whether a particular state taxes or exempts a given SaaS transaction, a number of states still treat the SaaS transaction as a license or delivery of prewritten software to the user.

As seen below, the definitional problems, as well as conventional treatment of sales or licenses of software for state tax purposes, influence how state departments

<sup>12</sup> As of Oct. 1, 2012, 22 states are full members of the SSUTA, while Ohio and Tennessee are “Associate Members.” Among the nonconforming states are California, Florida, Illinois, New York, Texas, and Virginia.

<sup>13</sup> See SSUTA, Part I Administrative Definitions, p. 139 (May 24, 2012 amend.) (definition of “tangible personal property”), and Part II, Product Definitions, p. 144 (May 24, 2012 amend.) (definition of “prewritten software”).

<sup>14</sup> SSUTA §333, Use of Specified Digital Products, p. 74 (Eff. Jan. 1, 2010).

of revenue approach cloud computing, and specifically SaaS transactions, for sales and use tax purposes.

### B. SaaS Transactions as Nontaxable Transactions

To date, those states that have addressed SaaS transactions and found them to qualify for exemptions from sales and use taxes, base the exemption on one of three characterizations of the transaction: (1) SaaS was exempt as electronically-delivered software; similarly, (2) the SaaS transaction was not taxable because no other tangible personal property was delivered to the user, or alternatively, any software deemed to have been delivered occurred out-of-state at the server location; or (3) the SaaS transaction is (properly) a nontaxable service transaction.

**1. Exempt Electronically-Delivered Software.** Florida imposes sales and use tax on sales or licenses of software delivered or supplied on a tangible medium, except for custom software. Notwithstanding the delivery method, the sale or license of custom software is treated as an exempt service transaction.<sup>15</sup> However, it has been the position of the Florida Department of Revenue that a sale or license of prewritten software that is delivered electronically is also exempt from Florida sales and use taxes.<sup>16</sup> In a Technical Assistance Advisement, the department applied the electronic delivery exception to a SaaS transaction.<sup>17</sup> The taxpayer provided a business and financial information database, including applications that were accessed through the internet. No software (or any tangible information, such as reports) were licensed, delivered or downloaded. Customers paid the taxpayer a subscription fee to access the database and applications. Because no tangible personal property was provided by the taxpayer and the customers accessed the database and software applications only through the internet in electronic format, the department ruled that the subscription fees were not subject to Florida sales and use taxes.<sup>18</sup>

Although the result was favorable for the taxpayer, applying a state’s electronically-delivered software exemption furthers the canard that a SaaS transaction involves the delivery of software. In substance, the transaction should be viewed as a service transaction and determined to be taxable or exempt based on that characterization. While applying an electronically-delivered software exemption appears to be a good result for SaaS providers and customers, if the state can attach to the SaaS transaction a sale of tangible personal property in addition to electronic software deliv-

<sup>15</sup> Fla. Admin. Code Ann. r. 12A-1.032(4). A “sale” includes a license. Fla. Stat. §212.02(15)(a).

<sup>16</sup> Fla. Dept. Rev., Technical Assistance Advisement (TAA) 05A-026 (June 2, 2005). See also *Florida Dept. of Revenue v. Quotron Systems Inc.*, 615 So. 2d 774 (Fla. Dist. Ct. App. 1993) (electronically transmitted information is not subject to sales or use tax).

<sup>17</sup> Fla. Dept. Rev., TAA 10A-052 (Dec. 3, 2010).

<sup>18</sup> California is another state that exempts electronically-delivered canned software from sales and use taxes. Cal. Code Regs. tit. 18 §1502(f)(1)(D). Moreover, in a recent Policy Letter, the Iowa Department of Revenue arrived at a similar conclusion as did Florida regarding a SaaS transaction. See Iowa Revenue Policy Letter No. 12300002 (Jan. 11, 2012).

ery, then the SaaS transaction could be deemed taxable in these states.<sup>19</sup> Further, a state that taxes electronically delivered software can point to these rulings as reasoning in support of its characterization and taxation of the SaaS transaction (see below).

**2. No Delivery of Tangible Personal Property.** Similarly, in Letter Ruling No. 11-58 (Dec. 10, 2011), the Tennessee Department of Revenue considered whether on-line access to software providing customer relationship management (“CRM”) was a taxable transaction. Access to the CRM software was provided by a vendor, and the software resided at all times on the vendor’s servers outside Tennessee. Users accessed the software via web browser and passwords, and they were not permitted to install or download the CRM application onto their computers. The department ruled that the monthly subscription fee paid by the taxpayer to the vendor was not subject to Tennessee sales and use taxes.

Tennessee imposes sales and use tax on the sale, lease, licensing, or use of “prewritten software,” even if the software is electronically delivered.<sup>20</sup> Nonetheless, the department ruled that this SaaS transaction was nontaxable because no tangible personal property was delivered in Tennessee when the vendor provided on-line access to the CRM software via the internet. If there was any delivery of prewritten software, that delivery occurred at the location of the vendor’s servers that were all located outside Tennessee. Most importantly, the ruling indicates that since the taxpayer was prohibited from downloading the CRM software, the software was never delivered to, transferred to, or installed on the taxpayer’s computers in Tennessee.<sup>21</sup> The letter ruling also concluded that the SaaS transaction was not a taxable sale of telecommunications services. The CRM software application fell under the category of data processing and information services, which are specifically excluded from Tennessee’s definition of taxable “telecommunications service.”

Letter Ruling No. 11-58 is a better reasoned approach to defining an exempt SaaS transaction than treating the transaction as electronically-delivered software, although the ruling concludes that, if there is any delivery of software, that delivery occurs not at the user location, but at the vendor’s server location. In this respect, the ruling shows that Tennessee still can’t seem to shake the notion that software is delivered in a SaaS transaction. Thus, the reasoning in the ruling is still troubling, as a SaaS transaction is in substance a service transaction and no software or product is actually or even virtually delivered to the user. If the same reasoning in the ruling is applied by the state where the vendor’s servers are located, then the SaaS transaction

<sup>19</sup> For example, the Florida TAA 10A-052 cautions to “[k]eep in mind that electronically accessed software is subject to Florida sales tax when sold as part of the sale of tangible personal property.” Thus, if a SaaS transaction is coupled with hosting as a service, a HaaS transaction, could it be considered taxable in a state like Florida or California? Further, if the customer receives a report or downloads some other “tangible” information, could the SaaS transaction be taxable?

<sup>20</sup> Tenn. Code Ann. §67-6-231(a).

<sup>21</sup> In addition, while modifications to prewritten software are subject to Tennessee sales and use taxes, *Creasy Systems Consultants Inc. v. Olsen*, 716 S.W. 2d 35 (Tenn. 1986), any modification of the CRM software would occur at the vendor’s servers outside Tennessee.

may be taxable as a delivery of prewritten software in that state (subject to the “nexus” and sourcing rules, discussed below). As a result, if the vendor’s servers and users are located in Tennessee, then the SaaS transaction may be subject to Tennessee sales and use taxes.<sup>22</sup>

**3. SaaS Classified as a Nontaxable Service Transaction.** The most appropriate treatment of SaaS transactions appears to be what is developing in Virginia where the Department of Taxation is treating SaaS as a nontaxable service transaction. In a number of rulings, the department has ruled that subscription fees and other charges for on-line access to view data, obtain delivery of digital products, or use web-based applications were not subject to Virginia sales and use taxes.<sup>23</sup> Since the department correctly viewed these SaaS transactions as not involving any exchange of tangible personal property, they qualified as nontaxable service transactions.<sup>24</sup> Indiana and South Carolina also appear to follow a characterization and treatment similar to Virginia’s.<sup>25</sup>

## C. SaaS Transactions as Taxable Transactions

Other states are either specifically subjecting SaaS transactions to sales or use tax by statute or regulation, taxing the transaction as a taxable electronic delivery of prewritten software, classifying the transaction as a taxable service transaction, treating the SaaS transaction as a deemed transfer or license of tangible personal property (prewritten software), or sourcing the SaaS transaction as an in-state delivery to the user.

**1. SaaS Transaction Is Specifically Taxable.** Charges for the sale, use, or licensing of prewritten software, including SaaS, whether electronically downloaded or accessed by the customer on the provider’s server or hosted by a third party, are subject to Massachusetts sales and use taxes.<sup>26</sup> However, if there is no charge for the use of the software and the object of the transaction

<sup>22</sup> For example, prior to an amendment to Utah’s sales and use tax statute, the Utah Tax Commission took a position similar to Tennessee’s. See Utah Private Letter Ruling No. 08-012 (Jan. 21, 2009) (Services that involve granting access to software located on an Application Service Provider (an ASP’s) server located outside of Utah are not subject to Utah sales tax, because customers’ remote access of the software without downloading it onto a computer located in state does not create possession of the software in Utah.). As a result of the law change under Utah Code Ann. §59-12-102(113), Utah’s ruling position has changed. See Utah Priv. Ltr. Ruling No. 10-011 (Feb. 24, 2012), below.

<sup>23</sup> Virginia Ruling of Commissioner (Ruling of Comm’r), P.D. 12-2 (Jan. 19, 2012) (access to authentication solutions and digital certificates); Ruling of Comm’r, P.D. 10-264 (Dec. 15, 2010) (access to financial and credit information); Ruling of Comm’r, P.D. 02-111 (July 25, 2002) (access to on-line database).

<sup>24</sup> Va. Code Ann. §58.1-609.5(1); Va. Regs. §10-210-4040. The Virginia rulings, however, may not be entirely clear on this point. While they exempt SaaS transactions as nontaxable service transactions, some of the rulings seem to arrive at this conclusion on the basis that the SaaS transaction at issue was an electronic software transaction.

<sup>25</sup> Indiana Letter of Finding, 04-20110291LOF (March 28, 2012); South Carolina Private Letter Ruling No. PLR12-2 (June 11, 2012).

<sup>26</sup> Mass. Regs. Code tit. 830, §64H.1.3(3)(a).

is to acquire a good or service other than the use of software, then the transaction is not taxable.<sup>27</sup> Thus, in Massachusetts Letter Ruling (LR) 11-4 (April 12, 2011), the taxpayer's customers accessed its cloud to get data regarding prospective employee applications that taxpayer had gathered and screened, and to receive reports prepared by the taxpayer. Since the object of the SaaS transaction was an information service and not for the use of software, the transaction was not taxable.

The Massachusetts Department of Revenue further elaborated in LR 12-8 (July 16, 2012):

(1) A SaaS transaction is not subject to sales tax when SaaS is provided to Massachusetts customers if the customers access the cloud using their own software or software available for free on the internet.

(2) Conversely, a SaaS transaction that uses the vendor's software to access the cloud is subject to Massachusetts sales tax when SaaS is provided to Massachusetts customers.

(3) Separately stated data transfer fees are taxable as telecommunications services.

(4) Remote storage services fees are not subject to Massachusetts sales tax.

The Massachusetts rulings also illustrate how confusion is the order of the day for SaaS transactions in the multistate environment. In Massachusetts, SaaS transactions are generally taxable. To the contrary, in Virginia, SaaS transactions are generally nontaxable service transactions. However, delivery of a nontaxable tangible good could render the SaaS transaction non taxable in Massachusetts, while such delivery could render the SaaS transaction taxable in Virginia.

Likewise, Washington State imposes its business and occupation tax, which is a gross receipts tax, on charges made to consumers for the right to access and use prewritten software on the seller's or a third party host's servers.<sup>28</sup> Washington regulations explicitly apply the taxing statute to application service providers (ASPs) and SaaS transactions. However, the B&O Tax is imposed only when the service (the hosting) is performed in Washington, and if the hosting service or other activities of the ASP are performed in multiple states, then the provider or hosting service may apportion its gross receipts.<sup>29</sup>

## 2. Taxable as Electronic Delivery of Prewritten Software.

While some states, like Florida, California, and Iowa above, may exempt SaaS as a nontaxable electronic delivery of prewritten software, other states tax such electronic delivery. Although both treatments are flawed and based on the canard that SaaS results in the delivery of software to a customer, Pennsylvania has recently joined the mire by indicating that it will treat SaaS as the electronic delivery of prewritten software, which is taxable if "delivered" to a Pennsylvania customer.<sup>30</sup>

**3. Taxable Service Transaction.** Even if properly classified as a service transaction, an SaaS transaction may still be subject to sales and use taxes if the transaction is classified as a service that the state taxes. For ex-

ample, Texas imposes its sales and use taxes on data processing services.<sup>31</sup> In at least two rulings, the Texas Comptroller of Public Accounts has ruled that SaaS transactions were taxable data processing.<sup>32</sup>

## 4. Transfer of "Constructive Possession" of Prewritten Software.

The state that is among the most controversial in taxing SaaS transactions is New York. While Massachusetts and Washington have explicitly chosen by statute to tax SaaS transactions, and even Texas finds that SaaS transactions are service transactions, albeit taxable, New York's Department of Taxation and Finance claims that a SaaS transaction is the transfer of "constructive possession" of prewritten software. By statute, New York imposes sales and use taxes on prewritten software "regardless of the means by which it is conveyed to a purchaser."<sup>33</sup> From this, the department has reasoned in a series of advisory opinions that access to hosted software applications for use by New York customers or users is a taxable sale or license of the hosted prewritten software.<sup>34</sup> The department further claims that granting the customer or user the right to use and control the software on the server is a transfer of constructive possession of the software and, thus, a taxable sale.

**5. SaaS Sourced to User Address in Taxing State.** In this instance, a vendor provided a web-based service that enabled users to remotely access, attend, and participate in meetings online, attend webinars, and provide attended or unattended technical support to internal and external customers. Prior to a law change that was effective July 1, 2011, the Utah Tax Commission had ruled favorably for another SaaS vendor, because the vendor's server was not located in Utah and the users could not possess the hosted software in Utah.<sup>35</sup> However, because of the change to Utah's sales and use tax sourcing statute, "if a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser,"<sup>36</sup> then the sale (of prewritten software) is sourced to the user's address. Utah im-

<sup>31</sup> Tex. Tax. Code Ann. §151.0035. "Data processing" is generally defined as "the processing of information for the purpose of compiling and producing records of transactions, maintaining information, and entering and retrieving data." Tex. Admin. Code §3.330(a).

<sup>32</sup> Texas Comptroller's Letter No. 200805095L (May 28, 2008) (sales tax imposed on charges for on-line access to hosted customer relationship management (CRM) and enterprise resource planning (ERP) software); *Id.*, Letter No. 201004665L (April 29, 2010) (sales tax imposed on charges for on-line access to hosted medical transcription voice recognition software).

<sup>33</sup> N.Y. Tax Law §1101(b)(6). Like most states, New York defines "sale" for purposes of sales and use taxes as "any transfer of title or possession" and it includes a "license to use." N.Y. Tax Law §1105(b)(5).

<sup>34</sup> N.Y. Dept. of Taxn. and Fin., TSB-A-08(62)S (Nov. 24, 2008) (Adobe Systems "On Demand ASP Software"); TSB-A-09(15)S (April 15, 2009) (loan origination and processing product); TSB-A-09(19)S (May 21, 2009) (weekly merchandise markdown recommendations); TSB-A-09(25)S (June 18, 2009) (homecare process management solution); TSB-A-11(17)S (June 1, 2011) (hosted marketing service); TSB-A-12(3)S (Feb. 27, 2012) (certified data pool and Global Data Synchronization Network access product).

<sup>35</sup> Utah Priv. Ltr. Ruling No. 08-012 (Jan. 21, 2009).

<sup>36</sup> Utah Code Ann. §59-12-211(12).

<sup>27</sup> Mass. Regs. Code tit. 830, §64H.1.3(14)(a).

<sup>28</sup> Wash. Rev. Code §82.04.050(60)(b)(i).

<sup>29</sup> Wash. Admin. Code §458-20-15501(401)(g).

<sup>30</sup> Pa. Dept. of Revenue, Letter Ruling No. SUT-12-001 (May 31, 2012).

poses sales or use tax on prewritten software “regardless of the manner in which the prewritten software is transferred.”<sup>37</sup> Thus, Utah will treat a SaaS transaction as a delivery or transfer of prewritten software (or tangible personal property) that is sourced to the user’s address (and taxable by Utah if that address is in Utah).

## D. Bundled Transactions

If the user must contract with the cloud vendor for hosting services to access or license SaaS software, charges for the hosting service may also be subject to sales and use tax in a state that treats SaaS as a taxable software transaction.<sup>38</sup> Likewise, if the SaaS software transaction is not taxable by the state, but hosting or other services provided in conjunction with the SaaS transaction are, then charges for the SaaS may be included as part of the taxable consideration. Thus, SaaS vendors and users need to ascertain the taxability of other service charges that may be provided in conjunction with the software, and whether this renders the SaaS transaction taxable (or the bundled services taxable, as the case may be). In these instances, it is important to determine whether separately stating nontaxable from taxable charges preserves an available exemption.

The bundle could render a SaaS transaction nontaxable in some states that would normally impose sale or use tax on the SaaS. For example, the nature of the SaaS transaction in the Massachusetts LR 11-4 could be viewed as a bundled transaction whose real object was nontaxable data access and information reporting.

## IV. Nexus and Sourcing

### A. Hosted or Vendor-Provided Cloud?

A vendor will have “substantial nexus” (and be required to collect sales and use taxes from end-users if the state taxes SaaS transactions) with those states in which the vendor has a physical presence—meaning real, and tangible personal property, employees, and representatives located in state.<sup>39</sup> As a result, a vendor-provided cloud will result in that vendor having nexus where the server farm, data center, or other physical infrastructure is located.<sup>40</sup>

The rules of the taxing jurisdiction should be no different for the vendor using a hosted-cloud (i.e., using a third party’s infrastructure). However, the question for the vendor in these circumstances is whether the host’s physical presence in a given state can be attributed to the vendor. That is, are the activities of the host where its infrastructure is located significantly associated with the vendor’s ability to establish and maintain a market

in that or other states such that the vendor would be subject to the state’s imposition of tax?<sup>41</sup>

Moreover, what about a state, like New York, that treats the SaaS transaction as the constructive delivery or license of tangible personal property to end-users in the state? Could the state use this characterization of the SaaS transaction as the means to assert taxing jurisdiction over the vendor by claiming that the vendor’s licensing of tangible personal property (prewritten software hosted outside New York) constitutes a physical presence of the vendor in New York? After all, although the U.S. Supreme Court in *Quill* stated that *Quill*’s licensing “of a few floppy diskettes to which *Quill* holds title,” did not rise above a “slightest presence,” the Court stopped short of stating when such licensing could be more than a slight presence and rise to the level of a “substantial nexus” permitting a state to impose tax under the Commerce Clause to the U.S. Constitution.<sup>42</sup>

In addition, the creative “genius” of states to develop new theories of tax jurisdiction to push the physical presence envelope should never be underestimated. Only a few years ago, few would have thought that bloggers in New York who linked their readers to Amazon.com and other websites created substantial nexus for Amazon in New York.<sup>43</sup> Even fewer would have predicted prior to New York’s “click-through nexus” statute, that the adoption of similar statutes by other states would become widespread.

### B. Sourcing - Substantial Risks of Multiple Taxation?

A vendor may have nexus with a state and that state may impose its sales and use tax on cloud computing, but the transaction is not a taxable retail sale unless the state “sources” the retail SaaS transaction to that state. As discussed above, Utah’s approach to imposing sales tax on SaaS transactions is really a sourcing rule.

The Streamlined Sales and Use Tax Agreement (SSUTA) provides a general illustration of state sales and use tax sourcing rules. Generally, a sale is sourced to the location where “the product is received by the purchaser.” If that sourcing rule does not apply, then the sale is sourced (in order of priority) to: the purchaser’s address in the seller’s records, the address of the purchaser obtained when the sale was consummated, or the “address . . . from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold).”<sup>44</sup> The only clear answer provided by this sourcing rule is the difficulty it poses for SaaS vendors and users in determining where a particular SaaS transaction should be sourced. Further, sourcing will be dependent on the underlying characterization of the SaaS transaction. Does the state treat

<sup>37</sup> Utah Code Ann. §59-12-102(113)(b)(v).

<sup>38</sup> For example, in New York, charges for mandatory hosting services contracted in conjunction with SaaS software are included in the tax measure of the taxable SaaS software. N.Y. Dept. of Taxn. and Fin., TSB-A-09(19)S (May 21, 2009).

<sup>39</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

<sup>40</sup> See Virginia Ruling of Commissioner PD 12-36 (March 28, 2012) (ownership of servers in Virginia (maintained by a third party) to provide on-line services to users created nexus with Virginia).

<sup>41</sup> *Tyler Pipe Industries Inc. v. Washington Dept. of Rev.*, 483 U.S. 232 (1987). See also Texas Comptroller’s Letter No. 20110722L (July 1, 2011) (access to internet host’s Texas servers did not create nexus with Texas).

<sup>42</sup> See *Quill*, 504 U.S. at 315 n. 8.

<sup>43</sup> *Amazon.com LLC v. New York Dept. of Taxation and Finance*, 913 N.Y.S. 2d 129 (App. Div., 1st Dept. 2010).

<sup>44</sup> SSUTA §309.B.

it as a taxable electronic delivery of software, a taxable service transaction, or something else? Most disturbing, given the myriad ways that states characterize SaaS transactions, is the risk of multiple taxation of any given SaaS transaction, and that risk is not theoretical.

While most state sales and use tax sourcing rules may be similar to SSUTA, other state rules bear no similarity. For example, New York will source the SaaS transaction to the location where the user or its employees are deemed by New York to use the software. What if the vendor's or host's server is in Tennessee. If Tennessee deems the SaaS software was delivered or provided to the user in Tennessee where the server is located, then Tennessee may attempt to impose sales tax on the transaction. If the user also has employees in New York who access the Tennessee cloud server, then New York would also deem those users to have received "constructive possession" of the SaaS software

in New York. Thus, it is conceivable that the SaaS transaction is sourced to and taxed by Tennessee and New York. The interaction of other various state substantive sales tax treatments of SaaS transactions and their different sourcing rules could also create similar risks of multiple taxation.

## **V. Conclusion**

Cloud computing will present significant challenges for vendors, hosts, users, and states. SaaS vendors and hosts will need to take into account the varied and unpredictable state sales and use tax treatment and sourcing rules in making their infrastructure investments. In the meantime, vendors, hosts, and users should continue monitoring state sales and use tax developments, as well as multistate income tax and international tax developments, as they relate to cloud computing and plan accordingly.