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A Look Ahead – Forecasting Trends in State Tax Litigation for Communications Companies

TeleStrategies' Communications Taxation 2016
Phoenix, Arizona

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Agenda

- False Claims Act / Quit Tam Litigation
- Income Tax Litigation
- The Expanding Definition of "Telecommunications"
- Transaction Tax Litigation
- Sales & Use Tax Litigation
- State Taxation of Internet Access
- Inclusive Billing
- Property Tax Litigation

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FALSE CLAIMS ACT / QUIT TAM LITIGATION

False Claims Act / Quit Tam Litigation

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People ex rel. Schneiderman v. Sprint Nextel Corp., 26 N.Y.3d 98, 42 N.E.3d 655 (2015)

- Alleged $130M in **tax** underpayment based on taxability of bundled wireless interstate communication charges.
- New York Court of Appeals held NY AG's complaint sufficiently pleaded a cause of action under New York's False Claims Act that Sprint knowingly filed false tax records with the state.
- Some states have expanded False Claims Act "Whistleblower" actions to include tax matters.

Taxpayer Concerns

- NY AG: Sprint did not seek "the advice of outside counsel concerning its sales tax obligations."
- Extremely high stakes:
  - Generally treble damages plus substantial penalties for each return filed
  - Extended Statute of Limitations period
  - Tried in the public domain, often labeled as tax fraud

False Claims Act / Quit Tam Litigation

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State of Illinois, ex rel. Stephen B. Diamond P.C. v. Lush Internet, Inc., No. 13-L-009147 (Ill. Cir. Ct. May 10, 2016)

- Plaintiff alleged underpayment of IL sales/use tax on Lush's online sales arguing Lush had sufficient nexus with IL.
- Circuit Court of Cook County held Plaintiff failed to prove by preponderance of the evidence that: 1) Lush had nexus with IL, *and* 2) Lush *knowingly* failed to collect IL sales/use taxes.

State of New York, ex rel. David Danon v. Vanguard Group, Inc., Index No. 100711/13 (N.Y. Sup. Ct., Nov. 13, 2015)

- Plaintiff alleged taxpayer avoided payroll withholding obligations and charged artificially low prices to its related funds for investment management and administrative services.
- Qui tam action dismissed due to violations of attorney ethics rules.

False Claims Act / Quit Tam Litigation

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False Claims Acts for 9-1-1 Charges

- Most state FCA statutes contain explicit "tax bars" prohibiting qui tam actions for allegedly false tax claims (*e.g.,* CA, DC, MA, NM, NYC, NC, TN, VA).
- Some states impose a tax bar only with respect to income tax matters (e.g., IL, IN, RI).
- Uncertainty on whether 9-1-1 Charges subject to FCA or precluded by "tax bar."
  - *See Phone Recovery Servs., LLC v. Verizon of New England, Inc.*, No. CV1500783BLS1, 2015 WL 8331983 (Mass. Super. Oct. 27, 2015) ("The 911 surcharge at issue here has the attributes of a tax, not a fee" and as a result the claim is "precluded by the MFCA's tax bar").

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INCOME TAX LITIGATION

Costs of Performance

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***Comcast of Mass. I, Inc. v. Comm'r of Revenue*, pending before MA ATB (argued 2015)**

- Issue: Whether the preponderance of Comcast's costs of performance are incurred in Massachusetts.

***AT&T Corp. v. Comm'r of Revenue*, Mass. ATB 2011-524 (June 8, 2011), *aff'd,* 82 Mass. App. Ct. 1106 (2012)**

- Court adopted operational approach for sourcing costs of performance – income producing activity includes entire business of providing national telecom network.
- Held AT&T incurred greater costs of performance outside of Massachusetts.

Costs of Performance

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***AT&T Corp. v. Dep't of Revenue*, TC 4814 (OR. Tax Ct. June 28, 2011)**

- Court adopted transactional approach – income producing activity consists of each individual telephone call transaction, and evidence of costs for each call must be demonstrated.

***Dish DBS Corp. v. S.C. Dep't. of Revenue,* No. 14-ALJ-17-0285-CC (S.C. Admin. Law Ct. Feb. 10, 2015)**

- Court held SC is not a "strict" COP state, and costs are sourced according to Taxpayer's "place of activity."
- Court found insufficient facts to determine what Taxpayer's "income-producing activities" are and to what extent they occur in SC.

***DIRECTV, Inc. v. S.C. Dep't of Revenue*, No. 14-ALJ-17-0158-CC (S.C. Admin. Law Ct. May 12, 2015)**

- Court held the primary income-producing activity of a satellite video provider includes customer subscriptions and delivery of signal into customers' homes.

Tex. Private Letter Ruling No. 143010942 (Apr. 21, 2016)

- Comptroller determined national radio network must apportion advertising receipts based on ratio of radio stations that license and broadcast its programming from Texas compared to the total number of radio stations that broadcast such programming.
  - Ruling states the "end-product act" for which the customers contract is the radio stations' broadcasts of the customers' advertisements.

Alternative Apportionment

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Vodafone Americas Holdings, Inc. v. Roberts, No. M2013-00947-SC-R11-CV (Tenn. Mar. 23, 2016)

- TN Supreme Court upheld Department's application of an alternative apportionment method for a wireless communications provider.

- Department required Vodafone to apportion sales using market-based sourcing instead of the statutory cost of performance method.
  - Sourcing was based on pay-per-use or primary-place of use methodology, determined by customer's billing address.

- Vodafone originally calculated its apportionment formula by using a pay-per-use or primary-place of use methodology.
  - Later filed a refund claim and argued that it was not subject to Tennessee franchise tax.
  - Amended complaint argued that a COP analysis should be used instead – resulted in 89% reduction in tax liability.

Debt v. Equity

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***Comcast of Mass. I, Inc. v. Comm'r of Revenue*, pending before MA ATB (argued 2015).**

- Whether Comcast's intercompany loans are debt or equity.

***Mass. Mutual Life Ins. Co. v. Comm'r of Revenue*, Docket Nos. C305276, C305277 (Mass. App. Tax Bd. June 12, 2015)**

- ATB held intercompany loans made between parent and subsidiaries constituted bona fide debt.
- Applying a 16-factor test, the ATB concluded that interest paid on the debt was not required to be added back.

Proposed Treasury Regulations Under I.R.C. § 385

- Proposed federal regulations could reclassify certain intercompany debt as equity
- States may chose to adopt these federal regulations to disallow intercompany debt interest.

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THE EXPANDING DEFINITION OF "TELECOMMUNICATIONS"

The Expanding Definition of "Telecommunications"

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Matter of N.Y. Commc'ns Co., DTA No. 825586 (NYS Div. Tax App. Aug. 13, 2015)

- New York State Division of Tax Appeals Administrative Law Judge (ALJ) determined that two-way radio communications, or walkie-talkie services, are not telephone services subject to New York State's telecommunications excise tax because the service did not establish a connection with the Public Switch Telephone Network (PSTN) (i.e., no dial tone and no ability to call a telephone number).

- The Department sought to impose the tax by arguing a "telecommunications service" includes any transmission of voice signals by radio waves, including walkie-talkie services that use repeaters to strengthen the transmission of the voice signal.

- ALJ determinations are non-precedential.

The Expanding Definition of "Telecommunications"

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State ex rel. Collector of Winchester, MO v. Jamison, 357 S.W.3d 589 (Mo. 2012)

- City of Winchester and other MO municipalities, filed suit against Charter Communications to recover unpaid license taxes – on sales from interstate telephone service even though:
  - The tax is imposed on gross receipts derived from "exchange access, interexchange access, interconnection facilities…intrastate telephone service and other sources."
- Circuit court struck and dismissed class action claims.
- Supreme Court of MO issued a permanent writ of mandamus directing the trial court to vacate order.
  - MO statute disallowing cities to bring class actions is unconstitutional because it purported to amend procedural rule of the court without expressly stating intent to do so.

The Expanding Definition of "Telecommunications"

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Colo. Gen. Inf. Letter No. GIL-15-003 (Jan. 27, 2015)

- Taxpayer is Application Service Provider that uses either: 1) Customer's Wi-Fi Network, or 2) a cellphone data plan to enable customers to transmit pictures from a camera to the taxpayer's servers (the cloud).
- The Department "would likely view charges for data plans by mobile telecommunications providers as a telephone service."
  - Whether Taxpayer is subject to sales tax on purchase or must collect/remit on resale undetermined.
- Wi-Fi plan is not telephone service because customer's own Wi-Fi network is providing data transmission.

Colo. Dept. of Rev. PLR-15-001, PLR-15-003 (released April 5, 2015)

- Integrated Desktop Messaging (electronic fax)
  - Not telephone service: one-way closed communication and that does not allow for instant response
- Electronic Data Interchange VAN service
  - Not taxable – true object of transaction is data conversion
- Broadcast Fax
  - Not telephone service: does not allow receiving part to respond instantly
- Notifications Email – Taxation preempted by ITFA
- Production Email – Taxation preempted by ITFA

The Expanding Definition of "Telecommunications"

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Conference Bridging Services

- **Ill. Dept. of Rev., General Info. Letter ST-15-0028-GIL (May 14, 2015)**
  - Department notes that "telecommunications" subject to IL's Telecommunication Excise Tax (TET) do not include *value-added services* in which computer processing applications are used to act on information for purposes other than transmission.
  - Department also added that a customer's rental of an affiliate's videoconferencing facility is not subject to IL sales tax as long as no tangible personal property is transferred to the customer.

- **Vermont Formal Ruling No. 2015-01, Vermont Dep't of Taxes, May 1, 2015**
  - Conference bridging services are exempt from Vermont sales and use tax as ancillary "vertical service."
  - Meeting collaboration software service not a taxable "telecommunications service" because customers only purchase the ability to share and access information from the service provider, and they paid .
    - Other third parties provided Internet access and voice transmission services.

The Expanding Definition of "Telecommunications"

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Tenn. Dept. of Revenue, Letter Ruling # 14-05 (Aug. 25, 2014)

- Taxpayer's cloud collaboration service is a taxable telecommunications service because taxpayer "routes" voice, data, and video.
  - Messaging and conferencing = taxable ancillary service

- The service eliminates need for customer to maintain software and hardware necessary to monitor and manage internal network – voice, video, messaging, and conferencing managed by cloud-based applications.

States are not uniform in their treatment of cloud-based communications management software.

- Taxable = VA, KS, MO
- Not Taxable = FL, UT, OH, NM, GA, IL

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TRANSACTION TAX LITIGATION

Transaction Taxes – 9-1-1 Charges

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Localities are increasingly bringing suits alleging undercollection of 9-1-1 Charges

- Compl., *Cobb Cnty. v. Bellsouth Telecomm. LLC,* No. 15A-12873-4 (Gwinnett Cty. Super. Ct. Dec. 16, 2015).
- Compl., *Cobb Cnty. v. Comcast Commc'ns,* No. 16-1-334-53 (Cobb Cty. Super. Ct. Jan. 13, 2016).
- *Hamilton Cty. Emergency Commc'ns Dist. v. CenturyLink Commc'n,* No. 1:14-CV-311, 2015 WL 7903938 (E.D.Tenn. Jan. 22, 2015).

Courts have generally held 9-1-1 Surcharges constitute a "tax."

- *Bay Area Cellular Tel. Co. v. City of Union City*, 162 Cal. App. 4th 686, 75 Cal. Rptr. 3d 839 (2008) (holding fee imposed on telephone lines within city to fund 911 service was a "special tax," rather than a "user fee").

- *Phone Recovery Servs., LLC v. Verizon of New England, Inc.*, No. CV1500783BLS1, 2015 WL 8331983 (Mass. Super. Oct. 27, 2015) ("The 911 surcharge at issue here has the attributes of a tax, not a fee").

- *Fulton Cty. v. T-Mobile, S., LLC*, 305 Ga. App. 466, 699 S.E.2d 802 (2010) (holding 9-1-1 charge imposed by counties was a tax).

- *But see T-Mobile S., LLC v. Bonet*, 85 So. 3d 963 (Ala. 2011) (holding 911 charge was a "service fee" rather than a tax).

Transaction Taxes – NYC Utility Tax

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Sprint Commc'ns Co. v. N.Y.C. Dep't of Fin., No. 154499/2014 (Sup. Ct. N.Y. Cty. Apr. 25, 2016)

- New York trial court held Sprint subject to both NYC Unincorporated Business Tax (UBT) and NYC Utility Tax.
- A "utility" paying the Utility Tax is exempt from the NYC UBT, while a "vendor of utility services" is liable for both UBT and the Utility Tax.
- Trial court found Sprint was not a "utility" because the NYS Public Service Commission's (PSC's) supervision amounted to "mere light regulation."

Transaction Taxes – Kentucky's Telecommunications Tax

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City of Florence v. Flanery, No. 2013-CA-001112-MR (Ky. Ct. App. 2014) (unpublished)

- Kentucky's taxes on Multichannel video programming and communications services (Telecom Tax) was challenged by Kentucky Cities.
- The Kentucky Finance and Administration Cabinet collects the Telecom Tax and distributes the revenue to Kentucky cities.
- Because the Cities receive these distributions, the Telecom Tax prohibits them from levying local franchise fees or taxes on cable and communication services.

- **Court of Appeals held that the KY Telecom Tax is "unconstitutionally void."**
  - The KY Constitution "delegated to local government the right to grant utility franchises and necessarily the concomitant right to collect franchise fees."
- The case is currently pending before the KY Supreme Court.

Transaction Taxes – Kentucky's Telecommunications Tax

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Netflix, Inc. v. Kentucky Finance & Admin. Cabinet, Order No. K-24900 (Ky. Bd. Tax App. Sept. 23, 2015)

- KY Board of Tax Appeals held Netflix's digital streaming service is not subject to the state's telecommunications tax.
- Netflix is the first of several Over-the-Top (OTT) providers assessed
  - KY argued streaming video over the internet constitutes a taxable "multichannel video programming service."
    - Definition includes programming that is "generally considered comparable" broadcast television programming.
- The case has been appealed to the Kentucky Court of Appeals.
- Other cases are held in abeyance pending Netflix disposition.

Transaction Taxes – Florida's Communication Services Tax

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- **Fla. TAA No. 14A19-005 (Dec. 18, 2014)**
  - Taxpayer provides digital content that may be streamed or downloaded. A customer may either rent or purchase the movie/TV show.
  - Rental of digital video is a "video service" and subject to CST; Purchase of digital video is sale of an "information service" not subject to CST.

- **Fla. Letter of Tech. Assistance No. 15A19-004 (May 1, 2015)**
  - Taxpayer's charge for premium subscription service is not subject to CST where charge is for capability to download and store music; streaming music is part of free service.

Standing for Refund Claims

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AT&T Mobility II, LLC v. Ala. Dep't of Revenue, Nos. 13-414, 13-415 (Ala. Tax Trib. May 6, 2015)

- In 2014, Alabama's Tax Tribunal held that AT&T and class members filed proper refund claims with the DOR.
- DOR now argued that it may hold refunds to offset any future potential liability of AT&T's customers.
- Tax Tribunal rejected this argument – such an order would allow DOR to hold viable refund claims indefinitely; ordered nearly $10M refund to customers.

New Cingular Wireless PCS, LLC v. Director, Div. of Taxation, No. 000003-2012, 2014 WL 714769 (N.J. Tax Ct. Feb. 21, 2014)

- The New Jersey Tax Court held that a mobile telecommunications service provider was not required to reimburse its customers before seeking a $32 million refund of erroneously collected sales tax because New Jersey law requires only that a provider reimburse its customers before any refund is paid.
  - *See also Sipple v. City of Hayward*, No. B242893, 225 Cal. App.4th 349 (Cal. App. 2014) (ISP has standing to file suit for refund on behalf of its customers).

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SALES & USE TAX LITIGATION

Sales & Use Tax Litigation

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Normand v. Cox Commc'ns Louisiana, LLC, 167 So.3d 156 (La. App. 5 Cir. 2014), *writ denied*, 163 So.3d 815 (La. Apr. 10, 2015)

- LA Court of Appeals held that VOD and PPV programming services are not TPP, and therefore, not subject to sales tax.
  - VOD and PPV is not computer software.
  - Digital data stream required the provider's constant involvement and has to be interpreted by software.

- VOD and PPV qualify as either nontaxable services or exempt cable television services.
  - VOD and PPV are included within the definition of cable television service.

- Trial Note: Court held it was not abuse of discretion for trial court to admit testimony of tax law professor regarding tax policy and tax law of other state.
  - Professor did not opine on Louisiana tax law.

Sales & Use Tax Litigation

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Level 3 Commc'ns, LLC v. Commonwealth of Pennsylvania, 166 F.R. 2007 (Commw. Ct. Oct. 15, 2015)

- Network infrastructure services (including local dial networks, telephone numbers and modems, i.e., Internet "backbone") sold to ISPs to provide Internet access to end users were not subject to Pennsylvania sales and use tax.

- Such transactions were charges for access to the Internet, and thus, excluded from the definition of taxable "telecommunications service" in PA.

- Taxpayer also argued PA's sales tax assessment on Internet backbone services violated ITFA.
  - Commonwealth Court ruling did not address ITFA preemption argument because it resolved the case under Pennsylvania sales tax law.

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STATE TAXATION OF INTERNET ACCESS

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Federal Internet Tax Freedom Act (ITFA)

- ITFA expressly prohibits state from imposing "discriminatory taxes on electronic commerce."
- "Electronic commerce" is defined as "any transaction conducted over the Internet…comprising the sale…of property, goods, services, or information[.]"
- "Discriminatory tax" is "any tax imposed by a State or political subdivision thereof on electronic commerce that
  - (i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means; [or]…
  - (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means."
- *See* Pub. L. No. 105-277, Title XI, 112 Stat. 2681 (1998) (enacted as a statutory note to 47 U.S.C. § 151); Pub. L. No. 108-435, 118 Stat. 2615 (2004); Pub. L. No. 110-108, 121 Stat. 1024 (2007); Pub. L. No. 114-125 (enacted Feb . 24, 2016).

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Federal Internet Tax Freedom Act (ITFA)

- Most recently, ITFA was permanently extended by enactment of H.R. 644, "Trade Facilitation and Trade Enforcement Act of 2015."
- The legislation permanently extending ITFA phases out the Grandfather Clause by allowing the seven grandfathered states (i.e. Ohio, Texas, Wisconsin, etc.) to continue to tax "Internet access" until June 30, 2020.
- However, the new legislation, and the Grandfather Clause, does not apply to, or otherwise effect, the prohibition against discriminatory taxes on electronic commerce.
- *See* Pub. L. No. 114-125 (enacted Feb . 24, 2016).

State Taxation of Internet Access

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Ohio Dep't. of Taxation, *On-line Services and Internet Access*, Info. Release No. ST 1999-04 (rev. Dec. 2015)

- Ohio Dep't. of Taxation revised longstanding policy in December 2015.
- Revised policy indicates that subscription services, inventory advertising, credit reports, and online chat features for use in business constitute taxable "electronic information services."
- "Ohio's tax on Internet access and on-line services is not subject to the [ITFA] moratorium" because such taxes are "grandfathered" by ITFA.

State Taxation of Internet Access

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City of Eugene v. Comcast of Oregon II, Inc., 263 Or. App. 116, 127 333 P.3d 1051 (Or. Ct. App. 2014)

- City of Eugene's 7% license fee, measured by gross revenues, was not a "tax" under ITFA as it was to compensate the city for use of its right-of-way.
  - The 7% fee "is imposed for a specific benefit and therefore not a 'tax' for purposes of ITFA."
- The City failed to show that it had "interpreted and applied" its registration fee to IA prior to 1998.
- Pointing to a broadly-worded statute is insufficient to show that a provider was on notice as to the applicability of registration fee to IA.
- The City's 2% registration fee was a "tax" barred by ITFA.
- Oregon Supreme Court allowed Comcast's Petition For Review. 356 Or. 689, 344 P.3d 1111 (Feb. 11, 2015) .

State Taxation of Internet Access

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Even cities within the same state have applied their respective sales and use taxes to Internet Access differently.

- ***Comcast Colorado IX, LLC v. City of Golden*, No. 13CV31253 (Colo. Dist. Ct., Jefferson Cnty. 2014)**
  - Colorado's First Judicial District ruled that Internet access is included within Golden's definition of "telecommunications service."

- ***Mile Hi Cable Partners, L.P. v. City and Cnty. of Denver*, No. 08CV6208 (Colo. Dist. Ct., Denver Cnty. 2009)**
  - Colorado's Second Judicial District ruled that Internet access was not subject to sales and use tax because it did fall within Denver's statutory definition of "telecommunication services."

State Taxation of Internet Access

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j2 Global Commc'n, Inc. v. City of Los Angeles, 159 Cal.Rptr.3d 742 (Cal. Ct. App. 2013)

- Taxpayer provides eFax, virtual phone systems, hosted email, email marketing, and online backup services.
- Taxpayer agued that eFax service (1) enables consumers to access the internet; and (2) the connection is used to access content/information.
- Court of Appeals opined that Taxpayer's construction would exempt "virtually all business conducted over the Internet" and render ITFA's definition of Internet access "meaningless."

State Taxation of Internet Access

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***Community Telecable of Seattle, Inc. v. City of Seattle, Dept. of Exec. Admin*., 164 Wash.2d 35 (Wash. 2008) (en banc)**

- City of Seattle assessed a telephone utility tax against Comcast on its sale of high-speed internet service – despite state law prohibiting new taxes on internet service providers and ITFA.

- Seattle argued that Comcast's internet service included a transmission component and falls within Seattle's definition of "telephone business."
  - Seattle's definition, unlike Washington's, did not exclude internet services.

- Court held that WA law prohibits the taxation of Internet service providers as network telephone providers.
  - "It is appropriate that our statute, consistent with federal and other state laws, disfavors the kind of artificial division of Internet service components [Seattle] advocates."

State Taxation of Internet Access

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Performance Marketing Assoc., Inc. v. Hamer, 998 N.E.2d 54 (Ill. 2013)

- Illinois Supreme Court held that ITFA preempted the state's "Amazon law."
- IL law singled out out-of-state internet retailers and imposed collection and remittance requirements that were not applicable to traditional out-of-state businesses.
- The Court held that the imposition of use tax on internet retailers and not brick and mortar retailors was a discriminatory tax on electronic commerce barred by ITFA.

State Taxation of Internet Access

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In the Matter of Helio, LLC, No. 825010 (N.Y. Div. Tax Appeals 2014)

- Taxpayer offered customers All-In Plans (with internet access) and A La Carte plans (without internet access).

- The Department assessed tax on bundled charges for internet access and mobile telecommunications service.

- The Division of Tax Appeals held that Taxpayer was able to sufficiently identify the component of the monthly charges attributable to data services and that tax on such charges barred by ITFA

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INCLUSIVE BILLING

Inclusive Billing

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- **Companies are considering the impact of taxes and fees on customer pricing.**
  - *See e.g.*, Cricket Wireless' homepage: "And taxes and fees are included in your monthly bill, so you can easily plan and budget your phone expenses."

- **Many state require the amount and/or type of taxes to be separately stated on customer invoices.**
  - In some cases the penalty for failing to separately state the amount of tax is a criminal offense.
  - Taxpayers may also face class action risk associated with less than clear billing.

- **Taxpayers in an effort to attract new customers or to deal with system limitations have been creative in how they comply with these requirements.**

- **Several state have issued rulings agreeing to non-traditional presentments. *E.g.*, AL, PA, DC, FL, IL MO, WA.**

Inclusive Billing

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Ferrie v. DIRECTV, LLC, Class Action Complaint (D.C. Conn. Filed March 19, 2015)

- Class alleges that DirectTV did not include various pass-through taxes and fees in its advertised price.
- Brings claim for unfair and deceptive trade practices.
- Alleges that DirectTV, "rather than absorb this tax as one of the many costs of doing business," elected to impose the cost on [CT] customers as a surcharge in an unfair and deceptive manner."
- Complaint further alleges that:
  (1) the "surcharges" were not included in customer quotes.
  (2) Monthly billing statements itemized surcharge as "Taxes" under the item "Sales Tax" to induce customers to believe that surcharge was imposed directly on consumers by State.

Inclusive Billing

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Peck v. AT&T Mobility, 174 Wash. 2d 333, 275 P.3d 304 (2012)

- Supreme Court of Washington held Cingular could not pass WA B&O tax through to customers as a separately stated fee despite prior disclosure.
  - A seller may include B&O tax in the sales price as overhead; may even disclose during negotiation that sales price includes the B&O tax.
  - However, a seller may not add on the B&O tax to the agreed upon sales price —even with prior disclosure.

- B&O a "levy for operating a business in WA" & must be treated as business operating expense and not a second sales tax.

- Court relies on deposition of Cingular's senior tax manager:
  - B&O surcharge "very much like a transactional tax, which you would think was a sales tax."

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PROPERTY TAX LITIGATION

Property Tax Litigation

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Virginia Set-Top Box Litigation (*Kellam (Virginia Beach) v. Verizon Online*)

- Primary issue is the taxability of set-top boxes.
  - Cable property is nontaxable, but there is an exception for "machines and tools."
  - Question as to whether set-top boxes are machines, and therefore, taxable personal property.

- Cases pending in Prince William County and Chesterfield County.

- Henrico County – Circuit Court held set-top boxes qualified as exempt cable converters. *Dir. of Finance of Henrico Cnty. v. Verizon Online*, LLC, No. CL 13-3050 (Henrico Cnty. Cir. Ct., Mar. 2, 2016).

- Some counties have conceded the issue, consistent with the Commissioner's determinations, and have issued refunds.

Property Tax Litigation

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Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216 (Iowa 2014)

- Iowa Supreme Court held cable company selling VoIP service is a telephone company and can be centrally assessed.
  - Iowa DOR assesses the property of owners and operators of "telephone lines"
  - Cable property historically assessed at the local level.

- Court held that the meaning of "telephone line" can change with evolving technology.
  - Iowa's property tax law did not provide for a primary use test – irrelevant that taxpayer's primary use of its hybrid-coaxial cable network was for providing cable service.

Property Tax Litigation

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Comcast Corp. v. Oregon Dep't. of Revenue, 356 Or. 282 (2014)(en banc)

- Oregon amended statute in 1973 to centrally assess property used in providing "communications," which includes "data transmission services by whatever means provided."
  - *But* Oregon did not attempt to centrally assess Comcast for cable/internet access service until 2009.
- Oregon Supreme Court held that Comcast property used in provision of cable television and internet access service are communication services subject to central assessment.
- Comcast recently prevailed before the Tax Court regarding the scope of issues on remand. TC 4909, Ore. Tax Court (Apr. 21, 2015).

Cable One, Inc. v. New Mexico Tax. & Rev. Dept., No. D-101-CV-2014-00059 (N.M. 1st Jud. Dist., 2014)

- Trial court granted summary judgment in favor of Cable One determining that it does not operate a communications system; cable service is not "two way communication.
- A 2008 change to central assessment policy to keep up with "evolving technology advancements" not justified when cable service has existed since 1985.
- The New Mexico TRD has appealed .

Questions?

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