SALES AND USE TAXES

Sales Tax Considerations in Financing Transactions—Does Substance over Form Govern?

In certain financing transactions, tax advisors would be remiss to ignore potential sales tax issues that can be traps for the unwary.

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When a company undertakes a financing transaction, federal and state income tax considerations most frequently take priority in the tax department. In certain financing transactions, however, one would be remiss to ignore potential sales tax issues that can be traps for the unwary.

Indeed, sales tax issues frequently arise when a financing transaction involves the pledging, securitizing, transfer, or assignment of accounts receivable (of which the underlying sale involved a taxable transaction) or a financing arrangement where a capital lease or lease-purchase agreement functions as a security interest rather than a true operating lease. This article examines the sales tax considerations a taxpayer should consider when a company engages in these common financing transactions.

Sales Tax Complications Related to Accounts Receivable Transactions

Retailers and other businesses often enter into transactions that involve the transfer, assignment, and/or sale of accounts receivable to monetize those receivables by accelerating receipt of payment. For example, businesses enter into so-called factoring transactions to accelerate their receipt of funds from deferred payments or, in other cases, slow-paying customers.
As the Massachusetts Department of Revenue explained: "Factoring has been defined as the sale of accounts receivable of a firm to a factor at a discounted price. The purchase of accounts receivable from a business by a factor who thereby assumes the risk of loss in return for some agreed discount." 

A traditional factoring arrangement—where a business shifts the risk of loss on its accounts receivable to a third party—may create unwanted sales tax complications. This is especially true if the business is a "retailer" that must collect and remit sales tax on its sales of tangible personal property or services. More specifically, if the account receivable was generated by a transaction subject to sales tax, the retailer's sale of that receivable, with the corresponding risk of loss, to a third party (the "factor") in a traditional factoring arrangement can have a significant impact on the ability of the retailer (and the factor) to take a bad debt deduction on its sales tax return. 

**Maintaining the bad debt deduction**

The ability to deduct bad debts on sales tax returns is a significant consideration for retailers that sell their products on credit, and disagreements over retailers' entitlement to a bad debt deduction has led to numerous controversies. Most states require a retailer to remit the full amount of sales tax at the time of a sale, even if the retailer has not yet received full compensation for the sale because the purchaser pays for the product over a period of time under terms of credit.

In the event the purchaser defaults on the terms of credit and never pays the retailer for the entire purchase, states usually permit retailers to deduct (or credit) these bad debts on their sales and use tax returns to accurately reflect the retailers' economic loss on these credit sales. To take the bad debt deduction, states frequently require some or all of the following criteria be met: (1) the retailer writes off the bad debt for federal income tax purposes (pursuant to I.R.C. § 166); (2) the taxpayer writes off the bad debt on its books and records, per generally accepted accounting principles; and/or (3) the retailer seeking to take the deduction is the retailer that collected and remitted state sales and use tax on the underlying transaction that gave rise to the worthless account for tax purposes.

Thus, a retailer may lose its bad debt deductions in some jurisdictions if it transfers the risk of loss by selling its accounts receivable for tax purposes. Conversely, some states allow the retailer to retain the ability to take a bad debt deduction if the retailer retains risk of loss to the accounts receivable, or in some cases sells the receivables to a related party.
The following examples show the different approaches that the states take on issues related to transactions involving accounts receivable and the sales tax considerations that retailers should review when engaging in such transactions.

**Survey of state guidance addressing accounts receivable transactions and bad debts**

The Kansas Department of Revenue has directly addressed transfers or assignments of accounts receivable at a discount and the subsequent retransfer of those discounted receivables. Kansas restricts the ability of retailers to take a sales tax bad debt deduction if the accounts receivable giving rise to the deduction are sold to a third party. For Kansas sales tax purposes, if a retailer "sells, factors, assigns, or otherwise transfers an account receivable" to a third party at a discount, the retailer is no longer eligible to deduct the bad debt, even when that receivable is sold back to the retailer.  \(^5\)

The Department of Revenue updated its Kansas bad debt regulation after a taxpayer requested guidance regarding whether Regulation § 92-19-3b (as it then existed) permitted wholly owned subsidiaries that obtained receivables from an affiliate to claim a deduction for bad debt.  \(^6\) The Department of Revenue explained, "[t]he revised language [in Regulation § 92-19-3b] allows certain retailers to claim a bad debt deduction on an account receivable if the qualifying retailer transfers or assigns an account receivable without receiving a discount of any kind and the account receivable is later transferred back or reassigned to the qualifying retailer without a discount of any kind."  \(^7\) The revised regulation, according to the Department of Revenue, "does not allow a retailer or lender to claim a credit or refund for bad debts that arises from discounted account receivables."  \(^8\)

Some states allow a retailer to transfer or assign its accounts receivable to a related party and still retain its sales tax bad debt deduction if the transaction meets certain conditions, namely that the retailer retains the risk of loss for the subject receivables. Depending on the jurisdiction, financing transactions may be structured to achieve the company's business goals without losing the ability to take bad debt deductions. Of course, before transferring or assigning accounts receivable as security in a financing transaction, a retailer should carefully review jurisdiction-specific rules related to assignment or transferability of accounts receivable it takes material bad debt deductions for on its sales tax returns.

In Texas, for example, sellers are allowed to deduct bad debts if (1) during the reporting period in which an item was sold, the seller determines that the unpaid portion of the sales price will remain unpaid; (2) the
seller enters the unpaid portion of the sales price in the seller's books as bad debt; and (3) the bad debt is claimed as a deduction for U.S. federal income tax purposes during the same or a subsequent reporting period. In relevant part, "seller" means "a person engaged in the business of making sales of taxable items . . . ." Moreover, under Texas sales and use tax law, "[a] retailer who extends credit to a purchaser on an account that is later determined to be a bad debt, a person who extends credit to a purchaser under a retailer's private label credit agreement on an account that is later determined to be a bad debt, or an assignee or affiliate of either who extends credit on an account that is later determined to be a bad debt, is entitled to a credit or refund for the tax paid to the Comptroller on the bad debt." The Comptroller explains in Rule 3.302 the ability of a "retailer [to] sell, factor or assign to a third party the retailer's right to receive all payments due under a credit sale": "At the time the contract or receivable is sold, factored, or assigned, the tax becomes due on all remaining payments. The retailer is responsible for reporting all remaining tax due under the credit sale to the comptroller in the reporting period in which the contract or receivable is sold, factored, or assigned. No reduction in the amount of tax to be reported and paid by the retailer is allowed if the transfer to the third party is for a discounted amount. This section does not apply to a seller's assignment or pledge of contracts or accounts receivable to a third party as loan collateral." Interpreting the provisions of Rule 3.302, the Comptroller ruled that a retailer that makes taxable sales and assigns or factors the rights to collect the receipts to a third party may claim a bad debt deduction so long as the bad debt is written off the retailer's books as a result of recourse provisions contained in the financing agreement. However, the Comptroller noted a retailer that factors receivables-and receives a lesser amount for the receivables than the face value of uncollected accounts-"cannot reduce the amount of the tax payable for the discounted amount." In the ruling, the financial institution received full recourse from the retailer for all bad debts assigned in the financing agreement. Thus, the Comptroller concluded that the retailer could claim a bad debt deduction when: (1) the retailer was notified of the bad debt by the financial institution; (2) the retailer compensated the financial institution; and (3) the retailer recorded the uncollectible account as a bad debt on its books and records. In another ruling, the Comptroller determined that where the retailer was not obligated to pay back any worthless account previously transferred to a wholly owned subsidiary, the arrangement was a true factoring agreement and the retailer could not claim the full bad debt deduction for those worthless
accounts. The taxpayer's receivables purchase agreement with its finance subsidiary established a five percent collection reserve. Under that agreement, if uncollectible accounts depleted the reserve or forced it into a negative balance, the taxpayer was not obligated to make up any deficit in the subsidiary's collection reserve. The taxpayer did not show that it was required to replenish the reserve upon its depletion, and the agreement provided that a portion of the purchase price would be retained by the finance subsidiary.

Indiana also permits "retail merchants" to deduct bad debts from their gross receipts. Generally, Indiana does not permit the bad debt deduction for accounts sold to third-party creditors. However, Indiana permits such a deduction in certain circumstances: "[t]he right to a [bad debt] deduction . . . is not assignable to an individual or entity that is not part of the same affiliated group as the assignor." Put another way, the right to a deduction is assignable to an entity in the same affiliated group. For this purpose, "affiliated group" means any combination of the following: (1) an affiliated group within the meaning of I.R.C. § 1504 (except that the ownership percentage is determined using 50% instead of 80%) or a relationship described in I.R.C. § 267(b)(11); or (2) two or more partnerships, including limited liability companies and limited liability partnerships, that have the same degree of mutual ownership as an affiliated group described above, as determined under rules adopted by the Indiana Department of Revenue.

In Arizona, a bad debt deduction will be allowed on conditional or installment sales if: (1) the tax liability is paid on the full sales price of the tangible personal property (or taxable service); or (2) the retailer sells its contract to a third party as a sale with recourse and principal payments are made by the vendor to the third party upon default by the original payor, where "[s]uch principal payments may be taken as a bad debt deduction if the tax was paid by the vendor on the original sale of the tangible personal property or on the subsequent sale of the financing contract." For these purposes, a "sale with recourse" occurs when "a vendor sells a contract or other financial obligation to a third party but retains liability for payment upon default of the original payor." If all of these conditions are met, the vendor would then be allowed to claim the amounts paid to the third party as a bad debt deduction.

"Lease" versus "Loan" in the Sales Tax Context

Businesses often enter into financing arrangements that involve leases to provide security to the lender or to secure off-balance sheet financing. While these arrangements may look like ordinary operating leases,
they are often entered into for financing purposes and do not involve transfer or possession of risk of loss.

For example, in a "capital lease" the buyer (lessee) "takes possession of the goods with the first payment and takes ownership with the final payment" and "is responsible for paying taxes and other expenses on the property." In contrast, in an "operating lease," the agreement's term is "shorter than the property's useful life" and "the lessor is typically responsible for paying taxes and other expenses on the property." 27

Courts and revenue departments in a number of states have addressed whether the true purpose of these transactions is really a sale or lease, or if it is merely a financing arrangement. Whether a transaction is characterized as a "sale" (i.e., lease) of tangible personal property or a financing arrangement secured by tangible personal property goes to the heart of whether the transaction will be subject to sales tax.

**Background-sales tax treatment of "leases"**

Unlike the general definition of "lease" as used in commercial law or common law, states typically define "sale" for sales and use tax purposes to include a "lease." Because states impose sales tax on "sales at retail" of tangible personal property, states generally impose sales tax on rents from leases of tangible personal property, unless made for "resale" (i.e., sublease or subrent) or some other exemption applies.

Often, states require lessors of tangible personal property to collect sales tax based on the monthly rental payments paid by the lessee. As with any other state tax issue, there are notable exceptions to these general rules affecting the sales taxation of leases and rentals.

For example, Illinois requires lessors to remit use tax on leased property, without collecting sales tax from lessees. California permits lessors to elect to pay tax on their purchase (or cost) price of leased property or on the monthly rental payments from lessees, if certain requirements are met. Lastly, Maine's definition of "sale" includes leases and contracts payable by rental or license fees for the right of possession and use, but only when such leases and contracts are deemed by the State Tax Assessor to be in lieu of purchase.

Despite this typical patchwork of state sales tax laws related to leases, there is some uniformity among the states' definitions of "lease or rental." The Streamlined Sales and Use Tax Agreement ("Agreement") and its Member States define "lease or rental" as "any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration . . . [and] may include future options to purchase or extend." However, the Agreement excludes the following from the "lease or rental" definition:
1. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;

2. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price does not exceed the greater of one hundred dollars or one percent of the total required payments; or

3. Providing tangible personal property along with an operator for a fixed or indeterminate period of time. A condition of this exclusion is that the operator is necessary for the equipment to perform as designed. For the purpose of this subsection, an operator must do more than maintain, inspect, or set-up the tangible personal property.  

The Agreement further provides that the above definition, "shall be used for sales and use tax purposes regardless if a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, the [state commercial code], or other provisions of federal, state or local law." Recognizing the economic realities of certain leases that function as financing transactions, rather than operating leases, and the differing treatment thereof by its Member States, the Agreement provides that its "lease or rental" definition "shall neither impact any existing sale-leaseback exemption or exclusions that a state may have, nor preclude a state from adopting a sale-leaseback exemption or exclusion after the effective date of the Agreement."  

**Background—sales tax treatment of "loans"**

In contrast to the application of sales tax to leases of tangible personal property, states generally do not impose sales tax on loans or other financial transactions where tangible personal property secures the transaction for the lender.

Arkansas, for example, provides illustrative guidance as to the sales tax implications of loans. Arkansas defines "sale" as "any transaction resulting in the transfer of either the title or possession, for a valuable consideration, of tangible personal property or taxable services regardless of the manner, method, instrumentality, or device by which such transfer is accomplished." But, Arkansas makes clear that "[a] financing arrangement which only gives a lender a security interest in tangible personal property will not subject such lender to the tax, if, prior to such financing arrangement, either the Arkansas gross receipts or compensating use tax has been paid on the purchase price of the tangible personal property by one of the parties to the financing arrangement."
Indicia of "leases" and "loans" under state sales tax law

Whether a transaction is a "lease" or "loan" for sales tax purposes depends on the totality of the circumstances. While the sales tax law is usually "form" driven, states have adopted a substance over form approach in the context of determining if lease transactions are for operating or financing purposes. Several state tax administrators have issued guidance on the pertinent factors that they will consider when evaluating a transaction.

For example, Alabama will consider a transaction a "lease" for sales tax purposes if: (1) title does not pass to the lessor at the end of the lease or shortly thereafter; (2) the lessee's option to purchase is for more than a nominal amount; (3) the lessee can exercise an option to renew the lease at the end of the lease term; and (4) the lessee must return the property upon the expiration of the lease term. 40

In Revenue Ruling 98-012, the Alabama Department of Revenue determined that a transaction was a "true lease" because, at the end of the lease term, the lessee could renew the lease, purchasing the property for more than a nominal amount, or return the property to the lessor. The Department distinguished this transaction from one in an earlier case, Ex Parte Thompson Tractor Company, Inc., in which the Alabama Supreme Court held that a transaction was really a disguised installment sale. 41 In Thompson, the parties intended that once the customer had made sufficient payments to cover the sales price plus interest, title would transfer to the customer. 42 The court stated that treating the transaction as a lease "places form over substance." 43

The Virginia Department of Taxation will consider a transaction a lease, not merely a financing arrangement, if the legal title to the property is transferred automatically at the end of the lease, and possession of the property is transferred from one party to another. 44 More specifically, in a sale-leaseback transaction, the "sale" to the finance company is exempt from sales tax under the resale exemption and the subsequent leaseback transaction is subject to the sales tax. 45 Sales tax paid on the original purchase of tangible personal property to be leased in a simultaneous leaseback transaction may be refunded when no use has been made of the property prior to the leaseback transaction. 46

For Virginia sales and use tax purposes, a conditional sales contract is treated in the same manner as any other sale of tangible personal property because title passes to the buyer automatically. In a lease agreement, the tax payments on a lease are spread over the term of the lease. A secured loan transaction and safe harbor transactions do not constitute a sale for retail sales and use tax purposes and are not subject to the tax. 47 In contrast to Alabama, the Virginia Department of Taxation determined that even a
contract providing a purchase option for a nominal $1 would not be considered a taxable conditional sale, because title must pass automatically. 48

States have also issued guidance as to when a transaction will be considered a "loan" for sales tax purposes. Such distinctions are important where, among other things, the nominal "lease" functions as security for the lender.

For example, the South Carolina Department of Revenue has explained its substance-over-form approach in this area: "In the Department's opinion, whether a sale followed by a leaseback is subject to sales tax depends upon the substance of the transaction. If the leaseback is a true lease, i.e. a lease for income tax purposes, it is subject to sales tax. If the sale and leaseback is in substance a financing arrangement, i.e. a loan for income tax purposes, it is not subject to sales tax." 49

In Private Letter Ruling No. 99-2, the South Carolina Department considered a sale-leaseback transaction a financing arrangement where the possession of the underlying property does not transfer and the entity that nominally "sold" the property and leases it back retains risk of loss and responsibility for the property's maintenance, insurance, and taxes, despite transfer of legal title. 50 In Private Letter Ruling No. 90-13, the Department previously considered a scenario where the seller retained legal title to and possession of the property, bore all expenses associated with the property, and was treated as the property owner for income tax purposes. 51

After explaining that a "sale" occurs in South Carolina when there is a transfer of title and/or possession, the Department determined that no sale occurred because the transferor retained both legal title and possession. 52 The Department explained that sale-leaseback transactions may be for financing purposes rather than true sales and leases, and, in such cases, sales tax is imposed on the initial purchase rather than on the lease payments. The Department concluded that the sale-leaseback was a financing agreement and, therefore, not subject to sales tax. 53

The Florida Department of Revenue has issued similar guidance. In a mortgage leaseback, the Department considered the totality of the factors in determining whether the transaction was a loan or a lease.

In Technical Assistance Advisement No. 04M-002, the lease agreement plainly and clearly articulated the intent of the parties. The transaction, based on the documentation, demonstrated the parties' intent to secure a loan, rather than create a "leasing" situation. The lease payments were directly tied to servicing the debt obligation rather than to fair market value rent. A special purpose entity was created before the transaction specifically to facilitate the loan process. The entity "selling" the property bore both short-term
and long-term risks. Finally, after the lease term, title to the property would be sold back to the lessee. Based on these factors, the Department concluded that the transaction was a financing arrangement rather than a taxable lease.

In another ruling, the Florida Department of Revenue concluded that an aircraft lease agreement between a lessee and lessor was a conditional-sale lease agreement and the tax was due at the moment the agreement was entered into. The factors the Department considered were: the lessor was not entitled to any benefits associated with owning the aircraft; the lease payments were for the cost of obtaining the aircraft and related interest; the agreement required the lessee to make all payments associated with the aircraft cost and the related interest; and the lessor was required to transfer title to the lessee after the final payment. Thus, the transaction qualified as a taxable sale.

Massachusetts also uses a totality of the circumstances approach to determine if a nominal sale-leaseback is a financing arrangement or a true lease. In making this determination, the Department of Revenue will consider the following factors, none of which are dispositive: (i) whether title and possession remain with the seller-lessee; (ii) whether the seller-lessee retains the benefits and burdens of owning the property, such as the risk of loss, entitlement to gain, maintaining insurance, and paying taxes; and (iii) whether the seller-lessee is eligible to claim the federal income tax deductions and credits accorded an owner.

In Letter Ruling 01-8, the Massachusetts Department determined that based on the above factors, the parties intended to enter into a financing agreement rather than a sale-leaseback. Specifically, the lessee bore all the burdens, risks, and responsibilities of ownership, "analogous to that of a property owner," and the lessor's risk and obligations were "consistent with those of a lender."

Finally, the Arizona Department of Revenue has similarly found a transaction to be a financing arrangement rather than a lease, where payments from the lessee to the lessor track the terms of an underlying loan. In that ruling, the lessee's payments were closely related to amounts under a separate loan between the parties, calculated to cover interest on the loan plus a small return on the investment. Further, the lessee had a purchase option that could be exercised at any time. The purchase amount would be the sum of unpaid principal, interest, and other obligations under the loan. The lease terms also treated the taxpayer as the owner of the properties but provided that the lessee would be treated as the owner for federal, state and local income tax purposes.

The Arizona Department determined that this was a synthetic lease or financing agreement and not a commercial lease subject to transaction privilege tax. The lease was a mortgage-type arrangement that did not, in substance, constitute a lease of real property for commercial purposes.
Common factors affecting characterization

The various state guidance provides a framework suggesting that taxpayers should consider the totality of the following non-exclusive factors when characterizing a transaction as either a "lease" or "loan" for sales tax purposes:

- Do the parties intend to enter into a "lease" or a "loan," as evidenced by the contract?
- Which party holds title and/or possession of the tangible personal property, i.e., the "lessee"/"borrower" or the "lessor"/"lender"?
- Do the risk of loss and other benefits/burdens of ownership, such as maintenance of insurance and payment of taxes, pass to the third-party "lessor"/"lender"?
- Are the payments by the "lessee"/"borrower" reflective of fair market value rent or do they track an underlying debt obligation?
- Is the purchase option at the end of the contract for a nominal amount or fair market value?
- Which party is entitled to federal income tax benefits, such as deductions and credits?

Conclusion

Ignoring the state sales tax implications of financing transactions can potentially be costly for businesses. States are not consistent in their treatment of financing transactions, and retailers should carefully evaluate such transactions for potential sales tax traps. In particular, consideration should be given to risk of loss provisions and the economic realities that may affect characterization of the transaction.

1 See discussion, infra.


3 Factoring and the other arrangements discussed here should be distinguished from the captive or "private label" credit card arrangements between retailers and third-party banks that have generated substantial bad debt litigation over the years. See, e.g., Home Depot U.S.A., Inc. v. North Carolina Dep't of Revenue, N.C. Business Ct., Decision No. 11 CVS 2261 (Nov. 4, 2015) (finding that the retailer's bad debt deduction
refund claim was properly denied because the debts arose under its private label credit card program with third-party banks in which the third-party banks maintained the accounts and charged off the debts on their income tax returns).


7 Id. (emphasis in original).

8 Id. (emphasis in original). Furthermore, the Department of Revenue notes, "[s]uch a provision [that would allow a bad debt deduction for discounted accounts receivable] would run afoul of In re the Appeal of Ford Motor Credit Company, 275 Kan. 847, 69 P.3d 612 (2001), and be contrary to the legislature's refusal to enact 2007 House Bill 2511 and 2008 Senate Bill No. 499. See Home Depot USA, Inc. v. Arizona Department of Revenue, Maricopa County Superior Court (Arizona), No. TX 2006-000028, December 9, 2010." Kansas Opinion Letter, No. O-2011-003 (April 19, 2011).


11 Tex. Tax Code Ann. § 151.426(c) (emphasis added); see also 34 Tex. Admin. Code § 3.302(d)(3). To document the Texas bad debt deduction, a Texas retailer must meet the following requirements: (1) have a valid sales or use tax permit and remit tax for which the deduction is sought; (2) prorate payments on an account between taxable and nontaxable charges; and (3) provide the Comptroller detailed information about each debt that is being written off. Tex. Tax Code Ann. § 151.426(e). Specifically, such detailed information should include: date of original sale and name and Texas sales tax permit number of the retailer; name and address of purchaser; amount the purchaser contracted to pay; taxable and nontaxable charges; amount on which the retailer reported and paid the tax; all payments or other credits applied to the account of the purchaser; evidence that the uncollected amount has been designated as a bad debt in the books and records of the person claiming the deduction and the amount that has been or will be claimed as a bad debt deduction for income tax purposes; city, county, transit authority or special purpose district to which local taxes were reported; and the unpaid portion of the assigned sales price. 34 Tex. Admin. Code § 3.302(d)(4).
14 Texas Comptroller's Decision No. 14,785 (Apr. 18, 1986).
15 Id.
16 Id.
17 Id.
18 Ind. Code § 6-2.5-6-9(a). A "retail merchant" is a person who engages in "selling at retail," which in turn means a transaction where an individual acquires tangible personal property for the purpose of resale and transfers that property to a third person for consideration in the ordinary course of his or her business. Ind. Code §§ 6-2.5-4-1(a), 6-2.5-4-1(b). To claim the deduction in Indiana, the retail merchant must "writ[e] off as an uncollectible debt for federal tax purposes under Section 166 of the Internal Revenue Code during the particular reporting period." Ind. Code § 6-2.5-6-9(a)(3).
20 Ind. Code § 6-2.5-6-9(c).
21 Id.
23 Id.
24 Id.
25 For example, in synthetic leases (which are common vehicles for purchasing real estate), the "lender creates a special-purpose entity that buys the property and then leases it to the ultimate user." Black's Law Dictionary (10th ed. 2014). The archetypal synthetic lease is treated as a loan for income tax purposes and as an operating lease for accounting purposes, therefore permitting the "lessee" to "deduct the property's depreciation and the loan's interest yet keep both the asset and the debt off its balance sheet." Id.
26 Id.
27 Id.
In the broad sense, "lease" means "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usual[y] rent." *Id.* In the sales tax context, *see generally* Hellerstein, *State Taxation*, ¶ 13.07[1], *Lease or License to Use Tangible Personal Property: Statutory Definitions of Sale as Including Rental or License to Use Tangible Personal Property* (WG&L 2015).

_E.g.,_ Ga. Code Ann. § 48-8-2(31) (defining "retail sale" for Georgia sales tax purposes as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent") and Ga. Code Ann. § 48-8-2(33) (defining "sale" for Georgia sales tax purposes as "any transfer of title or possession, transfer of title and possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means of any kind of tangible personal property for a consideration.")


For example, the Illinois Department of Revenue explains that lessors of tangible personal property under bona fide lease or rental agreements, do not sell tangible personal property and are not subject to the retailers' occupation (sales) tax. Ill. Admin. Code tit. 86, § 130.2010(b). But the Illinois Department of Revenue considers lessors the users of the leased or rented tangible personal property and, therefore, they are subject to the use tax when purchasing tangible personal property that they lease or rent to others. *Id.* However, the Illinois use tax generally does not apply to the rental payments made by a lessee to a lessor because the lessor is legally the "user of the property and is taxable on the purchase price thereof." Ill. Admin. Code tit. 86, § 150.305(e).

_See generally* Cal. Code Regs. tit. 18, § 1660.

_Me. Rev. Stat. tit. 36, § 1752(13)._  

_Streamlined Sales and Use Tax Agreement, Appendix C Library of Definitions, Part I Administrative Definitions. For information on the Agreement and its Member States, see www.streamlinesalestax.org._

*Id.* at -(A)(1), (2), (3).

*Id.* at -(C).

*Id.* at -(D).


41 432 So. 2d 497 (Ala. 1985).

42 Id.

43 Id.


45 Id.

46 Id.

47 Id.

48 Id.

49 S.C. PLR No. 99-2 (Aug. 30, 1999). See also, Ala. Rev. Rul. 97-001 (March 14, 1997) (finding that a transaction did not qualify as a sale when there was “no true transfer of ownership of the property.”)


51 Id.

52 Id.

53 Id.

54 Fla. Technical Assistance Advisement No. 04M-002 (Nov. 16, 2004). See also Fla. Technical Assistance Advisement No. 99M-005 (Aug. 5, 1999) (finding a similar transaction to be a financing arrangement where the lessor held bare legal title, was solely created for purposes of the transaction, and received rent calculated based on interest rather than fair market value.)

55 Fla. Technical Assistance Advisement No. 04M-002 (Nov. 16, 2004).

56 Fla. Technical Assistance Advisement No. 03A-008 (Feb. 27, 2003).

57 Id.
58 \textit{Id.}


60 \textit{Id.}

61 Ariz. Private Taxpayer Rul. LR03-002 (March 27, 2003).

62 \textit{Id.}

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