



# 2023 ARIZONA TAX REVIEW

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# 2023 ARIZONA TAX IN REVIEW

## SaaS IS TAXABLE RENTAL OF TANGIBLE PERSONAL PROPERTY!

- On September 12, the Arizona Supreme Court declined to take review in ***ADP, LLC v. Ariz. Dep't of Revenue, No. CV-23-0036-PR.***, which lets stand the Arizona Court of Appeals decision upholding the taxation of SaaS. 254 Ariz. 417, No. 1 CA-TX 21-0009 (Ariz. Ct. App. Jan. 31, 2023).
- This is significant because the Arizona Department of Revenue now has the court's blessing to tax software-as-a-service ("SaaS") transactions as sales or rentals of tangible personal property despite no clear Arizona statutory authority to tax digital goods and services.

**Facts:** ADP involved the taxability of the company's "eTime" software application, which was leased to Maricopa County. County employees were able to enter their time and other employment data into eTime via the web. Once entered, eTime collected and processed the data. Arizona imposes a transaction privilege tax (i.e., sales tax) on rentals of "tangible personal property." See A.R.S. § 42-5071. At issue in ADP was whether the eTime software was "tangible personal property," which under Arizona law includes "personal property that may be seen, weighed, measured, felt or touched or that is in any other manner perceptible to the senses." A.R.S. § 42-5001(21) (emphasis added).

**Court of Appeals Relied on Decades Old Pre-Digital Cases:** The Arizona Court of Appeals relied on decades-old case law to support its conclusion that eTime is taxable, analogizing the use of eTime to inserting a coin in a jukebox to play a record and the use of a coin-operated laundry machine, both taxable transactions, to conclude that eTime was subject to the transaction privilege tax as a rental of tangible personal property. The cases on which the Arizona Court of Appeals relied – *State v. Jones*, 60 Ariz. 412 (1943) (music played by a jukebox is tangible personal property) and *State Tax Commission v. Peck*, 106 Ariz. 394 (1970) (use of a coin operated washing machine is a rental) – are 80 and 53 years old, respectively.

**Effect of Supreme Court's Declining Review:** By declining review, the Arizona Supreme Court let the Court of Appeals decision stand as law in Arizona. This result arguably gives the Arizona Department of Revenue almost unbounded discretion to determine what is “perceptible to the senses” and therefore subject to tax. ADP offers no clear limiting principle for the interpretation of this phrase.

**Arizona is Outlier in Taxation of SaaS:** Among 23 states that impose sales tax on SaaS, Arizona is an outlier – it is one of only three states that tax SaaS without any clear statutory authority. See COST, Best and Worst of State Sales Tax System (December 2022).

**More Latitude to Department to Tax Digital Services?** It would also arguably allow the Department of Revenue leeway to tax formerly nontaxable services merely because those services have been automated. See *ADP, LLC v. Arizona Dep't of Revenue*, 254 Ariz. 417, ¶ 28 (Ct. App. 2023): “ADP manually processed its customers’ payroll; now, ADP licenses eTime to its customers, and eTime automates the [nontaxable] labor that ADP previously provided. The charging of fees to use eTime software that automates its HR work fundamentally altered ADP’s business, thereby warranting a change in taxation that is not discriminatory.”



# 2023 TRANSACTION PRIVILEGE TAX LEGISLATION AND DECISIONS

## Legislation

### **Senate Bill 1102, Chapter 203. Maricopa County Transportation Tax Extension.**

Authorizes Maricopa County to hold an election asking voters if they wish to continue the 0.05% county transportation excise tax, to the TPT rate.

### **Senate Bill 1131, Chapter 204. Cities Prohibited from Taxing Residential Rentals after January 1, 2025.**

The state and Counties do not tax residential rentals, but the cities do. This bill prohibits cities and towns from imposing the TPT rental tax on residential rentals effective January 1, 2025. This prohibition does not apply to transient lodging businesses. The bill also prohibits landlords from charging their tenants for those taxes also effective January 1, 2025. The Department must notify residential landlords that the tax no longer applies after January 1, 2025.

### **Senate Bill 1189, Chapter 192. Municipal Tax Code Commission Continuation.**

This bill continues the Municipal Tax Code Commission ("MTCC") for four years and allows a city or town to adopt an amendment to the Model City Tax Code ("MCTC") if the amendment is a result of a statutory change. The bill requires a two-thirds vote of the MTCC to adopt proposed amendments to the MCTC; such amendments may either repeal an option that provides an exemption from taxation or expand the type of business activities that are considered taxable. The bill also specifies that changes in tax rates are not subject to approval by the MTCC.

### **Senate Bill 1190. Chapter 7. Defines Audit.**

Bill defines what an audit is for purposes of TPT and income tax audits. Audit means a review or examination of a taxpayer's accounts, financial information, books and records, and any other document to ensure information is reported correctly on a tax return and to verify the reported tax is correct.

### **Senate Bill 1242. Chapter 66. Board of Tax Appeals is Continued.**

Bill continues the State Board of Tax Appeals, which hears TPT appeals for another eight years to June 30, 2031, and is retroactive to July 1, 2023.

### **Senate Bill 1274. Refunds for Computer Data Centers.**

2021 Legislation expanded the computer data center deduction and made the clarification retroactive to September 12, 2013 and limited any claims for refund to an aggregate of \$10,000. This legislation clarifies that sales and use tax refunds filed on or after January 1, 2022 for periods beginning on or after January 1, 2022 are not limited by the \$10,000 aggregate refund amount.

## Legislation



### **Senate Bill 1473, Chapter 11. Annual Tax Corrections Act: Exemption Documentation for Sales of Vehicles to Nonresidents.**

Among numerous technical changes, this bill also makes the following substantive changes to Arizona TPT laws.

- This bill requires a motor vehicle dealer to retain a copy of any nonresident registration permits for the purposes of the TPT deduction for sales of motor vehicles to nonresidents for use outside the state.
- This bill removes the requirement that a public consignment auction dealer submit a copy of the certificate used to establish entitlement to the TPT deduction for sales of motor vehicles to nonresidents for use outside the state; now must only retain a copy.

### **Senate Bill 1230, Chapter 14. Transaction Privilege Tax Non-Profit Annual TPT Exemption Letters.**

In part, this bill requires 501(c) nonprofits that are required to obtain an exemption letter from ADOR to apply to ADOR for the exemption letter and provide written notice to ADOR if the entity no longer qualifies for the exemption letter. The bill further states that if ADOR approves the exemption letter application, then such letter is valid until the nonprofit no longer qualifies for the exemption letter. The bill outlines the liability implications for the nonprofit and requires the paid liability amount to be treated as tax revenues collected from the seller.



# COURT DECISIONS

***Ute Mountain v. Arizona Department of Revenue, 1 CA-TX 22-0004 (January 10, 2023). Construction on Indian Reservation where contract was with the Federal government is taxable.*** Ute Mountain Tribe had a construction company that had contracts with the Federal Government for construction work on the Navajo and Hopi Reservations. The Court of Appeals applied the long-standing Blaze Supreme Court case, which held that a contract with the Federal government for work on an Indian reservation is not preempted by Bracker and the Bracker balancing test is not to be applied. Bracker is proper only when the proceeds at issue derive from a nontribal entity's direct transaction with the tribe or tribal members.

***ADP, LLC v. Arizona Department of Revenue, 1 CA-TX 21-0009 (January 31, 2023). Application software (SaaS) is subject to both State and City TPT Under the Rental Classification.*** ADP, a human resource services provider, contracted with Maricopa County in leasing out its product, eTime. ADP paid the TPT on its license of eTime to the County and then filed a refund claim, which the Department denied. ADP argued that the contract was not subject to TPT under A.R.S. § 42-5071(A) and Phoenix City Code § 14-450 because it was not tangible personal property and was not a rental of software but was a nontaxable service. The Court of Appeals affirmed that under A.R.S. § 42-5071(A), tangible personal property ("TPP") includes application software, like eTime. Accordingly, given that TPT applies to any lease of TPP, the eTime contract was subject to TPT. The Court further affirmed that under Phoenix City Code § 14-450 ("P.C.C."), eTime is subject to TPT because it is unambiguously and expressly included in P.C.C.'s category of business activity and definition of TPT.

***Dove Mountain Hotelco, LLC v. Arizona Department of Revenue, 1 CA-TX 22-0003 (June 8, 2023). Payments from hotel rewards programs is taxable income to hotel.*** The Marriott Hotel, Dove Mountain, participated in the Marriott Rewards Program, wherein the hotel paid 4.5% of their room revenue to cover the cost of allowing members to redeem their points for free lodging. When members redeem their points for free stays, Dove Mountain requests money from the Rewards Program to cover the costs of the complimentary lodging. Dove Mountain argued that it paid TPT on the lodging at the time the Reward points were earned, and the money received from the Rewards Program upon member's redemption should not be subject to an additional TPT. The Court of Appeals disagreed and affirmed the Tax Court's ruling in favor of the Department of Revenue. The Court reasoned that double taxation was not present because Dove Mountain's remittance to the Rewards Program was payment for membership in the Marriott Rewards Program. Further, the Court categorized the compensation from the program for extending complimentary stays as a benefit of the program and as taxable income. The Court found no record of a built-in mark-up implemented by Dove Mountain that would have already been taxed—nor did the Court find any other evidence to signal that Dove Mountain was previously subject to TPT.

The dissenting opinion characterized the funds that the Rewards Program distributed to Dove Mountain as post-tax reserves, not new income that would be subject to additional taxation.

# DEPARTMENT OF REVENUE GUIDANCE

**Transaction Privilege Tax Ruling TPR 23-1 (April 7, 2023). Exemption of prosthetic appliances from the retail transaction privilege tax (“TPT”) classification.** This ruling provides guidelines to determine whether a device meets the definition of “prosthetic appliance” provided under A.R.S. § 42-5061(A)(9). Once the device can be accurately categorized as a prosthetic appliance, it may be consequently exempt from TPT, county excise tax, and city privilege tax under A.R.S. § 42-5009(A). The ruling provides further guidance on how to substantiate the prosthetic appliance deduction from TPT and it outlines the relevant documentation needed for the relevant sales.

## 2023 PROPERTY TAX LEGISLATION AND DECISIONS

### Legislation

#### **House Bill 2064, Chapter 79. Property Tax Exemption For Disabled Persons.**

This bill defines “competent medical authority” to include registered nurse practitioners and physician assistants, for the purpose of exempting widow(er)s, persons with total or permanent disabilities or veterans with disabilities from property taxes. The bill also defines “person with a total and permanent disability.”

#### **House Bill 2534, Chapter 100. Mortgaged Property Tax Statements Can be Emailed.**

This bill allows a county treasurer, upon the mortgagor’s request, to email a statement of taxes due on the mortgagor’s property. If the mortgagor of the property changes thereafter, the bill requires that a county treasurer mail the property tax statement to the address of the property until the new mortgagor requests email delivery of the tax statement.

#### **Senate Bill 1230, Chapter 14. Annual Property Tax Eligibility Affidavits Not Needed for Educational Non-Profits.**

In part, this bill removes the requirement that nonprofits file subsequent annual eligibility affidavits with the county assessor for educational and library property, religious property and low-income Indian housing. This bill requires that nonprofits file evidence of their tax-exempt status with the county assessor. The bill also requires certain persons or institutions send written notice to the county assessor if there is any event that disqualifies them from exemption.

#### **Senate Bill 1473, Chapter 11. Annual Tax Corrections Act.**

Among numerous technical changes, this bill removes the requirement that a copy of a property tax appeal notice be served on ADOR.



## CASES

***Machu Picchu Holdings, LLC v. Pinal County*, 1 CA-TX 21-0003; 1 CA-TX 21-0007 (March 16, 2023). Utilizing the “neighborhood system” when calculating Rule B Ratios violates A.R.S. § 42-13302.**

Several property owners (“taxpayers”) sued their respective counties and the Arizona Department of Revenue alleging illegal collection of property taxes, by way of improper calculation. Property tax calculation is often assessed by the county assessor, wherein they assess a property’s limited property value (“LPV”), in part by utilizing the “Rule B” method. Under A.R.S. § 42-13302, Rule B’s LPV is established at a percentage of full cash value that is comparable to that of other properties of a similar classification. Taxpayers challenged this method, contending that the Rule B ratios applied to their property were greater than those applied to properties of a similar classification. The relevant counties calculated the Rule B ratios by dividing the counties into different geographic areas and then dividing those areas into different neighborhoods. Because of this, properties within the same classification, but located in different neighborhoods, would result in different Rule B ratios. The Court of Appeals reversed the Tax Court’s holding in favor of the counties and instead found the counties’ use of the neighborhood system to be in violation of A.R.S. § 42-13302’s plain language.

***Huhtamaki, Inc. v. Maricopa County*, 1 CA-TX 21-0010 (March 23, 2023). The Rule B methodology exception applies only when a property’s split, subdivision or consolidation is initiated by a governmental entity.** A taxpayer purchased six parcels of property. Upon the purchase, the seller of the parcels requested the Minor Land Division (“MLD”) create new legal descriptions reflecting the reorganization of the six original parcels. Because the MLD’s description required a split and various combinations of the property, A.R.S. § 42-13302(A) was invoked. A.R.S. § 42-13302(A) requires Rule B methodology be utilized to calculate property taxes under certain circumstances. An exception to the application of Rule B may be present when a “split, subdivision, or consolidation of property ‘result[ed] from an action initiated by a governmental entity.’” This exception requires the assessor to use the methodology of Rule A, instead of Rule B. Huhtamaki argued the assessor initiated the tax parcel split, necessitating the application of the Rule A method. The Court disagreed and reaffirmed the Tax Court ruling which granted the county’s motion for summary judgment. The Court reasoned that because the seller of the parcels applied for the MLD, they had initiated the split of the parcels. Accordingly, the action was not initiated by a governmental entity, thereby rendering the Rule B exception argument inapplicable.





## CASES

***5133 N Central, LLC v. Maricopa County, 1 CA-TX 22-0005 (April 18, 2023).*** **The Rule B Ratio Average Method Used by Maricopa County Does not Violate A.R.S. § 42-13302.** Taxpayers sued Maricopa County and the Arizona Department of Revenue arguing that the county’s method of calculating the limited property value violated Arizona law. In 2018, the county adopted an additional method for calculating Rule B Ratios, known as the “Ratio Average Method.” This method differs from the original method, the “Ratio Aggregate Method,” and using the different methods results in different Rule B Ratios. Taxpayers argued that the Ratio Average Method violated Section 42-13302, as this secondary method went beyond the uniform ratio that the taxpayers claim the statute’s language necessitates. Taxpayers further argued that the statute requires county assessors to use the same method when calculating Rule B Ratios. Alternatively, taxpayers argued that the county assessors do not have the authority, delegated by the legislature, to use the Ratio Average Method. The Court of Appeals affirmed the lower court’s ruling, unpersuaded by the taxpayers’ arguments. The Court reasoned that the statute’s language does not necessitate a uniform ratio, nor does it necessitate a uniform method to calculate Rule B Ratios. Finally, the Court found the statute provides county assessors wide discretion in assessing taxes on Rule B properties.

***Mesquite Power, LLC v. Arizona Department of Revenue, 1 CA-TX 22-0008 (May 4, 2023).*** **A taxpayer’s legal claims will be barred when they are claim or issue precluded.** Taxpayer appealed the dismissal of its allegation that the Arizona Department of Revenue illegally collected taxes from a 2020 valuation of the taxpayer’s property. The Court of Appeals affirmed the Tax Court’s ruling that the claim preclusion doctrine bars the taxpayer’s current claims. The Court also affirmed the Tax Court’s ruling that issue preclusion bars the taxpayer’s current claims.

# 2023 INCOME TAX UPDATES

## Legislation

### **Senate Bill 1171, Chapter 2. Annual Internal Revenue Code Conformity.**

This bill provides for conformity to the Internal Revenue Code in effect on January 1, 2023 for tax years beginning on or after January 1, 2023. The bill also provides for retroactive conformity to the provisions of the **Chips and Science Act of 2022** (P.L. 117-167), the **Inflation Reduction Act of 2022** (P.L. 117-169), and the **Consolidated Appropriations Act of 2023** (P.L. 117-328) for tax year 2022.

### **Senate Bill 1190. Chapter 7. Defines Audit.**

Bill defines what an audit is for purposes of TPT and income tax audits. Audit means a review or examination of a taxpayer's accounts, financial information, books and records, and any other document to ensure information is reported correctly on a tax return and to verify the reported tax is correct.

### **Senate Bill 1260, Chapter 67. Small Business Income Tax Rate Reduced to 2.5%.**

This bill aligns the Arizona small business income tax rate with the individual income tax rate of 2.5 percent for taxable years beginning January 1, 2023.

### **Senate Bill 1473, Chapter 11. Annual Tax Corrections Act: Entity Level Tax Election Rate Is Highest Individual Rate.**

Among numerous technical changes, this bill also makes the following substantive changes to the Arizona income tax laws.

- This bill requires that partners and shareholders of businesses that are treated as partnerships or S-corporations for federal income tax purposes and who consent to being taxed at the entity level for Arizona income tax purposes are to be subject to the highest individual income tax rate. (Sec. 7)
- Adds shelter to the definition of services for the purpose of administering the Credit for Contribution to Qualifying Charitable Organizations. (Sec. 8)

### **Senate Bill 1734, Chapter 147. Adds Arizona Families Tax Rebates; Increases Adoption Expense Subtraction; and Tweaks the Definition of Taxable Income for PTEs Electing to Be Taxed at Entity Level. Budget Reconciliation Provisions Relating to Taxation.**

Among numerous technical changes, this bill contains the following income tax provisions necessary to implement the FY 2024 state budget.

## Legislation

- **Onetime Issuance of the General Welfare Income Tax Rebate.** This bill requires the ADOR to issue a onetime individual income tax general welfare rebate to an Arizona taxpayer who meets the requisite criteria. The criteria includes Arizona taxpayers who filed a full-year resident tax return for TY 2021, claimed a Dependent Tax Credit on the tax return and meets one of the following qualifications: a) the taxpayer had a tax liability of at least \$1 on their relevant tax return; b) the taxpayer filed a full-year resident tax return for TY 2020 under the identical filing status used on the taxpayer's TY 2021 tax return and had a tax liability of at least \$1; or c) the taxpayer filed a full-year resident tax return for TY 2019 under the identical filing status used on the taxpayer's tax returns for TYs 2020 and 2021 and had a tax liability of at least \$1. The bill further outlines the administrative requirements ADOR must abide by when issuing the rebates.
- **Temporary Increase in Adoption Expense Subtraction.** This bill increases the amount of individual income tax subtraction for unreimbursed adoption expenses from \$3,000 to \$40,000, for TYs 2023, 2024 and 2025.
- **Entity Level Tax.** Includes, for taxable years beginning January 1, 2023, in the taxable income of a partnership that elects to be taxed at the entity level, the partners' distributive share of statutorily prescribed items that require separate computation.



## CASES

***State of Ariz., ex rel., Ariz. Dep't of Revenue v. Justin Ray Robinson, 1 CA-TX 22-0001 (March 16, 2023).*** **Appeal to Tax Court to Abate Interest on Income Tax Assessment Must be Supported by Legal Authority.** Mr. Robinson was sued by the ADOR for unpaid taxes. Mr. Robinson, at the time an inmate in the Arizona Department of Corrections, wrote to the tax court that he had no prior notice of past due taxes. The ADOR argued that his response served as an Answer and the Tax Court granted ADOR's motion for judgment on the pleadings. Mr. Robinson appealed, asking the Court of Appeals to cancel the accrued interest and stop the interest from being added. The Court affirmed the tax court's ruling, as Mr. Robinson provided no legal authority to support his contention that interest should be abated.

# MISCELLANEOUS TAX ITEMS

## Legislation

### **House Bill 2223, Chapter 25. Microbrewery Festival and Fair Liquor Licensing.**

In relevant part, this bill requires, beginning January 1, 2024, a farm winery, manufacturer, microbrewery, craft distiller or direct shipment licensee to pay the luxury privilege tax to ADOR annually, rather than monthly. Such tax must be paid by the twentieth day of the first month of the year succeeding the year in which the tax accrues.

### **House Bill 2432, Chapter 113. Children's Health Insurance Program Fund Appropriation and AHCCCS Expenditure Authority.**

This bill appropriates \$58,487,600 from the Children's Health Insurance Program Fund and \$3,307,915,900 from expenditure authority in FY 2023 to the Arizona Health Care Cost Containment System ("AHCCCS") for adjustments in formula requirements.

### **Senate Bill 1190. Chapter 7. Defines Audit.**

Bill defines what an audit is for purposes of TPT and income tax audits. Audit means a review or examination of a taxpayer's accounts, financial information, books and records, and any other document to ensure information is reported correctly on a tax return and to verify the reported tax is correct.

### **Senate Bill 1242. Continuation of State Board of Tax Appeals.**

The State Board of Tax Appeals hears transaction privilege tax, income tax, use luxury and estate tax appeals (the State Board of Equalization hears property tax appeals from Maricopa and Pima Counties). This bill continues the Board of Tax Appeals for an additional 8 years until June 30, 2031 and is retroactive to July 1, 2023.



## CASES

***Daniel Pope v. City of Phoenix*, 1 CA-TX 20-0006; 1 CA-TX 21-0004 (June 13, 2023). A rental car “Customer Facility Charge” does not violate the Arizona Constitution’s anti-diversion provision.** The City of Phoenix implemented a customer facility charge (“CFC”) of \$6 per transaction day for each vehicle rented at the newly built Sky Harbor rental car facility. Funds generated by the CFC were to be used to pay the debts accrued for the construction of the facility, as well as for the ongoing costs associated with the facility. Appellants sued the City on the claim that the CFC violated the Arizona Constitution’s anti-diversion provision, which requires that funds generated by taxes or fees imposed on road users for their road use be expended only for road purposes. The Court of Appeals affirmed the tax court’s dismissal of the claims. The Court reasoned that the CFC does not affect whether a driver may lawfully operate a rental vehicle and thus it is not “a prerequisite to . . . the legal operation or use of a vehicle on a public road’ as necessary to implicate the anti-diversion provision.”

***Law Office of Anne Brady, PLLC v. Dep’t of Econ. Security, ESA Tax Unit*, 1 CA-TX 20-0011 (June 1, 2023). Individuals Contracted by a Tax Service to Provide Tax Preparation Services Were Employees and Not Independent Contractors Because Too Much Control Was Exerted Over Them.** Brady’s Tax Service, an income tax preparation business, paid various individuals on a commission-only basis to prepare tax-returns. Brady’s Tax Service did not pay unemployment insurance tax on the payments it made to the contracted individuals. The Arizona Department of Economic Security (“ADES”) found the commissions paid by the company constituted wages for the purpose of unemployment insurance tax. Brady’s Tax Service appealed, asserting that the individuals worked as independent contractors. The company further asserted that regardless of the individuals’ status, A.R.S. § 23-617(23)<sup>1</sup> exempted their tax preparation services from unemployment insurance coverage. The Appeals Board applied the statute and its implementing regulation, A.A.C. R6-3-1720(B)(4)<sup>2</sup>, affirming ADES. The Court of Appeals affirmed the Appeals Board. The Court reasoned that Brady’s exerted control over the individuals that went beyond that which is necessary to ensure the accuracy of the tax preparer’s returns. This control renders the individuals as employees, not independent contractors. The Court further struck down A.A.C. R6-3-1720(B)(4) as it impermissibly restricted the intended scope of the statutory exemption.

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<sup>1</sup> A.R.S. § 23-617(23) provides: “Services performed by an individual for an employing unit in the preparation of tax returns and related schedules and documents, if all services are performed for remuneration solely by way of commissions, independent of the control of the employing unit, other than that required by the internal revenue service for correct preparation of the returns.”

<sup>2</sup> A.A.C. R6-3-1720(B)(4) provides in pertinent part: “The services of the tax preparer will not be exempt if such individual doing the work is subject to any controls, whether exercised or not, other than those required by the IRS.”

## Arizona State and Local Tax Team

The firm's tax lawyers provide counseling across the full range of state and local tax implications for business transactions, including multistate income tax responsibilities as well as sales and use tax collection obligations. Our experienced litigators represent clients in all aspects of tax controversy and disputes before state and local administrative agencies, the IRS, state tax or superior courts, the courts of appeals, and the United States Supreme Court. We also structure, negotiate, and provide tax analysis and guidance in connection with a wide variety of corporate and individual transactions.





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