



Sales and Use Tax Implications of Loyalty Programs

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Examining a loyalty program reward's form, structure, and parameters is essential for determining the state sales and use tax consequences.

In today's competitive consumer environment, loyalty programs are ubiquitous with the shopping experience. Most companies offer some form of a "loyalty" or "reward" program. When consumer spending slowed as a result of the economic downturn, consumer loyalty, and with it, loyalty programs, became even more important. For example, according to Jupiter Research, more than 75% of consumers today have at least one loyalty card, and the number of people with two or more is estimated to be one-third of the shopping population.¹ And loyalty programs are big business—according to *Forbes* in an article published in 2011, "U.S. companies spend \$50 billion a year on [various] loyalty programs. And when done right, loyalty programs can generate as much as 20 percent of a company's profits."²

Many can trace back their awareness of loyalty programs to airline frequent flyer programs and hotel re-

ward programs, but loyalty programs predate these programs and have actually been around for more than 100 years.³ One of the earliest loyalty programs was the S&H Green Stamps program, which began in the 1930s.⁴ Under that program, consumers received stamps when making purchases, collected those stamps in a booklet and later redeemed the booklet for products when the consumer accumulated the requisite number of stamps. In essence, the booklet functioned as an alternative for a currency having a certain associated value.

While the general premise of the S&H Green Stamps program is still applicable today, loyalty programs have evolved considerably from the trading stamps model. And while airline frequent flyer programs still exist today, current loyalty programs are varied, significantly more complex, structurally diverse, and constantly evolving. State tax laws, on the other hand, have not, in many instances,

kept up with the evolution of loyalty programs from a business perspective. As a result, taxpayers are often left to apply historic precedent to modern-day loyalty programs with varying degrees of success, depending on the particular program and the applicable state law. Adding further challenge, state laws are not uniform; thus, in addition to applying old precedent, taxpayers have to contend with applying non-uniform laws and interpretative guidance to their facts, which can result in different conclusions across states, even in states with identical or substantially similar statutes.

LOYALTY PROGRAMS GENERALLY

Very generally, loyalty programs are incentive-based programs whereby a company offers rewards, vouchers or similar instruments in exchange/consideration of certain consumer behavior (e.g., purchasing, referrals, etc.) that can be applied toward future purchases of products/services offered by the company (or an affiliate) (generally for purposes of this article such programs will be referred to as “loyalty programs” and the associated rewards as “loyalty rewards”). Programs are also offered by service providers, including airlines, spas, gyms, and restaurants, to name a few. However, it is hard to generalize as to the structure of loyalty programs and it would be unwise to do so, as today’s loyalty programs are structured in a variety of ways. Usually these programs entail “rewarding” certain consumer behaviors, including, rewarding prior purchases, incentivizing future purchases, rewarding the completion of a survey, referring a friend, and hosting events with the loyalty program sponsor, by way of examples.

Loyalty programs are also offered through third party arrangements (i.e., offered by a third party different than the one with whom it will be redeemed). Such programs are often structured as credit card reward programs, rewards sponsored by the related affiliate, franchisee-operated programs, and employee-sponsored

reward programs. As noted, the rewards themselves are offered in any number of forms, including but not limited to, cards, points, certificates, vouchers, credits, codes, and coupons. The business-to-business industry has also developed in this area whereby third-party instruments are used to “fund” the retailers’ programs, or to augment them.

While there are several discrete sales and use tax issues that arise in connection with an analysis of a loyalty program, the most common issue and the one that will be examined in this article relates to the ramification of the redemption of an award in exchange for a taxable item. Specifically, when rewards are exchanged for discounts on the sale of tangible personal property, is the value of the reward considered part of the “sales price” subject to the tax? The form of the reward, the program’s structure and the parameters of the reward are critically important in analyzing the state sales and use tax consequences.⁵

CONSIDERATION PAID AND THE DEFINITION OF SALES PRICE

As a general matter, sales tax is imposed on the “sales price” of a taxable item. While the relevant statutory terms may vary, the concept is the same; tax is imposed on a statutorily-defined base, be it “sales price,” “receipts,” or “gross receipts.” That statutory definition typically refers to the total amount of “consideration” paid for the taxable item. By way of example, the Streamlined Sales and Use Tax Agreement broadly defines “sales price” as the “total amount of consideration ... for which personal property or services are sold, leased, or rented.”⁶ However, state definitions of “receipts” or similar terms are not uni-

form. Even where similarities exist, determining the amount of “consideration” paid in connection with a particular sale when the redemption of a loyalty reward is involved is not always clear. Essentially, the question becomes, does the provision of a reward constitute taxable consideration?

Often the most analogous guidance is found in the coupon context. The typical sales and use tax scheme employed across the country draws a distinction first between coupons and general price reductions, and a further distinction between retailer coupons and manufacturer coupons. With regard to purchase price reductions, “[a] cash discount given by the seller at the time of the sale, and not dependent on time of payment, volume of purchases, or similar factors, is usually excluded from the sales tax base, on the ground that the discount is not part of the sales price.”⁷ When “coupons” are involved, most sales and use tax schemes draw a distinction between: (1) coupons issued by the retailer to the customer for which the retailer is not reimbursed (by the manufacturer or any other third party), and (2) manufacturer coupons for which the retailer is reimbursed (by the manufacturer or other third party).⁸ Across the country, it is “widely held that discount coupons for which retailers are not reimbursed by a manufacturer or other person serve to reduce the sales tax measure.”⁹ In contrast, manufacturer’s coupons “which reduce the sales price to the consumer but for which the retailer is reimbursed by the manufacturer or distributor, are usually held not to reduce the state’s sales tax measure” on the theory that the retailer’s receipts include both what it receives from the customer and what it receives from the manufacturer or distributor.¹⁰

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- 1 www.forbes.com/2007/01/02/frequent-flyer-miles-ent-sales-cx_kw_0102whartonloyalty.html.
- 2 www.forbes.com/sites/mckinsey/2011/12/01/loyalty-is-it-really-working-for-you/.
- 3 www.forbes.com/2007/01/02/frequent-flyer-miles-ent-sales-cx_kw_0102whartonloyalty.html.
- 4 www.forbes.com/2007/01/02/frequent-flyer-miles-ent-sales-cx_kw_0102whartonloyalty.html.

⁵ For additional background, see Hellerstein and Hellerstein, *State Taxation* (Thomson Reuters, 1998), ¶ 17.06[6].

⁶ SSUTA Appendix C, Part I.

⁷ See Hellerstein, *State Taxation*, ¶ 17.05[1].

⁸ *Id.*, ¶ 17.05[2].

⁹ *Id.*, ¶ 17.05[2][a].

¹⁰ *Id.*, ¶ 17.05[2][b].

The distinction between manufacturer and retailer coupons is often addressed by revenue departments in regulation and informal or formal guidance. Despite the widespread adoption of the distinction between retailer coupons and manufacturer coupons and the general conclusion that one such coupon is properly viewed as “consideration,” applying that framework to other fact patterns, especially in the rewards context, leads to inconsistent and often unsatisfying results.¹¹ Indeed, the coupon framework is routinely applied to new fact patterns, which have the appearance of being similar, but are nevertheless not a perfect fit, often resulting in litigation.

DIFFERENT STATES, DIFFERENT RESULTS?

Taxpayers are faced with the reality that state sales and use tax statutes, regulations and informal guidance often do not adequately address how to tax the purchase of taxable goods through the redemption of a loyalty reward. A survey of three states, New York, Georgia and Washington bear out this reality.

New York

Similar to the Streamlined Sales and Use Tax Agreement, New York defines “receipt” for sales tax purposes as: “The amount of the sale price of any property ... valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser...”¹² While arguably expansive, the definition does not always provide a satisfactory answer as to whether the provision of a loyalty reward would constitute a “receipt” for sales tax purposes. Is such a reward “valued in money”? Is it “consideration”? Or is it a “coupon” of sorts?

New York is a state that has some guidance related to loyalty programs, so in addition to applying the statute,

taxpayers must consider the guidance in determining whether certain loyalty rewards would be considered taxable consideration.

Similar to other states, New York has followed the “coupon” framework in analyzing reward programs—at least as applied to certain fact patterns. New York has addressed the sales and use tax consequences of using “store loyalty cards” through informal guidance.¹³ In that guidance, the Department of Taxation and Finance (the “Department”) has taken the position that the impact of the use of the loyalty card will be determined by applying the principles applicable to coupons—that is, if the retailer is reimbursed for the discount, the full selling price will be subject to tax.¹⁴ In this regard, New York generally follows the Streamlined treatment: the impact on the amount of taxable “receipts” associated with the customer’s purchase depends on whether the coupon is funded by the retailer or by the manufacturer of the item being purchased.¹⁵ The rationale being that the tax is imposed on the total receipts received by the vendor, whether those

receipts were earned in connection with Intercontinental Hotel Group’s (IHG) reward program were subject to sales tax. After accumulating enough points, reward members would redeem points through IHG for free hotel stays. IHG would then mail the member a voucher which instructed the member to contact IHG. IHG would arrange for the hotel stay at the participating hotel. IHG would then pay each franchisee hotel a certain amount to “reimburse” the hotel for the stay. The Department concluded that the hotel at issue was required to collect tax on the amount paid to the hotel by IHG, which essentially included the value of redeemed points.¹⁷

The New York State Tax Appeals Tribunal came to the opposite conclusion, in *Matter of Marriott International, Inc.*, DTA No. 821078 (N.Y. Tax. App. Trib., 1/14/10) and effectively revoked the Department’s opinion in *Turf House, Inc./Holiday Inn*. The Tribunal found that the members previously provided the consideration for occupancy of the hotel rooms by

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receipts come wholly from the purchaser or partly from the purchaser and partly from the manufacturer.¹⁶

The framework, however, is not always easy to apply to a complicated loyalty program fact pattern. Consider, for example, the treatment of a hotel rewards program under New York law. New York addressed a form of reward program in *Turf House, Inc./Holiday Inn*, TSB-A-04(19), 9/2/04, in which the Depart-

ment considered whether points earned in connection with Intercontinental Hotel Group’s (IHG) reward program were subject to sales tax. After accumulating enough points, reward members would redeem points through IHG for free hotel stays. IHG would then mail the member a voucher which instructed the member to contact IHG. IHG would arrange for the hotel stay at the participating hotel. IHG would then pay each franchisee hotel a certain amount to “reimburse” the hotel for the stay. The Department concluded that the hotel at issue was required to collect tax on the amount paid to the hotel by IHG, which essentially included the value of redeemed points.¹⁷

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Marriott Rewards in the form of rewards points.

The ALJ stated that the reimbursement to the hotels:

[d]id not entitle Marriott Rewards to the right to occupy a room or the right to distribute a room. It follows that the reimbursement was not consideration for hotel occupancy. Rather the method of payment supports the finding, as asserted by petitioners, that the Rewards Program was designed to reimburse the hotel for participation in the Marriott Rewards Program which, in turn, was a marketing tool intended to increase stays at Marriott Hotels. *Therefore, the consideration received by the hotels from Marriott Rewards is not subject to sales tax. The consideration for the occupancy of the hotel room was, in fact, provided by the customer who usually earned the points through previous lodgings at Marriott hotels....*The Division notes that if there is no occupancy, there was no payment. This argument is without merit because it fails to recognize that it would be erroneous to tax a transaction as consideration for a stay in a hotel room when the primary purpose of the payment was reimbursement for participation in a program which was a marketing program to promote stays in a hotel. The fact that the hotels are reimbursed according to a formula that factors in occupancy does not alter this conclusion.¹⁹

Interestingly, the ALJ distinguished the case from the “trading stamp” rule, stating that the redemption of trading stamps for tangible personal property is subject to sales tax, which the state argued applied. The ALJ concluded that:

[t]he application of this rule to the issue presented here is dubious. As pointed out

by petitioners, a central difference is that under the trading stamp rule, the tax is collected from the individual who redeemed the stamps. In contrast, here the Division is not seeking to collect the tax sought on the discounted room from the hotel patron. Rather, it is trying to collect the tax from Marriott Rewards. It follows that the trading stamp rule is not relevant to this matter.²⁰

What is entirely clear is that the states differ in their approaches. Thus, there is no “one size fits all” answer for taxpayers.

One could presumably apply the logic in the *Marriott* decision to other loyalty programs—airline miles, hotel rewards, retailer rewards, etc.—however, as the case makes clear, the program’s underlying structure is critical to the analysis, and loyalty program structures vary. Clearly, a key question in New York is whether the entity providing the taxable good or service at issue receives “reimbursement” or “consideration” in connection with redemption of a loyalty reward. As the above suggests, an answer to this question may be quite difficult, depending on the nature of the program

at issue, especially where such a program involves a third-party or multiple third parties. Further, it is not clear the extent to which a taxpayer may look to guidance dealing with one type of program to analyze a slightly different program. The presence of material or immaterial factual differences could lead to vastly different tax results. Indeed, a pure/unprincipled application of the “trading stamp” rule would have rendered the Marriott reward program taxable.²¹

Georgia

Georgia is an example of a state that does not have any direct guidance related to loyalty programs. Thus, in order to analyze whether loyalty rewards would be considered taxable consideration in Georgia, one would begin with the statutory definitions of “sales price” and then review the existing regulations and case law, which deal primarily with trading stamps.

Georgia sales/use tax is imposed on the “sales price” of taxable tangible personal property and services. Georgia defines “sales price” as “the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise without [certain deductions].”²² Like many other states, Georgia excludes from the definition of

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¹¹ By way of example, guidance issued in connection with the sales and use taxation of “discount vouchers” offered by internet-based social coupon programs focused on this type of analysis with mixed success. For an overview of the issue see e.g., “Social Confusion: How Do Sales Taxes Apply To A Group?” www.forbes.com/sites/janetnovack/2011/02/18/social-confusion-how-do-sales-taxes-apply-to-a-group/ (2/18/11).

¹² N.Y. Tax Law § 1101(b)(3) (emphasis added); see also 20 NYCRR § 526.5. The definition of “complimentary accommodations” contained in 20 NYCRR § 527.9(f) is consistent with the notion that there must be consideration to constitute receipts/rent for sales tax purposes.

¹³ TSB-M-11(10)S (6/29/11).

¹⁴ *Id.* (“When these loyalty card discounts are given and the discounted item is subject to sales tax, the amount subject to sales tax generally depends on whether the discount reflects a manufacturer’s discount or a store discount. If the store is reimbursed for the amount of the discount by the manufacturer, distributor or other third party, it is a manufacturer’s discount. If the store re-

ceives no reimbursement from a third party for the amount of the discount given, it is a store discount.”).

¹⁵ See 20 NYCRR § 526.5.

¹⁶ For a more recent example, see *In the Matter of GRJH, Inc.*, DTA No. 825192 (N.Y. Div. Tax App., 1/15/15) in which the Division of Tax Appeals considered whether the taxpayer was required to include in its taxable receipts the sale of gasoline that was reimbursed by a third-party provider pursuant to a rewards program. The taxpayer was in the business of motor fuel and diesel fuel distribution. The taxpayer provided a discounted price based on the number of points the customer accrued by making purchases at a participating supermarket. The taxpayer received the discounted sales amount (and sales taxes) from the customer and was reimbursed for the discounted amount by Sunoco. The taxpayer did not include the credits received from Sunoco for purposes of sales tax receipts. The ALJ found that the Department’s analogy of the fuel discount program to a manufacturer’s coupon to be “fitting.” “[B]oth the pump price received from the customer and the credit received from Sunoco are items of value received by petitioner for the gasoline it sells, and both are clearly encompassed within the

statutory language defining “receipt” as consisting of the sale price “valued in money, whether received in money or otherwise.”

¹⁷ Compare with NYC Finance Memorandum O6-2 (11/30/06).

¹⁸ The program in the Marriott case worked similarly to the IHG program at issue in *Turf House, Inc./Holiday Inn*.

¹⁹ Emphasis added, internal citations omitted.

²⁰ For another example of the Department veering from the coupon framework, see *Sales Tax Treatment Relating to the Sale and Redemption of Certain Prepaid Discount Vouchers*, TSB-M-11(16)S (11/19/11), in which the Department attempts to differentiate a specific type of Deal of the Day voucher from other discount vouchers and third-party discount coupons. Specifically, the Department concluded that when a stated face value voucher (a voucher with a specifically stated value) is redeemed, it is generally treated in the same manner as a gift card. That is, it is treated as cash up to the stated face value of the voucher.

²¹ For a discussion of a Virginia ruling addressing a similar issue, see Hellerstein, *State Taxation*, ¶ 17.06[6][b].

²² O.C.G.A. § 48-8-2(34)(A).

sales price “discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale.”²³ In addition, the Georgia statute provides that consideration the seller receives from third parties will be included in the tax base

549 (Ga. 1967), held that “trading stamps” were taxable consideration. In *Colonial Stores*, a grocery store rewarded its customers for shopping at the store by issuing “Sav-a-Stamps” with each retail purchase, at a rate of 10 cents per stamp. The store occasionally gave away Sav-a-Stamps

to complement the redemption value of trading stamps with cash.

While it is helpful to be aware of the existing authority, the guidance related to vouchers and trading stamps may not be particularly relevant to modern-day loyalty programs, as there are so many variations and differing fact

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if the seller “actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale.”²⁴

Therefore, in order to be treated as part of the taxable base, loyalty rewards must constitute “consideration” for the sale, but if they are in the nature of a discount or retailer’s coupon, they would not be included. Unfortunately, there is a dearth of authority in Georgia for purposes of determining whether the various types of loyalty rewards would be treated as “consideration” or would be excluded as some type of discount or coupon.

The closest guidance in Georgia involves “vouchers” and “trading stamps.” Georgia taxes the full retail value of an item purchased with a combination of cash and a voucher such as a Groupon or LivingSocial coupon.²⁵ Thus the Georgia Department of Revenue treats these vouchers as consideration constituting part of the sales price.²⁶

Additionally, an old Georgia Supreme Court opinion, *Colonial Stores, Inc. v. Undercofler*, 153 S.E.2d

without requiring a retail purchase. Collectors of the stamps could then redeem the stamps for merchandise at the store.

The Supreme Court of Georgia held that a transaction in which a customer exchanged Sav-a-Stamps for the store’s merchandise was a sale subject to the sales tax. More specifically, the stamps themselves represented “consideration” because customers paid for the merchandise they received in exchange for the stamps during the earlier transactions in which they earned the stamps. The court wrote: “Thus, although the objective of the trading stamp scheme may have been sales promotion and enticement of customers, the premium merchandise was not given away. It was paid for by the customers since the cost was included in the retail sales prices charged them.”²⁷

Subsequent to *Colonial Stores*, the Georgia Department of Revenue issued a regulation stating that transactions redeeming trading stamps are subject to the sales tax:

When a trading stamp company accepts trade stamps or a combination of trade stamps and cash in exchange for premiums, the transaction is subject to the tax and the trading stamp company shall collect the tax from the person surrendering the stamps, based on the total value of the stamp book and any cash paid. The trading stamp company shall not pay the tax on the purchase of such premiums, but should furnish its suppliers resale certificates....²⁸

Notably, the regulation contemplates both that the trading stamps will have a knowable redemption value and that purchasers may sup-

plement the redemption value of trading stamps with cash. While it is helpful to be aware of the existing authority, the guidance related to vouchers and trading stamps may not be particularly relevant to modern-day loyalty programs, as there are so many variations and differing fact

Washington

While Georgia’s treatment of loyalty programs lacks certainty, Washington has undertaken an extensive effort to be transparent in its taxation of loyalty rewards. Washington is important because it is a party to the Streamlined Sales and Use Tax Agreement, having adopted the uniform meaning of “sales price,”²⁹ and because it is one of the few states to have issued specific guidance relating to loyalty programs.³⁰ The guidance came about after the Department’s Audit Division began taking the position that some retailers should have been collecting retail sales tax on loyalty rewards when the rewards were earned by making prior purchases from the same retailer. The Department’s Appeals Division initially sustained at least one of those assessments, finding that because the member earned points by becoming a member, providing an email address and buying goods, the retailer received benefits and, therefore, the reward redemption was for consideration and not a discount.

The Department convened a small stakeholder group to discuss the issue, and the result was two forms of published guidance—an Excise Tax Advisory and an Interim Statement.³¹ The Excise Tax Advisory states several important conclusions, including:

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²³ O.C.G.A. § 48-8-2(34)(B)(i).

²⁴ O.C.G.A. § 48-8-2(34)(C)(i).

²⁵ See Georgia Dept of Rev., *Georgia Section 328 Best Practices Matrix* (1/14/14).

²⁶ *Id.*

²⁷ *Id.* at 552.

²⁸ Ga. Comp. R. & Regs. 560-12-2-.85(3).

²⁹ RCW 82.08.010(1)(b), (c).

³⁰ Washington Excise Tax Advisory 3191 (9/30/14); Washington Interim Statement Regarding Rewards Programs – Commingling Rewards Program Awards (11/12/14).

³¹ See footnote 30.

- A member's provision of his or her name, telephone number, email address or physical address does not represent consideration.
- Rewards provided solely for enrollment in the program, or the passage of time, or solely for purchasing seller's product are excluded from the selling price.

Equally important, the Excise Tax Advisory excludes from qualifying discounts:

- Rewards for completing surveys for the retailer.
- Rewards received for acting as a secret shopper.
- Rewards received as an employee for making sales exceeding a certain target.
- Rewards purchased for cash.
- Rewards earned from one retailer that are redeemable at another retailer, and when the first retailer reimburses the second.
- Rewards received for purchases using a co-branded credit card when the bank reimburses the retailer.
- Rewards for purchases at one retailer, under a program administered by a separate company, when the separate company reimburses the retailer.

Thus, such rewards would be considered taxable consideration.

Interestingly, the Excise Tax Advisory appears to take a simplistic view of third party consideration—if the retailer receives consideration from a third party, the reward is taxable. However, while both the Streamlined Sales and Use Tax Agreement and Washington law, provide that discounts “that are not reimbursed by a third party” are excluded from the “sales price”, both also go on to make that conditioned on several requirements. Under both, the term “sales price” includes third party consideration only if (1) the consideration is directly related to a price reduction or discount, (2) the seller has an obligation to pass the price reduction through to the purchaser; (3) the amount is fixed and determinable at the time of the sale of the item to the purchaser, and (4) (i) the purchaser presents documentation to the seller when such documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse; (ii) the purchaser identifies him or herself as a member of a group entitled to a price reduction; or (iii) the price reduction is identified as a third party price reduction on the invoice received by the purchaser, or on the documentation presented by the purchaser.

Therefore, it appears that several forms of third party consideration would not constitute part of the sales price. For example, a lump sum payment from a third party that does not require that the retailer pass on a price reduction, or that is not fixed and determinable at the time of the sale of the item to the purchaser, should not constitute part of the retailer's sales price.

The Interim Statement is intended to address a thorny practical problem for retailers, and by its nature, is subject to further review by the Department of Revenue. Having established in the Excise Tax Advisory that rewards received for consideration are taxable, but that certain rewards qualify as discounts, the Interim Statement addresses the problem that many retailers do not trace how specific rewards are earned. Consequently, they have commingled (taxable and non-taxable without the ability to differentiate) rewards. As a generality, the Department's position is that in the absence of the ability to trace the rewards, they will all be taxable. Alternatively, the Department has offered a “prepayment option” whereby a retailer may prepay sales tax on taxable rewards at the time they are issued if they will be commingled with dis-

DuCharme ad

1/3 pg, 4 color

count rewards. While the Department's purpose for offering this prepayment option is well intended, it is yet to be seen whether retailers can and will report using this prepayment option. So far, it appears that retailers may have as much trouble complying with the prepayment option as trying to trace how rewards are earned.

Finally, neither form of guidance addresses a potential use tax issue. An early unpublished draft of the Excise Tax Advisory provided that if a reward constituted a bona fide discount, but the redemption reduces the sales price to zero, the retailer would owe use tax on the product provided at no charge. This result may be consistent with the recent case of *Sprint Spectrum, LP v. State, Dept. of Revenue*, 174 Wash. App. 645, 302 P.2d 1280 (Wash. App. Div., 2013), *rev. denied* 178 Wn.2d 1024 (2013). During the stakeholder process, attempts were made to analogize loyalty programs with two-for-one arrangements. The Department agrees that two-for-one purchases are not subject to additional sales tax (sales tax is simply owed on the cash consideration paid), and furthermore, there is no use tax because the retailer has made a sale for consideration. However, the Department distinguishes loyalty programs and two-for-one arrangements because of the passage of time between the purchases in which the reward is earned and the redemption. Therefore, the use tax issue arises for the retailer with a loyalty program but not a two-for-one arrangement. It is unclear what the absence of this discussion in the final Excise Tax Advisory means, but retailers should be aware of this potential use tax issue.

RISKS FACING TAXPAYERS

As the above discussion of three states illustrates, determining the tax treatment of loyalty programs is quite complex and the analysis may often result in uncertainty. This is true particularly because there are many types

of loyalty programs, and a ruling related to the taxation of one program may not necessarily be relevant to how the redemption of loyalty rewards pursuant to another program should be treated.

What is entirely clear is that the states differ in their approaches. Thus, there is no "one size fits all" answer for taxpayers. This can leave taxpayers open to certain risks. For example, a company providing a loyalty program may determine that it will not collect any tax when loyalty rewards are redeemed on the basis that the redemption of the rewards operates akin to a retailer's coupon and is not taxable. This may very well be the case in a number of states. However, by taking a blanket approach across all states, this company risks being audited and assessed by states that do not agree with its characterization. At the other end of the spectrum, a company that does not want to face the risk of audit could take the global position that loyalty rewards constitute consideration when redeemed and collect tax on the full amount of the sale. In this situation, it is possible that a company may be over-collecting in certain states and thus opening itself up to the risk of a class action lawsuit.

WHAT SHOULD TAXPAYERS DO?

Given the complexities and uncertainty in this area, a company's tax department should make every effort to understand the specifics of the company's loyalty program. It can then examine the states in which the company has the most loyalty reward redemptions and determine the best course of action in each state. It may be advisable to seek a ruling from the revenue department in a state where the guidance is unclear and the potential liability could be significant. It is also vitally important for tax departments to be in constant communication with the business side of the program. In the authors' experience,

the business side is often reinventing, modifying, and updating a company's loyalty programs as well as developing new and different loyalty programs. Modifications to an existing program can affect the tax treatment of the program, and any new programs' tax treatment may not be the same as the prior program.

Finally, taxpayers should consider whether to implement a compliance system that can track applicable data for purposes of the positions the company determines to take in each state, including tracking the rewards and how they are earned and redeemed. As evidenced by the ongoing discussions in Washington, this type of granular ability could shape whether something is taxable.

As this article highlights, whether or not to include redeemed loyalty rewards in the tax base for purposes of collecting tax on the sales transaction is a complicated question. The starting point for analysis should be the state's definition of the base upon which the tax is imposed (i.e. sales price). While some states have further authority that provides direct guidance for today's loyalty programs, the specific guidance in many other states is restricted due to the factual basis of a particular case or ruling. In other states, the relevant authority is anemic at best. Nonetheless, taxpayers should understand the states' positions to the extent possible, knowing that the answers will not be uniform across state lines. The determination as to taxability will also depend in large part on the specifics of each loyalty program, so it is important to have a working understanding of the company's loyalty program, including how rewards are earned and redeemed, as well as any changes or variations that are made in the program that could affect the taxation analysis. Taxpayers are well advised to consider their reward programs proactively given the increasing focus such programs get both in the tax and business context. ●