

GeTtin' SALTY Podcast – Episode 64

Nikki Dobay ([00:00](#)):

Hello and welcome to GeTtin' SALTY a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Sacramento, California, and Portland, Oregon offices. I'm very pleased to be joined today by a former colleague and good friend, Fred Nicely senior tax counsel at the Council on State Taxation.

([00:23](#)):

Fred, thank you so much for joining me.

Fred Nicely ([00:26](#)):

Thank you so much, Nikki. We really miss working with you directly. But it's hard to believe I just passed my 18th year working at the Council on State Taxation.

Nikki Dobay ([00:36](#)):

That's pretty crazy. And I'm pretty sure you've been on the podcast before, but I don't know if I have ever asked you this question on the podcast, and I think it will be a fun one for the listeners. How did you get into state and local tax?

Fred Nicely ([00:50](#)):

Yeah. Well, Nikki, that's an excellent question. And I got into state, state and local tax, I have to blame my grandfather.

Nikki Dobay ([00:57](#)):

I've never had anybody blame their grandfather.

Fred Nicely ([01:00](#)):

Yeah. My grandfather, I remember when I was a kid, I was probably five, six years old and asked him what he did for a living and I said, "Oh grandpa, that's the most boring job I can think of." And what was he? He was a state and local tax attorney and he spent his first three years with the Ohio Department of Taxation, last 10 or 11 years, he was actually a tax commissioner. And then how this all happened was, it was my junior year in college and he asked if I was looking for a summer job and I said, yeah, I was looking at staying in Columbus rather than going back to Akron, Ohio. And he said that, well, maybe I can get you a job at the Ohio Department of Taxation as an intern and lo and behold that's how I got sucked into it, Nikki.

Nikki Dobay ([01:46](#)):

So what I'm hearing, you're a nepo baby, is that-

Fred Nicely ([01:50](#)):

I am, yeah. Well, not direct though. Indirect. My mom's an attorney, but she was not a state tax lawyer.

Nikki Dobay ([01:57](#)):

All right. All right. Thank you so much. And you're in good company, most people... Although I mean you kind of rejected it very early on, but somehow it caught up with you and it's been quite a career. So how long were you at the Ohio Department of Taxation then?

Fred Nicely ([02:15](#)):

Yeah, I was with the Ohio Department of Taxation for 20 years. So it's a good time. Last eight years I was the chief counsel for the department. So that was a lot of fun, getting to make some of the legal decisions.

Nikki Dobay ([02:30](#)):

But now you're on the other side helping out the business community at COST and we are always grateful for your contributions. And today we are going to be talking about taxing the digital economy, this is a topic that you recently presented on at a few of the conferences. It's a pretty big topic, so we'll try to keep the conversation high level and on track. But I guess first, how did you get involved with these presentations and what's kind of the overarching theme here of why this is such a hot topic at conferences this fall?

Fred Nicely ([03:08](#)):

Yeah. Nikki, this is something that COST has been very concerned with states taxing the digital economy for really the last eight years or so on the states looking at broadening their sales tax base. And the real big concern is states are already taxing a lot of business inputs and that the states, when they look at taxing the digital economy, are they going to inadvertently pick up more tax on business inputs? And that if we don't make it very clear that this is an issue and all out there, states' legislators can inadvertently put in a broad base and make it very difficult for them later on when they're trying to put in an exemption that has a fiscal cost to it to be able to change the tax on something.

([03:55](#)):

So we've worked with the National Conference of State Legislators and other groups for several years and it was great to be able to do a presentation last week at the Hartman Conference to talk about taxing digital products.

Nikki Dobay ([04:08](#)):

Right. Right. And so from your perspective, where's the best place to start on this? Because I know there's a few organizations working on this issue and I know COST has been very vocal on the business inputs piece, but catching up some of the listeners that maybe aren't as deep into it as you are. How did we get here?

Fred Nicely ([04:30](#)):

Yeah, so I look at it typically when you look at sales tax issues, you look at Streamlined Sales Tax, you don't look at Multistate Tax Commission, but the Multistate Tax Commission decided a couple years ago that they were going to look at what states were doing in taxing digital products. So they've been studying this issue for quite some time and they put together a specialized work group that's comprised of states and also practitioners and some business members to look at what are states doing in taxing digital products and come up with some results from that.

([05:05](#)):

It's been led by a person from Texas, [inaudible 00:05:10] counsel from the comptroller's office, Ray Langenberg, and I give him a lot of credit for having a lot of energy and spearheading this work group looking at defining digital products. I think it's safe to say from the business community, Nikki, we don't agree with the extent that he's gone to and looking at taxing digital products, but he's put a lot of energy

and I'd have to say he puts a lot of thought into it, but I don't think everything has been completely thought through.

Nikki Dobay ([05:36](#)):

Yeah, I feel like this is an area where you can create a definition which, and I think I might've read a quote from you after Hartman, where you said in theory or as a hypothetical, this could sound like a good idea, but then when you go to put this in practice it becomes very difficult. So I think we have the practical piece of this that's really challenging. But then also to your point on taxing business inputs, that seems to be an area where Ray has tended to be fairly in-aligned with some of cost's position in the business community's position that there should be, if you're going to have a broad definition, you should also have a broad exemption. And so is that still where he's at with his proposal or the MTC's proposal is at or whoever's proposal this is?

Fred Nicely ([06:29](#)):

Yeah. I think it's safe to say it's Ray's proposal the way he's been running the work group meeting, and I think that's fine. And it is very fair I think to say that he does want a very broad tax on all digital products and all that are out there. But he's also very good at saying that business inputs should not be subject to the tax and having be the exemption.

([06:51](#)):

Now with all that said though, he has said that, "I realize that my state, Texas, taxes data processing, information services. Other states like Ohio also impose similar taxes. That is it realistic that those states are going to get rid of those tax on businesses for those types of digital products? And the answer is no." So who's allowed himself a carb out there. But I think that creates a lot of problems when you have overlapping definitions and one would say something's not subject to tax because there's a B2B exemption, but then another says, oh no, but we are continuing to tax the business use of data processing. So to me that's problematic.

([07:35](#)):

I think another real big issue is what do you exempt? When do you get into when someone is purchasing a professional service versus when they're actually purchasing a digital product? And that's something that we talked a little bit about. One of the things Ray would like to use is something that has minimal human intervention. That really scares me because I think you have different types of medical products and all out there and the use of AI, even in the legal community and the accounting issue, you can have a lot of things that are highly done by computers and maybe you have some type of review from a human being, at least, I hope there's some type of review. But you look at how extensive is the human involvement in something in creating a PDF or a Word document when you're having a medical procedure or medical advice that's being taken care of, you have medical equipment that's being used to provide that. Or even with the creation of a will there's some attorneys that are going to probably be very AI intensive in the creation of a will and others that are going to still be using paper and pencil and someone is typing it up in Word [inaudible 00:08:56]-

Nikki Dobay ([08:55](#)):

WordPerfect, some are still using.

Fred Nicely ([08:57](#)):

Yes. Yes.

Nikki Dobay ([08:58](#)):

Well, I think that kind of falls into this practically bucket, how would you implement this? And this is something that Washington actually, in the changes they made this spring with SB 5814, they eliminated that reference to human effort because from the department's perspective in my conversations with them they've said, that's very hard to administer. And what is minimal? Is this going to be some percentage and now you're going to have to do a cost of performance study for your sales tax, what's minimal or what's not? So I think that, to your point, is a really slippery slope where you're getting into a lot of services that are otherwise professional services that wouldn't be taxed that now could be taxable.

([09:45](#)):

And then there's the issue with the, okay, so if you have a broad-based exemption, and I know on one of the calls there was a lot of conversations about do you have to have specified exemptions now, specifically enumerated exemptions or just anything being sold to a business? From my perspective, this is just completely fraught with really challenging issues to try to administer and comply with.

([10:14](#)):

And then if Ray's goal is to have the broad B2B exemption that I think we agree is necessary to check all the boxes for sound tax policy, is there even any money left for the states to raise or is there enough money left that makes this worth everybody's time and effort to try to figure all this stuff out?

Fred Nicely ([10:35](#)):

And Nikki, I think you bring up a really good point with the definition is do you try to be all encompassing with your definition and then you have to use a lot of exemptions and of course always going to probably miss something. And if you do, again, you get into that fiscal note then when you try to put the exemption in. And that's hard for legislators to do, especially having a shortcoming in their economic situation at the present time.

([11:00](#)):

So we definitely think that the best approach doing is having a very precise definition that's used that's going to be more limiting rather than relying on, okay, we're taxing the broad category of digital products, but then we're going to put in these exemptions and how does it work for certain financial instruments? How does it work for medical services or legal services or accounting services or engineering services? Which all can have heavy engagement of computer technology. But I think a lot of people would look at this still, there's a lot of human involvement or oversight that should occur there.

Nikki Dobay ([11:40](#)):

Yeah. I don't really feel like anybody has addressed in the MTC work group context, either in Ray's group or some of the broader groups, that there's been this theoretical agreement that a B2B exemption should be applied. But then you get to practically then what money is this going to raise? Even if it's a state that doesn't tax any digital goods at this point, there will be some incremental revenue that's being raised. But a lot of the dollars are in the business inputs. And that to me is just the fundamental challenge of trying to move any of this forward in the real world.

Fred Nicely ([12:18](#)):

Yeah, I agree with you. It's very concerning on state legislators and do they really have the will? Is there really the push that they want to tax all digital products? Because when we started our conversation last week, that's one of the things that Ray had kind of looked at is that there's states that have done it, that

they have a fairly broad tax base on digital products and then the states that want to. I really question that. I really question that I do all states really want to. And I'll use as a good example, let's take California and Florida, very populous states. And California and Florida, like all other sales tax states, if you have software that is on tangible personal property, so you're still buying it and you're putting on a USB or you're putting it on a CD, all the states are going to tax that. But California, Florida, and a couple other states, if you have that software delivered electronically, so it's downloaded on the computer via the internet download, there's several states that don't tax that. And we haven't seen a lot of legislative activity where states want to tax that. So I really question that all state legislators want to tax all digital products out there.

Nikki Dobay ([13:31](#)):

Well, and I noticed that slide in the deck and I assumed it wasn't yours, but I think maybe Ray's coming at this from a very different perspective. And again, this is a broad generalization, but think a lot of tax administrators and agencies would like to tax these things. But to your point, it's really, this is a policy decision that needs to be made by the state legislators. And I think when we've been at places like NCSL and Institute for State Policy Leaders, there's a lot of hesitation out there with going down this path or the digital advertising path or some of these other paths. I'm with you, I don't think there is this broad will. And speaking of a state like California, the will actually goes the other way because that's a huge industry for them and they are very much trying to protect some of that. So I think that that's a really good point and I think that assumption that Ray is making is flawed as well.

Fred Nicely ([14:32](#)):

Yeah, I mean, California sees themselves as a technology state. And you look at the 45, 46 states that impose a sales tax, now you want to do the count, there's only four states that really have a broad tax based on services. So that's South Dakota, you have Hawaii, New Mexico, and then West Virginia, but West Virginia only on non-professional services. And those four states, they represent 1.8% of the US population.

Nikki Dobay ([15:02](#)):

Well, and Washington is treading into this very recently and now they've had a broader definition than many states for over a decade. But they've really opened the floodgates earlier this spring and I will say from my perspective as a person that does a lot of work in Washington right now, it's not going well. There's a lot of challenges and a lot of it's on this B2B issue and how it's impacting the Washington companies because it's pretty crazy.

Fred Nicely ([15:34](#)):

Yeah, I think the Washington companies with digital products, it also creates major sourcing issues, Nikki.

Nikki Dobay ([15:39](#)):

Yes.

Fred Nicely ([15:40](#)):

But at least I'm pleased to say that Washington is a Streamlined state, so hopefully they're following the Streamlined rules when it comes to sourcing.

Nikki Dobay ([15:50](#)):

I'll just go gulp.

Fred Nicely ([15:51](#)):

Yeah, gulp, gulp. Yeah, we'll see how it all works out. But they also, when they went through the legislation all the way back in 2009 and even now, they are following the Streamlined procedure. So they tax pre-written software. They tax digital products. Rather than using the term specified digital products, they use digital products, but it's the same thing. And then they tax, what is it? Automated digital services.

Nikki Dobay ([16:18](#)):

Digital automated services, yeah.

Fred Nicely ([16:21](#)):

Digital automated services, yeah. They're able to do that through the agreement as a service. So they are compliant. But that's not the procedure that the MTC is looking at definition wise. And you have 24 states, I admit that they're not the most popular states, but you have over half the sales tax states that have the structural setup that what's being proposed with this MTC definition would not work with the Streamlined states unless the agreement was amended.

Nikki Dobay ([16:50](#)):

So now let's flip to Streamlined, because Streamlined is also looking at this and they're going about it from kind of, I would say probably the exact opposite way. And I mean that's because Streamlined has procedures in place where, and you've been involved with this from the beginning and the processes, you have specified definitions for everything that could be taxed and then the Streamlined states have the decisions, the policymakers decide whether or not that gets taxed. Is that the proper structure of how a Streamlined functions?

Fred Nicely ([17:22](#)):

That's correct. So Streamlined sales tax has what's called toggles and states can pick and choose whether or not they want to tax those. And so with pre-written software, that's part of tangible personal property the way the definition works in Streamlined sales tax, but states can toggle off taxing software that is delivered electronically. And that's different than transferred electronically. Delivered electronically it's where you're actually having the software downloaded on computer versus transfer Electronically is more of an access to software concept.

Nikki Dobay ([17:56](#)):

And from my perspective, Streamlined is moving forward. They're looking at more specified definitions or they're at least defining things in the digital space that could or wouldn't be taxable. I guess from a process or crystal balling it, that's not going to be a super quick process.

Fred Nicely ([18:17](#)):

It hasn't been. And right now they're looking at audiovisual works and seeing if they're going to be agreement on states that don't want to tax live presentations and getting some agreement there. And

we're already seeing some states have different standards on what they want to exclude as a non-taxable live presentation under audiovisual works. So I do think that's going to take some time.

(18:43):

I do think though, ultimately there's folks from the business community and folks from the Streamlined states that want to get to the access to software issue. And right now access to software is done by several states. Utah does it. Washington does it. So states can clearly do it as a service. But, is it something that needs to be clarified and should we have more uniformity with how the states approach that and is there a need for toggles? Some states want to attack some aspects of it, but not others. I think eventually that will get addressed, but I don't think that's going to happen in the next couple months.

Nikki Dobay (19:21):

And then what about you mentioned earlier the sourcing issues that arise when you start taxing more services and digital products that are being used across state lines? Do you think that this is also an area where Streamlined will start to take a look?

Fred Nicely (19:38):

I do. I think Streamlined is looking along with the digital product definitions, they're looking at the bundling rules and do there need to be some tweaks? And this was something that also came up from the Office of Tax Commission, the MTC, they wrote an analysis and provided the Streamlined Sales Tax. And so Streamlined Sales Tax is going to look at that. I don't believe when it comes to the bundling rule specified digital products is actually listed there, that probably needs to be included at a minimum. And then you have the issue with some of these digital products or specified digital products, they can be sold by third parties and another person is providing the actual offering of the product itself. And so when you look at the seller's books and records, if you're only a third party seller, just a retailer, a grocery store or a drug store selling a code to have access to a product, they don't have the same books and records that a provider of a service would have. So I think some of that is going to definitely have to be looked at.

Nikki Dobay (20:39):

All right, so what I'm hearing is you think everything will be nailed down and finalized probably by the end of the year?

Fred Nicely (20:45):

Yeah, exactly. What year though? [inaudible 00:20:50] 2030.

Nikki Dobay (20:50):

Oh, you got me there.

Fred Nicely (20:54):

I'll agree with you on the end of the year, it's just what year.

Nikki Dobay (20:56):

All right. So are you willing to wager what year?

Fred Nicely ([21:01](#)):

I said 2030, we're going to be in 2026. I think we're going to have some decent refinement by 2030.

Nikki Dobay ([21:10](#)):

All right. All right. Are you still going to be a part of the conversation? You don't have to answer that. You don't have to answer that.

Fred Nicely ([21:14](#)):

Yeah. Yeah. Who knows? Who knows?

Nikki Dobay ([21:18](#)):

All right, Fred, well thanks for catching us up on that. Is there anything else kind of on COST's radar that you want to tell the listeners about that you all have been paying attention to or dying to yell out over the airwaves? This isn't live radio, just so you know.

Fred Nicely ([21:33](#)):

We're really busy dealing with digital products. And then we love, as you know, Nikki, doing our US maps, where states fall on certain issues. So the One Big Beautiful Bill Act, we're in the process of trying to note where the states are with rolling conformity, static conformity, and also looking at some of the states that have previously decoupled and assuming that they're probably going to stay decoupled from certain provisions. So that's been a good, interesting challenge.

Nikki Dobay ([22:01](#)):

All right. And I'm sure your scorecards will be out soon and-

Fred Nicely ([22:07](#)):

We are earnestly working on our property tax scorecards.

Nikki Dobay ([22:09](#)):

Okay.

Fred Nicely ([22:09](#)):

Okay. You remember.

Nikki Dobay ([22:09](#)):

I do.

Fred Nicely ([22:14](#)):

We should be working on our unclaimed property tax scorecard next, and then I think by the end of next year our big state administrative scorecard, that'll be part of the review process.

Nikki Dobay ([22:25](#)):

Awesome. Well, Fred, thank you so much for this conversation. I think it's really helpful and helps listeners know where they need to keep their eyes and ears in this space. But before you go, I have to ask you a surprise non-tax question. And I was thinking about this, so I decided to go Ohio themed. I'm going to ask a couple questions. I like to let people have toggles. So you've been back in Ohio quite a while now. How many years?

Fred Nicely ([22:55](#)):

For seven years now. [inaudible 00:22:59] time flies.

Nikki Dobay ([22:58](#)):

Oh my God, okay.

Fred Nicely ([22:59](#)):

11 years in DC and yeah, been back on just a small farm for the last seven years.

Nikki Dobay ([23:07](#)):

All right. So do you either have a favorite season in Ohio and/or what is your favorite fall activity? And I will say I grew up in Ohio too, as you know, I don't know that all the listeners know. So I don't know that I have a favorite Ohio season, but I think my fall activity that did like was people like to say Vermont and Maine and those states are very beautiful, but Ohio is a very beautiful place in the fall too and I think fall weather is pretty great. So fall was a time I really liked. I don't know if I have anything in particular. I grew up riding horses, so maybe it was doing some riding in those times and just looking at the colors and how pretty things could be. So how about you?

Fred Nicely ([23:58](#)):

Yeah. I just say, Nikki, before I had pigs and goats I had to take care of on my small little farm I would've said fall was my favorite season. It's when things start to cool down. The grass gets green again. The leaves are beautiful. Football's going on, it's great. But no, my favorite season now is spring [inaudible 00:24:23] grass grow and I don't have to throw the goats and the pigs hay to eat every single night. So it's definitely spring and seeing things green up and I can get my garden going, get that rototill and plant my sweet corn for hopefully a good crop in the summer.

Nikki Dobay ([24:41](#)):

Awesome. Well thank you for that, Fred. And thank you to the listeners for tuning in today. Fred and my contact information will be in the show notes. If you have any questions or comments, please leave those in the show notes and I will be back with you in a few weeks on the next GeTtin' SALTy.