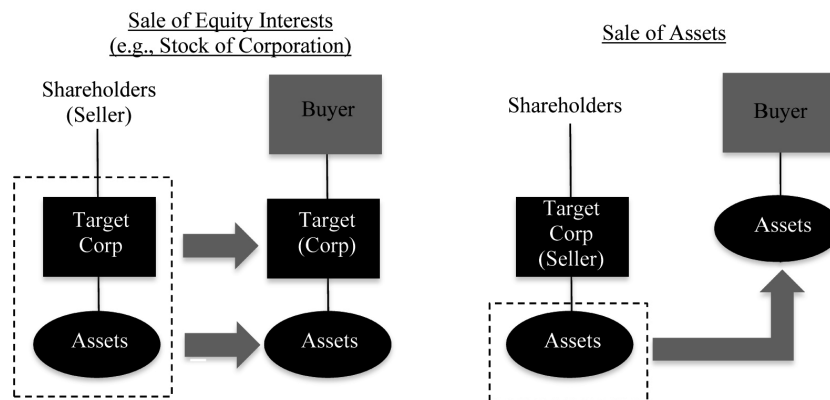


ASSET ACQUISITIONS: THINGS THAT MAKE YOU GO HMMMM . . . ARE YOU REALLY ENTITLED TO THAT BELOVED OCCASIONAL SALE EXEMPTION?

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INTRODUCTION

Transactional attorneys frequently represent clients who are either buying or selling a business. There are a myriad of legal issues that the transactional attorney must assist his or her client with when that client is selling a business. One of these issues is determining whether to structure the deal as a sale of the underlying assets or as a sale of the equity interests. As seen in the illustration below, an asset sale involves only the sale of the assets of a business while excluding the actual entity that owns the assets and operates the business. In contrast, structuring the deal as a sale of equity interests involves both the sale of the underlying assets and the entity.



There are both tax and non-tax related factors that the buyer and seller must consider in determining whether to structure the deal as an asset sale or as a sale of equity interests.¹ The buyer and seller oftentimes have divergent interests causing this decision to be a negotiated one.²

This Article focuses on the sale of a business structured as an asset sale ("Asset Sale"). From a tax perspective, one of the many issues buyers and sellers must address in an Asset Sale is determining whether the transfer of the subject assets will create sales tax implications or, alternatively, whether an exemption

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1. See *infra* Part I.
2. See *infra* notes 11-23 and accompanying text.

from sales tax exists.³ Most states impose sales tax on the transfer of tangible personal property (a tax term that generally means assets such as movable equipment and machinery that can be seen, touched, and that are perceptible to the senses).⁴ Many states also offer an exemption from sales tax for what is commonly known as occasional, casual, or isolated sales.⁵ This exemption is commonly referred to as the “occasional sale exemption” and is an often relied upon exemption in Asset Sales.⁶ The requirements for the occasional sale exemption vary from state to state, and while some states have broad exemptions for occasional, casual or isolated sales, other states have narrow exemptions.⁷ Further, some states do not have an occasional sale exemption.⁸ In short, there is no uniformity among the states and taxpayers and practitioners cannot be sure the occasional sale exemption applies to their transaction unless they carefully review the statutes, regulations, and other relevant authorities of the subject state.

This Article analyzes the occasional sale exemption with particular emphasis on states that have narrow exemptions, cumbersome or perhaps counterintuitive requirements that must be satisfied in order for the exemption to apply, or do not have an exemption at all for occasional, isolated, or casual sales. Thus, this Article centers on those states considered traps for the unwary. In addition, this Article examines whether there are valid policy reasons that justify the trap for the unwary states having narrow, cumbersome or counterintuitive requirements, or no occasional sale exemption at all. If valid policy reasons do not exist, then this Article will make recommendations as to how the subject state should consider changing its requirements concerning the occasional sale exemption.

I. SALE OF A BUSINESS STRUCTURED AS AN ASSET SALE

When an attorney represents a client who either wants to buy a business (the “buyer”) or sell a business (the “seller”), one of the first questions that must be addressed is whether to structure the sale as a sale of the assets or as a sale of the equity interests.⁹ The decision is typically a negotiated issue and can be significant to both buyer and seller for tax and non-tax reasons.¹⁰

For example, the buyer might prefer an Asset Sale structure for liability

3. See *infra* notes 20-40 and accompanying text.

4. See *infra* notes 24-28 and accompanying text.

5. See *infra* notes 33-38 and accompanying text.

6. See *infra* notes 33-38 and accompanying text.

7. See *infra* Part II.

8. See *infra* Part II.

9. See generally Michael L. Schler, *Basic Tax Issues in Acquisitions Transactions*, 116 PENN ST. L. REV. 879, 886 (2012) (discussing the choice between so-called “stock acquisition” sales and the sale of assets).

10. See *id.* See generally Byron F. Egan, *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 PENN ST. L. REV. 913, 914-31 (2012) (discussing the reasons to consider an Asset Sale).

protection reasons.¹¹ If the sale is structured as the purchase of equity interests, then all known and unknown liabilities attributable to the business carry over to the buyer.¹² In contrast, if the sale is structured as the purchase of assets, then far fewer liabilities carry over to the buyer; that is one of the most significant non-tax reasons a buyer may attempt to negotiate an Asset Sale structure.¹³ Although the buyer can negotiate protection from potential liabilities in an equity deal by way of indemnification,¹⁴ the buyer may still feel uncomfortable taking on the risk. Furthermore, a buyer may prefer an Asset Sale structure for tax reasons.¹⁵ For example, an Asset Sale structure generally allows the buyer to receive a “stepped-up” basis in the transferred assets.¹⁶

Unlike the buyer, a seller might prefer to structure the deal as a sale of equity interests for tax reasons.¹⁷ For example, if the business is a corporation for federal income tax purposes, an equity sale structure generally would cause gain from the sale, if any, to be taxed only once (to the shareholders) rather than twice (once to the target corporation and then again to the shareholders); the same would occur in the case of an Asset Sale.¹⁸ Further, a seller might also prefer an equity sale structure because it usually requires fewer third party consents as compared to an Asset Sale.¹⁹

Thus, there are many factors that the parties in an acquisition must analyze in making the decision whether to structure the transaction as a sale of assets or as a sale of equity interests.²⁰ From a tax perspective, the parties typically focus on federal income tax consequences.²¹ Oftentimes overlooked are state tax implications, including, but not limited to, sales tax exposure.²² Disregarding

11. See, e.g., Egan, *supra* note 10, at 920-23.

12. See *id.*

13. See *id.*; see also *infra* note 30 (regarding successor liability for certain taxes in Asset Sales).

14. See Daniel Avery & Nicholas Perricone, *Trends in M&A Provisions: Indemnification as an Exclusive Remedy*, BLOOMBERG BNA (Sept. 16, 2013), <http://www.bna.com/trends-in-ma-provisions-indemnification-as-an-exclusive-remedy/>, archived at <http://perma.cc/7VX8-HPQC>.

15. See *infra* note 16 and accompanying text.

16. See I.R.C. § 1012(a) (2014); see also Schler, *supra* note 9, at 887-88.

17. See *infra* note 18 and accompanying text.

18. See I.R.C. §§ 11, 1001, 1221, 1222; see also Schler, *supra* note 9, at 887-88.

19. See *Preparing for a Liquidity Event*, MORGAN LEWIS, http://www.morganlewis.com/documents/erh/ERH_PreparingForALiquidityEvent.pdf, archived at <http://perma.cc/Y3DQ-AES6>.

20. See *supra* notes 9-19 and accompanying text.

21. See generally David L. Huizenga, *Multistate Tax Planning for Mergers, Acquisitions, and Restructuring*, J. MULTISTATE TAXATION & INCENTIVES, Feb. 2002, at 7; Richard L. Lieberman, *Sales and Use Tax Aspects of Acquisitions, Mergers, and Divestitures*, STATE TAX TODAY, Apr. 10, 1995, at 2-3; Andrew W. Swain, *Sales and Use Tax Consequences of Reorganizations, Separations, and Acquisitions*, 32-MAY COLO. LAW. 81 (2003).

22. See, e.g., Huizenga, *supra* note 21, at 8-9; Lieberman, *supra* note 21, at 2; Timothy P. Noonan & Joseph N. Endres, *Sales Tax Considerations in an Asset Purchase*, STATE TAX NOTES, Apr. 11, 2011, at 119, archived at <http://perma.cc/G4ZX-NWN8>; Swain, *supra* note 21, at 81.

sales tax implications can be a costly oversight.²³

As background, states generally impose sales taxes on transfers of “tangible personal property” (“TPP”), a tax term that generally includes assets that can be seen, touched, and that are perceptible to the senses.²⁴ Equity interests are generally not considered TPP, but instead, are considered intangibles the sale of which is typically not subject to sales tax.²⁵ Thus, sales tax implications generally do not arise in acquisitions structured as a sale of equity interests.²⁶ In contrast, because acquisitions structured as Asset Sales typically involve the transfer of TPP (e.g., furniture, movable equipment, vehicles,²⁷ and movable machinery), sales tax implications will result with respect to the portion of the purchase price allocable to such TPP absent an available exemption.²⁸

If the parties to an acquisition ultimately decide on an Asset Sale structure, then one of the many items they will need to negotiate is which party will be responsible for the payment of sales taxes resulting from the transaction.²⁹ The

23. See Huizenga, *supra* note 21, at 8; Lieberman, *supra* note 21, at 2; Swain, *supra* note 21, at 81-87.

24. See WALTER HELLERSTEIN ET AL., STATE & LOCAL TAXATION 614 (2009) (discussing taxable sales, delineating sales of TPP from sales of services); Lieberman, *supra* note 21, at 2; Gregory E. Stern, *State Taxation of Mergers and Acquisitions*, 783-4th TAX MGMT. (BNA) U.S. INCOME, 2010, at 37.

25. See *infra* note 26 and accompanying text.

26. See, e.g., Ethan D. Millar, *Overview of State and Local Taxation*, TAX LAW & PRACTICE (PRACTISING LAW INSTITUTE, TAX LAW AND ESTATE PLANNING COURSE HANDBOOK SERIES), Oct. 1, 2009, at 40 (“The sale of intangible property is not subject to sales tax. Therefore, the sale of stock or interests in partnerships or limited liability companies will generally not trigger sales tax.”); Michael T. Petrik & Ethan D. Millar, *State and Local Aspects of Corporate Acquisitions*, CORPORATE BUS. TAXATION MONTHLY, Dec. 2006, at 23. An exception can arise when the sold equity interest is a disregarded entity for federal income tax purposes. See *id.* Also, certain states impose an intangible transfer tax that can apply to the transfer of stock or other equity interests. See, e.g., Millar, *supra*, at 44. Intangible transfer taxes are beyond the scope of this Article.

27. See *infra* note 45 and accompanying text (regarding Asset Sales that include the transfer of motor vehicles and/or other titled vehicles).

28. See Noonan & Endres, *supra* note 22, at 119. As a general rule, there is no sales tax on the transfer of goodwill because goodwill is considered an intangible; see, e.g., *id.* (“In most states, sales of intangible assets (such as goodwill, intellectual property, trademarks, and so on) are not subject to sales tax.”); see also Eric A. de Moya, *Managing Transaction Taxes When Moving Assets in Connection with Mergers and Acquisitions*, J. MULTISTATE TAXATION & INCENTIVES, May 2007, at 27 (stating that (“[t]ransfers of intangible assets such as trademarks, service marks, trade names, logos, copyrights, franchise rights, goodwill, etc., are generally not taxable for sales and transaction tax purposes”). Further, transfers of real property are also not typically subject to sales tax, although certain states do impose separate real estate transfer taxes on sales of real property. See generally Millar, *supra* note 26, at 42-43 (discussing jurisdictions that have real property transfer taxes).

29. See generally Millar, *supra* note 26, at 40; Noonan & Endres, *supra* note 22, at 119. Another important issue the parties must analyze in Asset Sales is successor liability for any unpaid

parties may negotiate that either buyer or seller is 100% responsible for the payment of such taxes.³⁰ Alternatively, the parties might agree to split the liability fifty-fifty, which is thought of as a “deal cost” appropriately shared between the seller and buyer.³¹ In analyzing the sales tax exposure of an Asset Sale, the buyer and seller are usually equally interested in determining whether or not any available exemptions exist.³² This is because many states impose joint and several liability on both the buyer and seller with respect to unpaid sales taxes.³³

Most states have a myriad of exemptions from sales tax.³⁴ One of the most common sales tax exemptions in Asset Sales is the exemption for “occasional,” “isolated,” or “casual” sales (oftentimes collectively referred to hereinafter as the “occasional sale exemption”).³⁵ In the context of an Asset Sale, the occasional sale exemption generally allows all, or at least part, of the TPP to be transferred free of sales tax.³⁶ Thus, in an Asset Sale, the existence of an occasional sale exemption in the state where the assets are located is quite valuable to both the buyer and seller.³⁷ The majority of states have an occasional sale exemption.³⁸ However, even in states that have an occasional sale exemption, such states are not uniform in the situations to which the occasional sale exemption extends, the types of TPP covered by the occasional sale exemption, and/or the requirements that must be satisfied in order for the occasional sale exemption to apply.³⁹ Further, a handful of states do not have an occasional sale exemption.⁴⁰

taxes of the seller, states generally impose this by statute or by regulation. Successor liability rules are beyond the scope of this Article. For a detailed discussion of the successor liability rules in Asset Sales, see generally Stern, *supra* note 24, at 36.

30. See generally Millar, *supra* note 26, at 40 (discussing contractual liability for taxes in Asset Sales). Some states may prohibit a seller from absorbing sales taxes imposed on the purchaser. This Article will not address this issue.

31. See *supra* note 30 and accompanying text.

32. See generally Egan, *supra* note 10, at 922 (discussing liability in Asset Sales for both buyers and sellers).

33. See Millar, *supra* note 26, at 43.

34. See generally Noonan & Endres, *supra* note 22, at 119; Stern, *supra* note 24, at 37.

35. See generally Lieberman, *supra* note 21, at 11; Millar, *supra* note 26, at 37-38 (discussing differences among the states regarding to occasional sale exemptions).

36. See generally Stern, *supra* note 24, at 37. Notably, the transfer of motor vehicles are generally not exempt from sales tax under the occasional sale exemption even though motor vehicles are TPP. See *infra* note 45 and accompanying text.

37. See Stein, *supra* note 24, at 37.

38. See Noonan & Endres, *supra* note 22, at 119.

39. See generally de Moya, *supra* note 28, at 21; Peter L. Faber, *The Impact of Sales and Use Taxes on Corporate Transactions*, PRACTICAL TAX LAW, Fall 2001, at 47; Lieberman, *supra* note 21, at 11 (discussing the many differences among the states regarding tax exemptions); Millar, *supra* note 26, at 41; Petrik & Millar, *supra* note 26, at 24; Stern, *supra* note 24, at 37.

40. See *supra* Part II; see also Noonan & Endres, *supra* note 22, at 119 (naming four states that do not have an occasional sale exemption).

As discussed in the Introduction, this Article analyzes the occasional sale exemption with emphasis on states that have narrow occasional sale exemptions, or cumbersome (perhaps even counterintuitive) requirements that must be satisfied in order for the occasional sale exemption to apply; additionally, it will touch on those states that do not have an occasional sale exemption at all. That is to say—this Article focuses on those states considered traps for the unwary with respect to the occasional sale exemption. The decision to put a state in the trap for the unwary category results from such state significantly deviating from what many taxpayers and practitioners might consider the *typical* occasional sale exemption: an occasional sale exemption that broadly exempts the sale of TPP as long as the seller is not in the business of selling such TPP (referred to herein as the “Baseline Model Exemption”).⁴¹ In addition, this Article examines whether there are policy reasons that justify the trap for the unwary states having narrow, cumbersome, and counterintuitive requirements, or no occasional sale exemption at all. If valid policy reasons do not exist, then this Article will make recommendations as to how the subject state should consider changing its requirements for the occasional sale exemption.

This Article focuses solely on the occasional sale exemption in the context of Asset Sales.⁴² In analyzing the occasional sale exemption, this Article assumes (1) the transaction is a taxable transaction;⁴³ (2) the buyer and seller are unrelated parties; (3) the seller is not in the business of selling the TPP being transferred, except for inventory; (4) the sale is not a reorganization; (5) the sale is not made through an auctioneer; and (6) the sale does not involve a liquidation or foreclosure.⁴⁴ Notably, many occasional sale exemptions do not exempt from tax the transfer of motor vehicles or other TPP for which state law requires a title.⁴⁵ As this is a common type of TPP not generally covered by occasional sale exemptions, this Article does not put a state in the trap for the unwary category simply because such state’s occasional sale exemption does not extend to cover the transfer of motor vehicles or other titled assets.

41. See generally 67B AM. JUR. 2D *Sales and Use Taxes* § 97 (2014) (providing definition of “casual” sale); Noonan & Enders, *supra* note 22, at 119 (“Most states maintain an ‘occasional or isolated sales’ exemption that can be applied to asset purchases. Those exemptions typically apply to transactions that do not regularly occur. For example, if a couple sells an old piece of furniture because they recently purchased a new living room set, the sale may be exempt from tax because the couple does not typically sell their furniture. Similarly, one can apply this exemption to asset sales because businesses are not typically in the business of selling their assets. Rather, they sell their inventory. Thus, because an asset sale is not a typical transaction for most businesses, the isolated or occasional sale exemption may apply.”).

42. For example, this Article does not address sales tax and the occasional sale exemption in the context of tax-free reorganizations. For a detailed discussion of sales tax issues in tax-free transactions, see generally Lieberman, *supra* note 21, at 30-35 and Schler, *supra* note 9, at 882-86.

43. See *supra* note 42 and accompanying text.

44. See *supra* note 42 and accompanying text.

45. See generally HELLERSTEIN ET AL., *supra* note 24, at 715 (discussing miscellaneous exemptions and exclusions from sales and use taxes, including occasional sale exemptions).

Additionally, occasional sale exemptions generally do not operate to exempt TPP sold by the seller as part of the seller's ordinary course of business (e.g., inventory).⁴⁶ Although the transfer of inventory as part of an Asset Sale would not be exempt from sales tax under an occasional sale exemption, states have another exemption, commonly called a "resale exemption," that would exempt the inventory component of an Asset Sale.⁴⁷ Because a resale exemption is generally available in all states, this Article will not analyze the resale exemption.⁴⁸

II. TRAP FOR THE UNWARY STATES

Part II examines the states fitting into the "trap for the unwary" category with respect to the occasional sale exemption either because (1) the state has a narrow occasional sale exemption, or cumbersome or counterintuitive requirements that must be satisfied;⁴⁹ or (2) the state does not have an occasional sale exemption.

A. Alabama

Alabama Code section 40-23-2(1) levies a sales tax "[u]pon every person, firm, or corporation . . . engaged or continuing within this state, in the business of selling at retail any tangible personal property whatsoever."⁵⁰ With respect to occasional sales, the Alabama Administrative Code section 810-6-1-.33(1) provides, "casual or isolated sales by persons not engaged in the business of selling are not required to be reported to the Department of Revenue by the provisions of the Sales Tax Law."⁵¹

One might conclude from the face of this statutory provision that Alabama's occasional sale exemption extends only to transfers of TPP by persons not engaged in the business of selling *anything* in the regular course of business.⁵² This interpretation stems from the language "not engaged in the business of *selling*" as opposed to the language reading "not engaged in the business of

46. See generally Noonan & Endres, *supra* note 22, at 120 (discussing instances in which sale of inventory in an Asset Sale can be taxed); Petrik & Millar, *supra* note 26, at 23.

47. See generally de Moya, *supra* note 28, at 31; Millar, *supra* note 26, at 40; Petrik & Millar, *supra* note 26, at 23; Stern, *supra* note 24, at 37.

48. While a resale exemption is generally available in all states, state procedural and administrative requirements may vary with regard to what must be satisfied in order to claim the exemption. For example, a state may require the buyer to register with the Department of Revenue of the subject state and hold a sales tax permit before the department will issue a resale certificate. See Millar, *supra* note 26, at 40 (discussing similar state requirements).

49. This Article does not address certain procedural/administrative requirements that must be satisfied in order to claim the occasional sale exemption (e.g., certain states may require an exemption certificate be filed with Department of Revenue whereas other states may only require the parties keep exemption certificates in their files).

50. ALA. CODE § 40-23-2(1) (2014).

51. ALA. ADMIN. CODE r.810-6-1-.33(1) (2014) (emphasis added).

52. *Id.*

selling the type of tangible personal property being transferred” or something similar.⁵³ Under this narrow interpretation, for example, TPP sold at a garage sale by a person not regularly engaged in the business of holding garage sales would be exempt from Alabama sales tax under the occasional sale exemption, but the exemption would not extend to an Asset Sale because the seller in an Asset Sale will be involved in selling some type of product or service.⁵⁴

While this narrow interpretation is arguably supported by the plain text of Alabama Administrative Code section 810-6-1-.33(1), a ruling issued by the Alabama Department of Revenue and an Alabama Department of Revenue administrative hearing decision indicate that Alabama’s occasional sale exemption is actually much broader.⁵⁵ Specifically, in 1996, the Alabama Department of Revenue issued Alabama Revenue Ruling 96-002 that involved a company in the communications business that was purchasing substantially all the assets of another communications business.⁵⁶ The seller was in the business of selling services and the seller’s primary assets included TPP used to operate the business.⁵⁷ The question addressed in the ruling was “[w]hether the sale of the entire ongoing business in a single transaction” was considered an occasional sale exempt from Alabama sales tax.⁵⁸ The Alabama Department of Revenue stated, “As [seller’s] regular course of business is not the selling of its assets, the sale of [seller’s] entire business outright to a single purchaser in one transaction is considered isolated or occasional and is therefore exempt from Alabama sales and use tax as a casual sale.”⁵⁹

Further lending support to this broader interpretation is the 1997 administrative ruling in *State of Alabama Department of Revenue v. Raymond Edwards*.⁶⁰ That decision concluded that Alabama’s occasional sale exemption applied to TPP sold by a seller not regularly engaged in the business of selling such TPP, even if the seller was regularly engaged in the business of selling other TPP.⁶¹ The company at issue was regularly engaged in the business of selling roof trusses upon which the company collected and remitted sales taxes.⁶² The company also occasionally sold scrap metal, but not as part of its regular course of business.⁶³ As to the scrap metal sales, the Administrative Law Judge stated:

[T]he sales were only occasional, and not made in the Taxpayer’s regular

53. *Id.*

54. *Id.*

55. *See infra* notes 56-64 and accompanying text.

56. Ala. Rev. Rul. 96-002 (1996), *archived at* <http://perma.cc/LZ93-XCDP>.

57. *Id.*

58. *Id.*

59. *Id.*

60. *State of Ala. Dep’t of Revenue v. Raymond Edwards*, No. S. 90-318 (Admin. Law Div., Apr. 17, 1997).

61. *Id.*

62. *Id.*

63. *Id.*

course of business. See, *State v. Bay Towing and Dredge Company*, 90 So.2d 743 (1956); *State v. U.S. Die Casting and Development Co.*, L. 91-208 (Admin. Law Div. 11/24/93). Consequently, those sales were not subject to sales tax.⁶⁴

Based on these additional authorities, Alabama's occasional sale exemption is generally broad.⁶⁵ However, Alabama still fits into the trap for the unwary category due to certain limitations involving how to structure the Asset Sale in order for the occasional sale exemption to apply.⁶⁶ For instance, the Alabama Department of Revenue appears to interpret the occasional sale exemption as applying to Asset Sales only when the transaction is structured as a *single transaction* to a *single purchaser*.⁶⁷ These requirements would seem to preclude the occasional sale exemption from applying to Asset Sales structured as a series of sales completed over time.⁶⁸ Further, these requirements would seem to preclude the naming of both a parent and subsidiary as the purchaser in the Asset Purchase Agreement, which the parties might otherwise desire for indemnification reasons or reasons associated with the representations and warranties in the Asset Purchase Agreement.⁶⁹ The Alabama Department of Revenue also appears to interpret the occasional sale exemption as applying only when the seller transfers the *entire* assets of the subject business.⁷⁰ This requirement is at odds with the practical nature of many Asset Sales where the seller will negotiate to exclude certain assets from the sale.⁷¹ The foregoing limitations are nuanced, at odds with how some Asset Sales may need to be structured in practice, and are different from the Baseline Model Exemption.⁷²

64. *Id.*

65. See *supra* notes 55-64 and accompanying text.

66. See *infra* notes 67-71 and accompanying text.

67. Ala. Rev. Rul. 96-002 (1996), archived at <http://perma.cc/LZ93-XCDP>.

68. See *id.*

69. See *id.*

70. See *id.* It is unclear from the text of Alabama Revenue Ruling 96-002 whether the term "entire" means all assets of the target business or only all operating assets of the subject business. One could argue that the "entire business," which is the language used in Alabama Revenue Ruling 96-002, only means those assets used to operate the business rather than each and every asset of the business because an "entire business" logically relates to operational assets only. However, because the term "entire" commonly means all, this Article presumes that the Alabama Department of Revenue intended for all assets of the business, both operational and non-operational, to be transferred in order for the occasional sale exemption to apply. Further, it is unclear whether Alabama has a de minimis exception to this requirement. Notably, even though the Alabama Department of Revenue stated in Alabama Revenue Ruling 96-002 that the "entire" assets of the business must be transferred, the facts of Alabama Revenue Ruling 96-002 indicated that only "substantially all" of the assets were purchased in the Asset Sale. See Ala. Rev. Rul. 96-002 (1996), archived at <http://perma.cc/LZ93-XCDP>.

71. See Egan, *supra* note 10, at 917.

72. See *supra* note 39 and accompanying text; see also RIA Checkpoint, State Tax Chart

Accordingly, Alabama fits into the trap for the unwary category.

B. Alaska

Alaska does not have a statewide sales tax system, although many local jurisdictions (cities and boroughs) impose sales tax pursuant to the authority granted in Alaska Statutes.⁷³ Thus, one must consult the local rules of the jurisdiction where the assets are located to determine if an occasional sale exemption exists.⁷⁴ The lack of a statewide rule is different from other states and puts Alaska in the trap for the unwary category.

C. California

The initial inquiry in determining whether California's occasional sale exemption applies to an Asset Sale is whether or not the seller's business is a permitted business; that is, whether a sales tax permit is required to operate the business.⁷⁵ California's regulatory provision relating to the sale of all or part of a *permitted* business provides:

In general, when a person sells a business which is required to hold a seller's permit, tax applies to the gross receipts from the retail sale of tangible personal property held or used by that business in the course of its activities requiring the holding of the seller's permit.⁷⁶

The only exception to the above is when another exemption applies (e.g., the manufacturing exemption),⁷⁷ or the Asset Sale involves the transfer of all, or substantially all, of the assets of a business and the structure is such that, after the transfer, the real or ultimate ownership of the assets transferred "is substantially similar to that which existed before such transfer."⁷⁸ The term "substantially similar" means that "80 percent or more of [the] ownership of the tangible

Results, Tax Type: Sales/Use, *available at* <https://checkpoint.riag.com>.

73. ALASKA STAT. §§ 29.45.650-710 (2013). *See generally* Stern, *supra* note 24, at 43; ALASKA DEP'T OF COMMERCE, COMMUNITY AND ECON. DEV., ALASKA TAXABLE 2012, 15, 18 (2013), *available at* <http://commerce.alaska.gov/dnn/Portals/4/pub/OSA%20TAXABLE%202012%20-%20FINAL%202013-02-05.pdf>, *archived at* <http://perma.cc/R3KK-E7HS> (tables one and two indicate which local jurisdictions impose sales tax).

74. *See id.*

75. *See* CAL. REV. & TAX. CODE § 6367 (2014); CAL. REV. & TAX. § 6006.5(b) (2014); *see also* Stern, *supra* note 24, at 45-46 ("The availability of the occasional sale exemption comes down to whether the seller is required to hold a seller's permit for the activities in which the assets are used."); Faber, *supra* note 39, at 56.

76. CAL. CODE REGS. tit. 18, § 1595(b)(1) (2014).

77. *See generally* Stern, *supra* note 24, at 37 (For example, if certain manufacturing equipment is being transferred as part of the Asset Sales, then a state's manufacturing exemption could apply to the transfer of such assets even if the occasional sale exemption did not apply.).

78. CAL. CODE REGS. tit. 18, § 1595(b)(2) (2014); *see also* RIA Checkpoint, *supra* note 72.

personal property is unchanged after the transfer.”⁷⁹ In a typical Asset Sale where a seller sells a business (or division thereof) to an unrelated third party, this “substantially similar” ownership requirement will not be met.⁸⁰

Consequently, when an Asset Sale involves a permitted business and the purchaser is an unrelated third party, California’s occasional sale exemption is narrow.⁸¹ It applies only to exempt proceeds attributable to TPP not held or used by the business in the course of activities requiring the holding of the seller’s permit.⁸² For example, a business might engage in one activity requiring the holding of a seller’s permit and a second activity that does not require the holding of seller’s permit. If the entire business is sold and structured as an Asset Sale, sales tax would apply to the portion of the purchase price allocated to the TPP held or used in the course of the activity requiring the seller’s permit, but would not apply to the portion of the purchase price allocated to the TPP related to the activity not requiring the seller’s permit as long as the sale is not itself one of a series of sales that would require the holding of a seller’s permit.⁸³ California’s regulations give the following example:

[A] person may own a hardware store at one location and a real estate brokerage business at another location, with no relationship between the two activities except that of common ownership. Under these circumstances, a sale of furniture used in the brokerage business would not be a sale of property held or used in an activity requiring the holding of a seller’s permit unless it was one of a series of sales of the property of the brokerage business. A sale of tangible personal property held or used in the hardware business would be a sale of property held or used in an activity requiring the holding of a seller’s permit.⁸⁴

This same analysis should also apply, for example, to a hotel that also operates a restaurant, the latter being an activity requiring a California seller’s permit.⁸⁵ If the owner sold the hotel and restaurant, the sale of hotel equipment and furnishings should qualify for exempt occasional sale treatment because such

79. CAL. CODE REGS. tit. 18, § 1595(b)(2) (2014).

80. *Id.*

81. See *supra* notes 75-80 and accompanying text; see also Marilyn Barrett, *When Is the Sale of a Business Subject to Sales Tax Like an Over-the Counter Retail Sale? In California, Most of the Time*, CEB CAL. BUS. L. REP., June 1995, at 339-40, archived at <http://perma.cc/BP8U-69V5> (“This exemption is drawn very narrowly and in most cases will not provide relief.”); Jeffrey S. Blum & William M. Backstrom, Jr., *Staying Out of Trouble—Sales & Use Tax Due Diligence for Mergers and Acquisitions*, Council on State Taxation, 39th Annual Meeting 7-8 (Oct. 22, 2008), archived at <http://perma.cc/53EP-9FH6>.

82. See Faber, *supra* note 39, at 5622. Notably, however, goodwill is not taxable. See Cal. Sales Tax Counsel Rul. 395, 1000 (1965), archived at <http://perma.cc/4HL4-DVUZ>; see also Stern, *supra* note 24, at 46.

83. CAL. CODE REGS. tit. 18, § 1595 (2014).

84. *Id.*

85. See *id.*

assets are used in an activity not requiring a seller's permit.⁸⁶ However, the sale of TPP used in the restaurant (e.g., movable kitchen equipment) would not be exempt under the occasional sale exemption because such assets are held or used in an activity requiring a seller's permit.⁸⁷

Unlike above, if the Asset Sale involves a *non-permitted* business (e.g., non-taxable service business), then California's occasional sale exemption is much broader.⁸⁸ California's occasional sale exemption will apply as long as the Asset Sale is not one of a series of sales sufficient in number, scope, and character to constitute an activity for which a seller's permit is required.⁸⁹ Generally, the number of sales of TPP requiring a seller to obtain a seller's permit is three or more of substantial amounts within any twelve-month period.⁹⁰

Based on the foregoing, California's occasional sale exemption can be narrow depending upon whether the sale is for a permitted or non-permitted business.⁹¹ The delineation between permitted versus non-permitted businesses is a trap for the unwary for practitioners and taxpayers who are familiar with broader occasional sale exemptions such as the Baseline Model Exemption.⁹² Thus, California fits within the trap for the unwary category.

D. Colorado

Colorado's occasional sale exemption applies only to certain occasional sales made by charitable organizations.⁹³ Thus, the proceeds from the transfer of the non-inventory TPP component of an Asset Sale will be subject to Colorado sales tax unless another exemption applies (e.g., manufacturing exemption).⁹⁴ The lack of any type of occasional sale exemption applicable to Asset Sales is divergent from the Baseline Model Exemption thereby causing Colorado to fit within the trap for the unwary category.⁹⁵

E. Florida

In Florida, there is a distinction between *isolated* versus *occasional* sales, which determines the requirements that must be satisfied for obtaining exempt

86. See CAL. CODE REGS. tit. 18, § 1595(a)(3)-(5) (2014). See generally *Ontario Community Found., Inc. v. State Bd. of Equalization*, 678 P.2d. 378 (Cal. 1984).

87. See *Ontario Community Found.*, 678 P.2d. at 385.

88. See *infra* notes 89-90 and accompanying text.

89. See CAL. REV. & TAX CODE § 6006.5 (2014); CAL. CODE REGS. tit. 18, § 1595(a) (2014); see also Blum & Backstrom, *supra* note 81, at 7.

90. See CAL. REV. & TAX CODE § 6019 (2014); CAL. CODE REGS. tit. 18, § 1595(a)(4)(A) (2014).

91. See *supra* notes 75-90 and accompanying text.

92. See *supra* note 41 and accompanying text.

93. See COLO. REV. STAT. § 39-26-718(1)(b) (2008).

94. See generally Stern, *supra* note 24, at 37.

95. See *supra* note 41 and accompanying text; see also Noonan & Endres, *supra* note 22, at 119; RIA Checkpoint, *supra* note 72. COLO. REV. STAT. § 39-26-718(1)(b).

occasional sale treatment.⁹⁶ With respect to *isolated* sales, subsection (2), section 12A-1.037 of the Florida Administrative Code states:

An exempt isolated sale or transaction occurs when an entity, which for purposes of this rule is a “person,” as defined in s. 212.012(13), F.S., required to be registered as a dealer, either distributes tangible personal property in exchange for the surrender of a proportionate interest in an entity, or transfers all, or substantially all, of the property of a person’s business, or a division thereof. Also the transfer of the property to an entity in exchange for an interest therein in proportion to the tangible personal property contributed is exempt as an isolated sale.⁹⁷

Subsection 2(a), section 12A-1.037 of the Florida Administrative Code then provides that exempt *isolated* sale treatment does not extend to certain transfers, which includes: (1) “[s]ales of aircraft, boats, mobile homes, or motor vehicles . . . required to be registered, licensed, titled, or documented” in Florida;⁹⁸ (2) the “distribution or sale of inventory;”⁹⁹ (3) the “distribution or sale of tangible personal property used in the business, such as salvage, surplus, or obsolete property;”¹⁰⁰ (4) “[s]ales made by or through an auctioneer, agent, broker, factor, or any other person required to be registered and to collect tax on such sales, as provided in Rule 12A-1.066, F.A.C.,” (5) transactions “not completed within 60 days from the date of the first distribution of assets of any entity;” and (6) “transactions where the transferor has not paid applicable sales or taxes” and the statute of limitations for assessment has not passed.¹⁰¹

Subsection 2(d), section 12A-1.037 of the Florida Administrative Code, also related to *isolated* sales, specifically states the following with respect to Asset Sales:

96. See Fla. Tech. Assistance Advisement 99A-080 (Dec. 30, 1999), available at https://revenue.law.state.fl.us/LawLibraryDocuments/1999/12/TAA-102778_ebeef76e-a942-4d3d-96b6-787787661512.pdf#search=, a, archived at http://perma.cc/SB4A-T89V.

97. FLA. ADMIN. CODE ANN. r. § 12A-1.037(2) (2014).

98. See *supra* note 45 and accompanying text.

99. See *supra* notes 46-48 and accompanying text.

100. On its face, this requirement would arguably exclude an Asset Sale from exempt isolated sale treatment because an Asset Sale involves a business selling TPP used in the business. However, the Florida Department of Revenue has ruled that this provision does not apply when the entire assets (or substantially all of the assets) of a business are sold. See Fla. Tech. Assistance Advisement 99A-080, *supra* note 96. Specifically, the Florida Department of Revenue stated:

It is the Department's position that this limitation is not applicable to the Transaction. If the Transaction involved a sale of less than “substantially all” of the assets of the division, and the division was remaining as part of Seller's business, this limitation would be applicable. However, the Transaction is not an individual sale of tangible personal property used in the business, such as salvage, surplus, or obsolete property, but it is rather a sale of the entire division or line of business.

Id.

101. ADMIN. ANN. § 12A-1.037(2)(a) (2014).

The sale of business assets in conjunction with the sale of the business as provided in Rule 12A-1.055(6)(b), F.A.C., other than inventory and aircraft, boats, mobile homes, and motor vehicles, qualifies as an isolated sale provided the sale and the transfer of the assets of the business is completed within 30 days from the date of the agreement for the sale of the business. If the sale of the business is not completed within the 30 day period, the sale may nevertheless qualify as an occasional sale provided the sale complies with the requirements in subsection (3), below, and provided none of the elements set forth in subsection (5), below, are present.¹⁰²

Notably, the provisions discussed above relating to exempt *isolated* sales apply only to sales made by sellers who are dealers engaged in the business of selling TPP or taxable services (i.e., permitted businesses).¹⁰³ The exemption for *isolated* sales does not extend to sales made by non-permitted sellers.¹⁰⁴

If an Asset Sale does not qualify for exempt *isolated* sale treatment (i.e., the seller is a non-permitted seller or the requirements discussed above for exempt isolated sales treatment cannot otherwise be satisfied), the sale can still be exempt if it satisfies the requirements for being an exempt *occasional* sale.¹⁰⁵ The rules for exempt *occasional* sales are set forth in subsection (3), section 12A-1.037 of the Florida Administrative Code.¹⁰⁶ Subsection (3)(a), relating to *occasional* sales, states:

An exempt occasional sale or series of sales occurs when there is a sale by the owner of tangible personal property, which meets the requirements set forth below, regarding the frequency and duration of the sales, the type of tangible personal property sold, the location of the sales, and the status of the parties as it relates to the property being sold.¹⁰⁷

Subsection (3)(b) imposes the following requirements for exempt *occasional* sale treatment: (1) the seller must have paid applicable sales and use taxes on the applicable assets, unless the statute of limitations for assessment has expired; and (2) such sales (or series of sales) must occur no more frequently than two times during any twelve month period.¹⁰⁸

Further, subsection (5) sets forth certain transactions that *per se* cannot be

102. *Id.* § 12A-1.037(2)(d).

103. *See infra* note 104 and accompanying text.

104. FLA. ADMIN. CODE ANN. § 12A-1.037(2) (2014) (stating that “[a]n exempt isolated sale or transaction occurs when an entity, which for purposes of this rule is a ‘person,’ as defined in s. 212.02(13), F.S., required to be registered as a ‘dealer’” transfers all or substantially all of a business).

105. *See infra* notes 106-14 and accompanying text.

106. FLA. ADMIN. CODE ANN. § 12A-1.037(3) (2014).

107. *Id.* § 12A-1.037 (3)(a).

108. *Id.* § 12A-1.037 (3)(b).

exempt from Florida sales tax as an *occasional* sale and, in some instances, an *isolated* sale:¹⁰⁹ (1) a sale (or series of sales) that occurs more than two times within any twelve month period, with tax being imposed on the third sale and on any sales thereafter;¹¹⁰ (2) transfers of property that were originally purchased or acquired for resale;¹¹¹ (3) a transaction where the sale is made on the same commercial premises or from a temporary location that is in competition with other persons required to collect Florida sales and use tax;¹¹² (4) the sale is made by or through an agent, broker, auctioneer, factor, or any other person required to be registered as a dealer in Florida to collect and remit tax on sales as provided in Fla. Admin. Code Rule 12A-1066;¹¹³ and (5) the sale of aircraft, boats, mobile homes, or motor vehicles “of a class or type required to be registered, licensed, titled, or documented” in Florida or by the U.S. government.¹¹⁴

Based on the foregoing, the proceeds from the transfer of the non-inventory TPP component of an Asset Sale should be exempt from Florida sales tax as long as the seller is not in the business of selling its non-inventory TPP, and as long as the other requirements set forth above with respect to either *isolated* sales or *occasional* sales, as the case may be, are satisfied.¹¹⁵

Florida’s delineation between *isolated* and *occasional* sales deviates from the Baseline Model Exemption and puts Florida in the trap for the unwary category.¹¹⁶ Notably, one issue caused by this delineation is the thirty-day transfer requirement that applies to isolated sales, which necessitates the completion of the transfer of the business within thirty days from the “date of the

109. *Id.* § 12A-1.037(5). Even though the text of subsection (5) is phrased to apply only to *occasional* sales and not also to *isolated* sales, certain language in subsection (2)(a)(3) makes the requirements set out in subsection (5) also apply to some transactions where the seller is a dealer (i.e., an *isolated* sale.); see also *id.* § 12A-1.037(3)(b)(3), which states:

Sales by a dealer of tangible personal property that was used in the business, which is not inventory and which was not originally purchased for resale, may qualify as an occasional sale, regardless of the items’ similarity to any items sold in the regular course of the dealer’s trade or business, provided the items are not specifically excluded, as set forth in subsection (5) of this rule, from the occasional sales exemption, and provided all other requirements set forth herein are met.

Id.

110. *Id.* § 12A-1.037(5)(a). This requirement is also set forth in subsections (3)(b)(2) and (3)(b)(3)(a). In the context of Asset Sales, this requirement means that the Seller cannot have engaged in two previous sales of non-inventory business assets in the previous twelve-month period. See Fla. Tech. Assistance Advisement 99A-080, *supra* note 96.

111. FLA. ADMIN. CODE ANN. § 12A-1.037(5)(b) (2014). This requirement is also set forth in subsection (3)(b)(3).

112. *Id.* § 12A-1.037(5)(c).

113. *Id.* § 12A-1.037(5)(e).

114. *Id.* § 12A-1.037(5)(f). This requirement is also set forth in (2)(a) and (2)(d).

115. Fla. Tech. Assistance Advisement 99A-080, *supra* note 96.

116. See *supra* note 41 and accompanying text.

agreement for the sale of the business.”¹¹⁷ Because the language used is “date of the agreement for the sale of the business” rather than “closing date for sale of the business,” Asset Sales having a closing date falling more than thirty days after the signing date would not appear to meet this thirty day transfer requirement.¹¹⁸ Such a requirement is at odds with the practical nature of Asset Sales because it would not be out of the ordinary for a closing date to extend more than thirty days beyond the signing date. However, this is not necessarily fatal as the regulations contain an “out” by way of the exemption for occasional sales, which does not contain the thirty-day transfer requirement.¹¹⁹ Florida also requires the prior payment of sales tax in order for either the isolated sale or occasional sale exemption to apply.¹²⁰ This requirement is also a deviation from the Model Baseline Exemption further causing Florida to fit within the trap for the unwary category.¹²¹

F. Georgia

Casual sales are exempt from Georgia sales tax.¹²² A casual sale is defined by section 560-12-1-.07 of the Official Compilation of Rules and Regulations of the State of Georgia to include:

- a. A sale in which the tangible personal property involved was not acquired or held by the seller for use in the operation of his business or for resale; or
- b. A sale of tangible personal property acquired or held by the seller for use in the operation of his business (not acquired or held for resale) if the total selling price of such sale and all such sales made during the calendar month of such sale and the preceding eleven calendar months does not exceed \$500; or
- c. A sale of tangible personal property acquired or held by the seller for use in the operation of his business (not acquired or held for resale) if such sale is made in a complete and bona fide liquidation of a business of the seller. For purposes of this paragraph the term “business” means a separate place of business subject to registration under the Act; the term “a complete and bona fide liquidation” means the sale of all the assets of such business conducted over a period of time not exceeding thirty days from the date of the first sale of such assets, or a longer time if approved

117. *See supra* note 102 and accompanying text.

118. *See supra* note 102 and accompanying text.

119. *See supra* note 107 and accompanying text.

120. *See supra* note 108 and accompanying text.

121. *See supra* note 41 and accompanying text. However, for the reasons discussed in Part III, subsection J, this requirement should not significantly impede, if at all, the occasional sale exemption from applying in Florida.

122. *See* GA. COMP. R. & REGS. 560-12-1.07(1) (2013).

by the Commissioner as a bona fide liquidation.¹²³

Paragraph (a) above is not applicable to Asset Sales and most, if not all, Asset Sales will not be exempt casual sales under paragraph (b) due to the \$500 limitation.¹²⁴ But the definition of “liquidation” in paragraph (c) appears broad enough to include Asset Sales, including Asset Sales where the buyer will continue operating the purchased business.¹²⁵ Thus, the term “liquidation,” as defined in subsection (c), does not appear to narrowly mean a termination of a business through the sale of assets and the payment of liabilities even though that might be the more common understanding of the term.¹²⁶

While it seems clear that paragraph (c) applies to Asset Sales, it is unclear whether paragraph (c) applies only to exempt sales of businesses that are registered for Georgia sales tax purposes (i.e., businesses ordinarily engaged in the sale of TPP or taxable services where a sales tax permit is required), or if it also applies to sales of businesses that are non-permitted (e.g., a law firm engaged in the business of selling nontaxable services).¹²⁷ This query results from the definition of “business” in paragraph (c), which means a place of business “subject to registration under the Act.”¹²⁸ Notably, paragraph (b) does not define the term business in the narrow way that paragraph (c) does.¹²⁹ This could logically mean that paragraph (c) does not cover Asset Sales involving non-permitted businesses and such sales must meet the narrow \$500 requirement of paragraph (b) in order for the Georgia’s casual sale exemption to apply.¹³⁰ Under this narrow interpretation, it would effectively mean most, if not all, Asset Sales of non-permitted businesses would be ineligible for exempt occasional sale treatment due to the \$500 limitation. Although unclear from the face of the regulations, it is unlikely that Georgia intended this narrow interpretation.¹³¹ In any event, this dichotomy between permitted and non-permitted businesses is a trap for the unwary for taxpayers and practitioners who are more familiar with the Baseline Model Exemption.¹³²

123. GA. COMP. R. & REGS. 560-12-1.07(2) (2103).

124. *Id.*

125. *Id.*

126. Further, Georgia case law indicates that Georgia’s casual sale exemption applies to an Asset Sale, even if the buyer will continue operating the purchased business. *See State v. Dyson*, 81 S.E.2d 217 (Ga. 1954). But some commentators have concluded that the exemption may not apply if the buyer continues the business. *See Faber, supra* note 39, at 5 (concluding that “[i]t is not clear if the exemption applies if the business is continued by the buyer”).

127. *See infra* note 128 and accompanying text.

128. *See supra* note 123 and accompanying text.

129. *See supra* note 123 and accompanying text.

130. *See supra* note 123 and accompanying text.

131. Considering the various rationales for the occasional sale exemption, it would make more sense for stricter requirements to be imposed on permitted sellers versus non-permitted sellers. *See infra* Part III.

132. *See supra* note 41 and accompanying text.

Another trap for the unwary, also involving the definition of “business,” is the proviso that the term “business” means, “*a separate place of business* subject to registration under the Act”¹³³ This requirement could arguably mean that the business sold in the Asset Sale must be at a separate location from any business that the seller will continue to operate post-sale, if any.¹³⁴

A further trap for the unwary is the definition of “complete and bona fide liquidation” meaning, “the sale of *all* the assets of such business.”¹³⁵ It is not uncommon for the parties to an Asset Sale to exclude certain assets from the Asset Purchase Agreement.¹³⁶ If Georgia does not have a *de minimis* policy to allow the exclusion of at least an insignificant amount of assets from the Asset Sale, then Georgia’s requirement mandating the transfer of all assets in an Asset Sale could cause the occasional sale exemption to be lost in its entirety when there are only a few excluded assets (i.e., not simply lost with respect to the excluded assets).

Over the years, courts and commentators have observed the lack of clarity in Georgia’s occasional sale exemption.¹³⁷ Additionally, in some instances, Georgia courts have appeared to recognize a fundamental exemption for casual sales that can apply even if the narrow restrictions discussed above are not satisfied.¹³⁸ This makes the scope of Georgia’s casual sale exemption even less clear because it means the above-discussed dichotomy between permitted and non-permitted businesses and other traps for the unwary may not necessarily be the law in Georgia.¹³⁹

G. Idaho

Occasional sales of TPP are generally exempt from Idaho sales tax.¹⁴⁰ Section 63-3622K(a) of the Idaho Code provides that “[t]here are exempted from the taxes imposed by this chapter occasional sales of tangible personal

133. GA. COMP. R. & REGS. 560-12-1.07(2)(c) (2013) (emphasis added).

134. See Blum & Backstrom, *supra* note 81, at 8 (“[T]he business sold must be at a separate location from the assets retained. Therefore, in situations where several businesses are headquartered at the same location for Georgia Sales Tax purposes, the sale of the assets of a single business when the others are retained will not qualify for Georgia’s Casual Sale Exemption.”).

135. GA. COMP. R. & REGS. 560-12-1.07(2)(c) (2013) (emphasis added).

136. See generally Egan, *supra* note 10, at 917.

137. See *Newscopters v. Blackmon*, 186 S.E.2d 759 (Ga. Ct. App. 1971); *Chilivis v. Bradley*, 237 S.E.2d 200 (Ga. Ct. App. 1977); see also John L. Coalson, Jr. & Kendall L. Houghton, *Georgia—Definition of Exempt Casual Sale is Tightened*, J. MULTISTATE TAXATION & INCENTIVES, Sept./Oct. 1992, at 2.

138. See Coalson & Houghton, *supra* note 137, at 12 (“It is unclear whether the Department’s regulatory authority extends this far, since the Georgia Court of Appeals has previously recognized a core exemption for casual sales that may transcend the restrictions the Department of Revenue has attempted to create and enforce by regulation.”).

139. See Coalson & Houghton, *supra* note 137, at 2.

140. See *infra* notes 141-43 and accompanying text.

property.”¹⁴¹ There are several types of transactions that meet the definition of occasional sale.¹⁴² With respect to Asset Sales, section 63-3622K(b)(5) of the Idaho Code is applicable. This section provides that the following is exempt:

The sale of substantially all of the operating assets of a business or of a separate division, branch, or identifiable segment to a buyer who continues operation of the business. For the purposes of this subsection, a “separate division, branch, or identifiable segment” shall be deemed to exist if, prior to its sale the income and expenses attributable to such “separate division, branch, or identifiable segment” could be separately ascertained from the books of accounts and records.¹⁴³

Idaho’s occasional sale exemption is similar to the Baseline Model Exemption with one critical distinction that causes Idaho to fit within the trap for the unwary category.¹⁴⁴ The distinction is Idaho’s requirement that the buyer must continue to operate the purchased business in the same form.¹⁴⁵ More specifically, section 35.01.02.099(03) of the Idaho Administrative Rules provides that occasional sale treatment will result only if the “purchaser continues the same type of business operation.”¹⁴⁶ This requirement would appear to preclude a buyer from purchasing a business and then using the purchased assets in another business or using the purchased assets in a way different from that of the seller.¹⁴⁷ This means the parties to an Asset Sale should ensure that the buyer will continue to operate the target business in the same manner in order for the occasional sale exemption to not be lost. The seller might consider obtaining a representation from the buyer in the Asset Purchase Agreement that the buyer will continue to operate the purchased business in the same way as that of the seller. Additionally, the parties might want to specify for how long the buyer must continue to operate the business.

141. IDAHO CODE ANN. § 63-3622K(a) (2014); *see also* IDAHO ADMIN. CODE r. 35.01.02.099 (2014).

142. IDAHO CODE ANN. § 63-3622K(b) (2014).

143. *Id.* § 63-3622K(b)(5); *see also* IDAHO ADMIN. CODE r. 35.01.02.099(03)(a) (2013) (providing that occasional sale treatment will only result if the “purchaser continues the same type of business operation.”). The example given in the regulations provides: “Corporation X sells its entire wood products division to Corporation Y, which continues to operate it in substantially the same form. The transaction qualifies for an occasional sale exemption.” *Id.* r. 35.01.02.099(03)(c); *see also* Stern *supra* note 24, at 52.

144. *See supra* note 41 and accompanying text.

145. *See supra* note 143 and accompanying text; *see also* RIA Checkpoint, *supra* note 72.

146. IDAHO ADMIN. CODE r. 35.01.02.099(03)(2013); *see also supra* note 143 and accompanying text.

147. *See* IDAHO ADMIN. CODE r. 35.01.02.099(03) (2013); *see also* Stern, *supra* note 24, at 52.

H. Illinois

The Illinois retailer's occupation tax does not apply to occasional or isolated sales in certain circumstances.¹⁴⁸ Applicable to Asset Sales is chapter 35, act 120/1 of the Illinois Compiled Statutes, which provides:

[t]he isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail, or a sale through a bulk vending machine, does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act.¹⁴⁹

Title 86, section 130.110 of the Illinois Administrative Code further provides that “[s]ince the Act does not impose a tax upon persons who are not engaged in the business of selling tangible personal property, persons who make isolated or occasional sales thereof do not incur tax liability.”¹⁵⁰ Regulations also confirm that the occasional sale exemption applies to occasional sales of TPP even if the seller is regularly engaged in selling certain other TPP by giving the following example:

For example, if a retailer sells tangible personal property, such as machinery or other capital assets, which he has used in his business and no longer needs, and which he does not otherwise engage in selling, he does not incur Retailers' Occupation Tax liability when selling such tangible personal property even if the sales are at retail and even if he may be required to make a considerable number of such sales in order to dispose of such tangible personal property, because such sales are isolated or occasional and do not constitute a business of selling tangible personal property at retail.¹⁵¹

Based on the foregoing, the Illinois occasional sale exemption is broad and similar to the Baseline Model Exemption.¹⁵² Thus, Illinois is not a trap for the unwary state because of its overall narrowness. Instead, Illinois is a trap for the unwary state because the occasional sale exemption does not apply to certain sales of TPP made by construction contractors or real estate developers.¹⁵³ The lack of applicability to certain industries is a deviation from the Model Baseline Exemption and causes Illinois to be a trap for the unwary state.¹⁵⁴

148. See 35 ILL. COMP. STAT. 120/1 (2014); ILL. ADMIN. CODE tit. 86-§ 130.110 (2014).

149. *Id.*

150. ILL. ADMIN. CODE tit. 86, § 130.110(a) (2014).

151. *Id.* § 130.110(b).

152. See *supra* note 41 and accompanying text.

153. See ILL. ADMIN. CODE tit. 86 § 130.110(c) (2014).

154. See *supra* note 41 and accompanying text.

I. Indiana

An exemption exists from the Indiana gross retail tax for certain casual sales.¹⁵⁵ Title 45, section 2.2-1-1(d) of the Indiana Administrative Code provides:

The Indiana Gross retail tax is not imposed on gross receipts from casual sales except for gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales.¹⁵⁶

The language providing that the term “casual sale” means “an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales” is similar to the Baseline Model Exemption.¹⁵⁷ However, while Indiana has a broad occasional sale exemption similar to the Baseline Model Exemption, there is one exception that puts Indiana in the trap for the unwary category.¹⁵⁸ The exception is that Indiana’s occasional sale exemption does not apply to sales of rental property.¹⁵⁹ Thus, if an Asset Sale involves the transfer of rental property, then the part of the purchase price allocated to the rental property will not be exempt under Indiana’s occasional sale exemption.¹⁶⁰ This is a deviation from the Baseline Model Exemption and puts Indiana into the trap for the unwary category.¹⁶¹

J. Kentucky

Kentucky’s occasional sale exemption is set forth in section 139.470 of the Kentucky Revised Statutes, which provides that the following are exempt from sales tax:

Gross receipts from occasional sales of tangible personal property or digital property and the storage, use, or other consumption in this state of tangible personal property or digital property, the transfer of which to the purchaser is an occasional sale¹⁶²

The term “occasional sale” means:

1. A sale of tangible personal property or digital property not held or used by a seller in the course of an activity for which he or she is

155. See 45 IND. ADMIN. CODE 2.2-1-1(d) (2014).

156. *Id.*

157. 45 IND. ADMIN. CODE 2.2-1-1(d) (2014); see *supra* note 41 and accompanying text.

158. See *infra* notes 159-61 and accompanying text.

159. See *supra* note 156 and accompanying text.

160. See *supra* note 156 and accompanying text.

161. See *supra* note 41 and accompanying text.

162. KY. REV. STAT. ANN. § 139.470(4) (West 2014).

required to hold a seller's permit, provided such sale is not one (1) of a series of sales sufficient in number, scope, and character to constitute an activity requiring the holding of a seller's permit. In the case of the sale of the entire, or a substantial portion of the nonretail assets of the seller, the number of previous sales of similar assets shall be disregarded in determining whether or not the current sale or sales shall qualify as an occasional sale; or

2. Any transfer of all or substantially all the tangible personal property or digital property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer.¹⁶³

Based on the above, one could conclude that the transfer of non-inventory TPP in an Asset Sale where the seller engages in a business requiring a Kentucky seller's permit is not exempt (to the extent such TPP relates to the permitted business) under Kentucky's occasional sale exemption (with the exception of when there is substantially similar ownership after the sale).¹⁶⁴ This is, in fact, how Kentucky courts have interpreted the occasional sale exemption.¹⁶⁵ In *Luckett v. Revday Industries, Inc.*, the court stated:

We start with the observation that the legislature, in KRS 139.070, obviously was trying to *exclude* from the meaning of "occasional sale" some transactions which normally would be thought to be included in the standard meaning of that term; for example, a going-out-of-business sale by a pure retailer . . . We think what the legislature has said is that a sale of property held or used *in that part* of the seller's business for which he must have a seller's permit is not exempt.¹⁶⁶

Thus, Kentucky's occasional sale exemption applies broadly only in the context of Asset Sales where the seller is engaged in a business not requiring a Kentucky seller's permit.¹⁶⁷ The only time the occasional sale exemption applies when the seller is engaged in a business requiring a Kentucky seller's permit is when, after the transfer, the real or ultimate ownership of the transferred assets

163. *Id.* § 139.010(17).

164. *See supra* notes 162-63 and accompanying text.

165. *See infra* note 166 and accompanying text.

166. *Commonwealth ex rel. Luckett v. Revday Indus., Inc.*, 432 S.W.2d 819, 820 (Ky. 1968); *see also Stern supra* note 24, at 56 ("Thus, the exemption is limited to the sale of business assets that were held or used in a separate and distinct activity for which the seller was not required to hold a seller's permit and may not be broadly applicable to transfers of business assets.").

167. *See also LWD Equip. Inc. v. Revenue Cabinet*, 136 S.W.3d 472, 476 (Ky. 2004) ("Considering this statute as a whole, it appears that the General Assembly intended the occasional sale statute to provide a limited exemption from sales and use tax for either a retail seller disposing of non-retail assets or a taxpayer reorganizing its business.").

is substantially similar to that existing prior to the transfer,¹⁶⁸ or with respect to a permitted business with multiple operations where some operations relate to the requirement of having a sales tax permit and other operations do not, in which case the occasional sale exemption should extend to the portion of the purchase price allocated to the non-permitted operations.¹⁶⁹

Based on the foregoing, Kentucky has a narrow occasional sale exemption that deviates from the Baseline Model Exemption.¹⁷⁰ Thus, Kentucky is a trap for the unwary state.

K. Maryland

Maryland's occasional sale exemption applies only when the sales price is less than \$1000.¹⁷¹ Thus, the proceeds from the transfer of the non-inventory TPP component of an Asset Sale will be subject to Maryland sales tax unless another exemption applies (e.g., manufacturing exemption).¹⁷² The lack of any type of occasional sale exemption applicable to Asset Sales is divergent from the Baseline Model Exemption, thereby causing Maryland to fit within the trap for the unwary category.¹⁷³

L. Minnesota

Isolated and occasional sales are exempt from Minnesota sales tax.¹⁷⁴ Minnesota Statute provides:

Isolated and occasional sales in Minnesota not made in the normal course of business of selling that kind of property or service are exempt. The storage, use, or consumption of property or services acquired as a result of such a sale is exempt. This exemption does not apply to sales of tangible personal property primarily used in a trade or business.¹⁷⁵

As indicated in the last sentence, the above quoted exemption does not apply if the subject TPP is primarily used in a trade or business.¹⁷⁶ For TPP primarily used in a trade or business, section 297A.68 of the Minnesota Statutes applies, which states:

168. Substantially similar ownership both before and after an Asset Sale will not result in the typical Asset Sale where the buyer and seller are unrelated parties.

169. See *supra* notes 167-68 and accompanying text.

170. See *supra* note 41.

171. See MD. CODE ANN. TAX-GEN. § 11-209(a) (West 2014).

172. See *id.* See generally Stern, *supra* note 24, at 58.

173. See *supra* note 41 and accompanying text; see also RIA Checkpoint, *supra* note 72; Noonan & Endres, *supra* note 22, at 119.

174. See MINN. STAT. ANN. § 297A.67, subd. 23 (West 2014); see also MINN. R. 8130.5800, subp. 1 (2014).

175. *Id.*

176. See *infra* note 178 and accompanying text.

The sale of tangible personal property primarily used in a trade or business is exempt if the sale is not made in the normal course of business of selling that kind of property and if one of the following conditions is satisfied:

- (1) the sale occurs in a transaction subject to or described in section 118, 331, 332, 336, 337, 338, 351, 355, 368, 721, 731, 1031, or 1033 of the Internal Revenue Code;
- (2) the sale is between members of a controlled group as defined in section 1563(a) of the Internal Revenue Code;
- (3) the sale is a sale of farm machinery;
- (4) the sale is a farm auction sale;
- (5) the sale is a sale of substantially all of the assets of a trade or business;¹⁷⁷ or
- (6) the total amount of gross receipts from the sale of trade or business property made during the calendar month of the sale and the preceding 11 calendar months does not exceed \$1,000.¹⁷⁸

Based on the above, the proceeds from the transfer of the non-inventory TPP component of an Asset Sale should be exempt from Minnesota sales tax under subsection (5).¹⁷⁹ The caveat, and the reason Minnesota fits into the trap for the unwary category, is that for the occasional sale exemption to apply, the Asset Sale “must occur as a single transaction or a series of related transactions within the twelve month period beginning on the date of the first sale of assets intended to qualify for the exemption.”¹⁸⁰ This requirement precludes occasional sale treatment when the structure of an Asset Sale is a series of sales completed over a period that will extend beyond twelve months.¹⁸¹ Because this requirement deviates from the Baseline Model Exemption, Minnesota is a trap for the unwary state.¹⁸²

M. Missouri

Missouri’s occasional sale exemption is set forth in title 10-103.200 of the Missouri Code of State Regulations, which provides:

177. The term “substantially all of the assets of a trade or business,” or “substantially all of the property sold,” means ninety percent or more of the total fair market value of the TPP and does not include property that is subject to property tax. It also includes the assets of a separate division, branch, or other identifiable segment of a business, if before the sale, the income and expenses attributable to the separate division, branch, or segment can be separately ascertained. *See* MINN. R. 8130.5800, Subp. (1)(a)(F) (2014).

178. MINN. STAT. ANN. § 297A.68, subd. 25(a) (West 2014).

179. *Id.* § 297A.68, subd. 25(b)(3).

180. *Id.*

181. *See id.*

182. *See supra* note 41 and accompanying text; *see also* MINN. STAT. § 297A.68 (2014).

In general, sales of tangible personal property are subject to tax only if the taxpayer is engaged in the business of making such sales. Isolated or occasional sales by a person not engaged in the business generally are not taxable. There are exceptions to this rule based on the frequency of such sales and total dollars of annual sales.¹⁸³

The dollar limitation significantly narrows the application of Missouri's occasional sale exemption.¹⁸⁴ Title 10-103.200(3)(A) of the Missouri Code of State Regulations provides the benchmark for this limitation, specifically stating that the occasional sale exemption applies only if the "gross receipts from all such sales are less than three thousand dollars (\$3000) in a calendar year."¹⁸⁵ However, the \$3000 limitation is waived in certain circumstances, including sales incident to the liquidation or cessation of a seller's business.¹⁸⁶ With respect to the liquidation or cessation of a seller's business, section 144.011 of the Missouri Revised Statute provides that the occasional sale exemption extends to "[t]he transfer of tangible personal property incident to the liquidation or cessation of a taxpayer's trade or business, conducted in proprietorship, partnership or corporate form, except to the extent any transfer is made in the ordinary course of the taxpayer's trade or business."¹⁸⁷

Asset Sales should come under this broader exemption for the "liquidation or cessation of business" where the \$3000 limitation does not apply.¹⁸⁸ Although not clear from the face of section 144.011 of the Missouri Revised Statute, the exemption should apply even if the seller continues to operate other businesses or divisions post-sale and the buyer continues to operate the target business post-sale.¹⁸⁹ However, a trap for the unwary is that the seller cannot remain in the same sold business¹⁹⁰ This requirement is a deviation from the Model Baseline

183. MO. CODE REGS. ANN. tit. 12 § 10-103.200(1) (2014).

184. *Id.* § 10-103.200(3).

185. *Id.* § 10-103.200(3)(A).

186. MO. ANN. STAT. § 144.011(1)(2) (West 2014); MO. CODE REGS. ANN. tit. 12 § 10-103.200(3)(D); *see Staley v. Mo. Dir. of Revenue*, 623 S.W.2d 246, 249 (1981) ("As to 'an isolated or occasional' liquidation sale within a year, by one not 'engaged in the business of selling' the item sold, no \$3,000 limit is applicable.").

187. MO. ANN. STAT. § 144.011(1)(2) (West 2014).

188. *Id.*; MO. CODE REGS. ANN. tit. 12 § 10-103.200(3)(D) (2014).

189. *See Staley*, 623 S.W.2d at 250.

190. *See Dir. of Revenue, State of Mo. v. Loethen Amusement, Inc.*, No. RS-86-0130, 1987 WL 51184, at *4 (Mo. Ct. App. Oct. 2, 1987), *aff'd*, *Dir. of Revenue v. Loethen Amusement, Inc.*, 753 S.W.2d 334 (Mo. Ct. App. 1988) ("The cited statute, and the rule interpreting the statute, quite unambiguously establish that the sales tax exemption is incident to liquidation or cessation of a taxpayer's business or trade. The undisputed facts indicate that Petitioner remained in the same business after the March 8, 1983 transaction. We agree with Respondent that the statute and rule in effect at the time of the sale relate explicitly to the complete liquidation of a taxpayer's business or trade and we find, therefore, that Petitioner is liable for the sales tax on its sale of tangible property on March 8, 1983.").

Exemption¹⁹¹ and causes Missouri to be placed in the trap for the unwary category.

N. Nebraska

Nebraska's occasional sale exemption is set forth in section 77-2704.48 of the Nebraska Revised Statute, which provides:

Sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental of and the storage, use or other consumption in this state of property or services the transfer of which to the consumer constitutes an occasional sale or the transfer of which to the consumer is made by way of an occasional sale.¹⁹²

The definition of "occasional sale" includes several types of transactions.¹⁹³ Applicable to Asset Sales is Nebraska Revised Statute section 77-2701.24(5), which provides that an occasional sale includes

[a]ny sale that is made in connection with the sale to a single buyer of all or substantially all of a trade or business if the seller or seller's predecessor in a sale described in subdivision (1) of this section directly or indirectly has previously paid a sales or use tax thereon¹⁹⁴

The corresponding regulatory provision elaborates by stating that an occasional sale includes "the sale of either new or used business assets, where a person liquidates his or her business in a single transaction in a sale to a single buyer" and "such liquidation must be all or substantially all of the property of the trade or business."¹⁹⁵

Nebraska's single transaction requirement seems to preclude the occasional sale exemption from applying to Asset Sales structured as a series of sales completed over time.¹⁹⁶ Further, Nebraska's single buyer requirement seems to prevent the naming of both a parent and subsidiary as purchaser in the Asset Purchase Agreement, which may be desirable to the parties for non-tax reasons.¹⁹⁷ Nebraska also requires the prior payment of sales tax in order for the occasional sale exemption to apply.¹⁹⁸ These limitations are deviations from the Baseline Model Exemption.¹⁹⁹ Accordingly, Nebraska fits into the trap for the unwary

191. *Id.*

192. NEB. REV. STAT. § 77-2704.48 (2014).

193. *Id.* § 77-2701.24.

194. *Id.* § 77-2701.24(5).

195. 316 NEB. ADMIN. CODE § 1-022.04 (2014).

196. NEB. REV. STAT. § 77-2701.24(5) (2014); 316 NEB. ADMIN. CODE § 1-022.04 (2014).

197. NEB. REV. STAT. § 77-2701.24(1)(a) (2014); 316 NEB. ADMIN. CODE § 1-022.03A (2014).

198. NEB. REV. STAT. § 77-2701.24(1) (2014); 316 NEB. ADMIN. CODE § 1-022.02B (2014).

For the reasons discussed in Part III, subsection J, this requirement should not significantly impede, if at all, exemption occasional sale status.

199. *See* 67B Am. Jur. 2d *Sales and Use Taxes* § 97 (2014).

category.

O. New York

New York does not have an occasional sale exemption applicable to Asset Sales.²⁰⁰ Thus, the proceeds from the transfer of the non-inventory TPP component of an Asset Sale will be subject to New York sales tax unless another exemption applies (e.g., manufacturing exemption).²⁰¹ The lack of any type of occasional sale exemption causes New York to fit within the trap for the unwary category.²⁰²

P. Oklahoma

Oklahoma does not have an occasional sale exemption, except in limited circumstances, such as estate sales.²⁰³ Thus, with respect to the non-inventory TPP component of an Asset Sale, the parties would need to determine if other exemptions are available that are not included in section 1360.²⁰⁴ Oklahoma's lack of any occasional sale exemption for Asset Sales causes it fit within the trap for the unwary category.²⁰⁵

Q. Rhode Island

Rhode Island sales and use tax does not apply to "casual sales made by a person not regularly engaged in the business of selling tangible personal property."²⁰⁶ The term "casual" means, "a sale made by a person other than a retailer."²⁰⁷ Regulations further state:

Casual sale includes a sale of tangible personal property not held or used by a seller in the course of activities for which the seller is required to hold a seller's permit(s) or would be required to hold a seller's permit(s) if the activities were conducted in this state. It is further provided such sale is not one of a series of sales sufficient in number, scope and character (more than five (5) in any twelve-month period) to constitute an activity for which the person is required to hold a seller's permit or would be required to hold a seller's permit if the activity were conducted

200. See N.Y. TAX LAW § 1105 (McKinney 2014).

201. *Id.* § 1115(a)(12).

202. See *supra* note 41 and accompanying text.

203. OKLA. STAT. ANN. tit. 68, § 1360 (West 2014) (including a sales tax exemption for the acquisition by a corporation of substantially all of the properties of another corporation when the consideration is solely all or a part of the voting stock of the acquiring corporation, or of its parent or subsidiary corporation).

204. *Id.*

205. See *supra* note 41 and accompanying text.

206. 60-1-197 R.I. CODE R. § 07-17 (LexisNexis 2014); see also R.I. GEN. LAWS ANN. § 44-18-20 (West 2014).

207. 60-1-197 R.I. CODE R. § 07-17 (LexisNexis 2014); R.I. GEN LAWS § 44-18-20(e) (2014).

in this state.²⁰⁸

The regulations give several examples of exempt casual sales, one of which includes the bulk sale of assets.²⁰⁹ Although, in the context of bulk sales, the regulations provide that, if the seller is a retailer, then the “sale must occur after the retail business for which the retailer had a permit has ceased.”²¹⁰

Based on the above provisions, Rhode Island’s occasional sale exemption should apply to exempt from sales tax the non-inventory TPP component of an Asset Sale; however, the regulatory provisions also arguably indicate that the occasional sale exemption applies only when the seller is not a retailer for Rhode Island sales and use tax purposes.²¹¹ Supporting this narrow interpretation is the statement in the regulations providing the term “casual” sale means, “a sale made by a person other than a retailer.”²¹² Supporting a broader interpretation is the caveat, also in the regulations, relating to bulk sales, that provides if the seller is a retailer, then the “sale must occur after the retail business for which the retailer had a permit has ceased.”²¹³ The “if the seller is a retailer” proviso seems to imply that the occasional sale exemption applies equally to permitted and non-permitted sellers, but that there is the added requirement imposed on permitted sellers (i.e., retailers) that the “sale must occur after the retail business for which the retailer had a permit has ceased.”²¹⁴

Based on the foregoing, Rhode Island is not a trap for the unwary state because of its overall narrowness, but because of the requirement imposed on permitted sellers that the “sale must occur after the retail business for which the retailer had a permit has ceased” in order for the occasional sale exemption to apply.²¹⁵ This requirement is a deviation from the Baseline Model Exemption, thereby causing Rhode Island to be a trap for the unwary state.²¹⁶

R. South Carolina

Chapter 117-332 of South Carolina Code of Regulations provides that “[c]asual or isolated sales by persons not engaged in the business of selling tangible personal property at retail are not subject to the sales or use tax.”²¹⁷ The term “casual” means, “occurring, encountered, acting or performed without

208. 60-1-197 R.I. CODE R. § 07-17 (LexisNexis 2014).

209. *Id.* § 07-17(1)-(7).

210. *Id.* § 07-17(7).

211. *See id.* § 07-17.

212. *Id.*

213. *Id.* § 07-17(7).

214. *Id.*; *see also* State of Rhode Island Dept. of Rev., Rul. 95-02, (1995) (concluding that the occasional sale exemption applied to the sale of a business when the seller held a Rhode Island seller’s permit).

215. 60-1-197 R.I. CODE R. § 07-17(7) (LexisNexis 2014).

216. *See supra* note 41 and accompanying text.

217. S.C. CODE ANN. REGS. 117-322 (2014).

regularity or at random.”²¹⁸ The terms “occasional” and “isolated” mean, “occurring alone or once, an incident not likely to recur, sporadic.”²¹⁹

South Carolina also has an exemption specifically relating to the sale of a business. Title 12, section 12-36-2120(42) of the South Carolina Code provides that the transfer of “depreciable assets, used in the operation of a business, pursuant to the sale of the business” is exempt from South Carolina sales and use tax, and only is applicable when “the entire business is sold by the owner of it, pursuant to a written contract and the purchaser continues operation of the business”²²⁰ The South Carolina Department of Revenue has given additional interpretive guidance regarding how the occasional sale exemption applies to an Asset Sale.²²¹ In South Carolina Revenue Advisory Bulletin 01-1, the South Carolina Department of Revenue stated:

In the Department’s opinion, the sale of a business will qualify as the sale of the entire business and will qualify for the exemption under Code Section 12-36-2120(42) under two circumstances: 1) when the taxpayer sells all the assets of the legal entity (other than a single member limited liability company or a grantor trust which is ignored for tax purposes); or 2) when the taxpayer sells all of the assets of a “discrete business enterprise” that is contained within the legal entity. In the Department’s opinion, whether the taxpayer has sold a discrete business enterprise is determined under the principles relating to a unitary business as set forth in the case law of the South Carolina courts and the United States Supreme Court. If the business is unitary with other businesses of the taxpayer, the taxpayer will not be considered to have sold a discrete business enterprise and the taxpayer will not qualify for the exemption provided in Code Section 12-36-2120(42). However, if the business being sold is not unitary with other businesses of the taxpayer, the taxpayer will be considered to have sold a discrete business enterprise and will qualify for the exemption provided in Code Section 12-36-2120(42).

In addition to the requirement that the taxpayer sell all the assets of the legal entity or all of the assets of a discrete business enterprise contained within the legal entity as provided above, the exemption will only apply if the sale is made pursuant to a written contract and the purchaser continues operation of the business.²²²

Thus, South Carolina has two different occasional sale rules that can apply in Asset Sales.²²³ First, if the target business is not in the business of selling TPP,

218. *Id.*

219. *Id.*

220. S.C. CODE ANN. § 12-36-2120(42) (2013).

221. S.C. DEP’T. OF REV., S.C. REV. ADVISORY BULLETIN No. 01-1 (2001).

222. *Id.*

223. *Id.*; S.C. CODE ANN. § 12-36-2120(42) (2013); S.C. CODE ANN. REGS. 117-322 (2014).

then South Carolina Code of State Regulations 117-322 should broadly apply, which provides that “[c]asual or isolated sales by persons not engaged in the business of selling tangible personal property at retail are not subject to the sales or use tax.”²²⁴ Second, if South Carolina Code of State Regulations 117-322 does not apply (e.g., when the seller is in the business of selling TPP), then the occasional sale exemption specifically for the sale of a business should apply.²²⁵ This exemption applies when: (1) all assets of the business are sold; (2) the assets of the business being sold are held in a legal entity (other than a limited liability company or a grantor trust treated as a disregarded entity for federal income tax purposes);²²⁶ (3) the sale is made pursuant to a written contract; and (4) the purchaser continues to operate the purchased business.²²⁷ Or, in the case of the sale of a division of a legal entity, including the sale of a limited liability company or grantor trust disregarded for federal income tax purposes, the exemption applies when: (1) all the assets of a discrete non-unitary business enterprise is sold, as determined under unitary business principles set forth in South Carolina and federal case law; (2) the sale is made pursuant to a written contract; and (3) the purchaser continues to operate the purchased business.²²⁸

Based on the foregoing, South Carolina has a narrow occasional sale exemption, at least with respect to permitted sellers.²²⁹ For example, the exemption does not cover an Asset Sale where the parties have negotiated to exclude certain assets from the sale, which is common.²³⁰ Another trap for the unwary is that the occasional sale exemption does not apply if the Asset Sale involves a seller that is a limited liability company disregarded for federal income tax purposes, unless the purchased assets comprise all of the assets of a non-unitary business enterprise of the seller.²³¹ Further, the buyer must continue to operate the purchased business, which would prevent the buyer from purchasing the target assets and using them in a way different from that of the seller.²³² These requirements are all deviations from the Model Baseline Exemption and cause South Carolina to be a trap for the unwary state.²³³

224. S.C. CODE ANN. REGS. 117-322 (2014); *see also* S.C. Dep’t of Revenue Comm’n Dec., S-D-171 (1995).

225. S.C. CODE ANN. § 12-36-2120(42) (2013).

226. This requirement is interesting because a limited partnership could also be a disregarded entity for federal income tax purposes. Further, this requirement is interesting because federal law disregards entities for federal income tax purposes, but they are still legal entities for state law purposes.

227. S.C. CODE ANN. § 12-36-2120(42) (2013).

228. S.C. Dep’t of Rev., *supra* note 221.

229. S.C. CODE ANN. § 12-36-2120(42) (2013); S.C. CODE ANN. REGS. 117-322 (2014); S.C. DEPT. OF REV., *supra* note 221.

230. S.C. Dep’t of Rev., *supra* note 221.

231. *Id.* This same rule would apply to grantor trusts and divisions of a corporation.

232. *Id.*

233. *See supra* note 41 and accompanying text; *see also* RIA Checkpoint, *supra* note 72; S.C. CODE ANN. REGS. 117-322 (2014); S.C. CODE ANN. § 12-36-2120(42) (2013). A further

S. Texas

Texas' occasional sale exemption is set forth in title 2 of Vernon's Texas Tax Statutes and Codes Annotated, section 151.304(a), that provides the following is exempt from sales tax: "An occasional sale of a taxable item and the storage, use, or consumption of a taxable item the sale or transfer of which to a consumer is made by an occasional sale"²³⁴

Texas has a specific occasional sale exemption relating to the sale of a business or the sale of an identifiable segment of a business.²³⁵ Texas Administrative Code section 3.316(d)(1) provides that "[t]he sale of the entire operating assets of a business or of a separate division, branch, or identifiable segment of a business is an occasional sale. . . ."²³⁶ Section 3.316(d)(2) goes on to provide that

[t]he sale of the entire operating assets of a separate division, branch, or identifiable segment of a business is an occasional sale if, prior to the sale, the income and expenses attributable to the separate division, branch, or identifiable segment could be separately established from the books of account or record.²³⁷

Section 3.316(d)(4) further provides that

[t]he entire operating assets of the business or of the division, branch, or identifiable segment of the business must be sold in a single transaction to a single purchaser" and that "the sale of the entire operating assets through several transactions to several purchasers does not qualify as an occasional sale"²³⁸

Based on the foregoing, Texas' occasional sale exemption applicable to Asset

requirement in South Carolina Code Annotated section 12-36-2120(42) is that the exemption only applies to the transfer of "depreciable assets, used in the operation of a business." An Asset Sale commonly involves the transfer of both depreciable and non-depreciable assets. While limiting occasional sale treatment only to depreciable assets seems restrictive and a trap for the unwary, in practice it probably does not pose much of an issue. In an Asset Sale, non-depreciable assets most likely will include land, goodwill, trademarks, and trade names. These are assets generally not considered TPP, so sales tax will not apply without an available exemption. Thus, while South Carolina's "depreciable asset" limitation is restrictive and a deviation from the Baseline Model Exemption, it likely will not have a negative impact on Asset Sales. Accordingly, the limitation is not a trap for the unwary.)

234. TEX. TAX CODE ANN. § 151.304(a) (West 2013); *see also* 34 TEX. ADMIN. CODE § 3.316 (2014).

235. 34 TEX. ADMIN. CODE § 3.316(d) (2014).

236. *Id.* § 3.316(d)(1).

237. *Id.* § 3.316(d)(2).

238. *Id.* § 3.316(d)(4).

Sales is narrow.²³⁹ First, it is narrow because of the requirement that “the entire operating assets of the business or separate division, branch, or identifiable segment” must be sold.²⁴⁰ The term “operating assets” means, “tangible personal property used exclusively by the enterprise in providing the product or service but does not mean tangible personal property maintained and used both for general business purposes by the specific enterprise.”²⁴¹ The requirement of the transfer of all operating assets is divergent from the Baseline Model Exemption and a trap for the unwary.²⁴² For example, it would not be uncommon for the parties to an Asset Sale to exclude certain assets from the Asset Purchase Agreement.²⁴³ If an excluded asset is an operating asset, then such exclusion could cause the occasional sale exemption to be lost in its entirety (i.e., not simply lost with respect to the excluded operating asset).²⁴⁴ Some commentators refer to this rule as the “paperclip” rule, meaning that not a single paperclip can be excluded from the Asset Sale.²⁴⁵

A further trap for the unwary in Texas is that the occasional sale exemption requires that the Asset Sale be accomplished in a “*single transaction to a single purchaser*.”²⁴⁶ Accordingly, the parties to an Asset Sale should ensure the structure of a transaction is as a single transfer of assets (e.g., not a series of multiple sales completed over time) to a single purchaser (e.g., the Asset Purchase Agreement should not collectively name the parent and a subsidiary entity as the purchaser).²⁴⁷

In the event the above-discussed requirements cause the occasional sale exemption to be lost, Texas has another type of occasional sale exemption that is

239. See TEX. TAX CODE ANN. § 151.304 (West 2013); 34 TEX. ADMIN. CODE § 3.316 (2014).

240. 34 TEX. ADMIN. CODE § 3.316(d)(1) (2014).

241. *Id.* § 3.316(d)(3). Notably, real property and intangibles are also not considered operating assets.

242. See 67B Am. Jur. 2d *Sales and Use Taxes* § 97 (2014).

243. Egan, *supra* note 10, at 917.

244. *Comptroller of Public Accounts of the State of Texas, Hearing No. 32,398* (1994) (softening this requirement somewhat when an administrative law judge concluded a de minimis exception is inherent in Texas’ occasional sale exemption when he considered whether a de minimis exception exists with respect to the occasional sale exemption requirement that mandates all operating assets must be transferred); see also Sam Long, *Texas Occasional Sale Exemption Offers “De minimis” Flexibility*, 5 JMTAX 92, 92 (1995) (stating “[t]he ALJ agreed . . . with the taxpayer’s contention that a de minimis rule was implicit in the occasional sale exemption”). *But see Comptroller of Public Accounts of the State of Texas, Hearing No. 28,823 & 28,824* (1992) (finding that purchase of entire business assets except for three did not constitute a purchase of the entire operating assets of the business for purposes of occasional sale exemption). See also Faber, *supra* note 39, at 50.

245. If the Asset Sale excludes any assets, the parties should ensure that such assets are non-operating assets, real property, or intangibles in order for Texas’ occasional sale exemption not to be lost with respect to the entire transaction.

246. 34 TEX. ADMIN. CODE § 3.316(d)(4) (2014) (emphasis added).

247. See *id.*

broader.²⁴⁸ Under this second type of occasional sale exemption, also exempt from Texas sales tax is “one or two sales of taxable items, other than an amusement service, during any 12-month period by a person who does not hold himself out as engaged (or who does not habitually engage) in the business of selling taxable items.”²⁴⁹ However, this occasional sale exemption does not apply if the seller holds a sales tax permit.²⁵⁰

Because the foregoing limitations are nuanced and different from the Baseline Model Exemption, Texas fits into the trap for the unwary category.²⁵¹

T. Washington

Washington has a sales tax exemption for casual and isolated sales made by persons not engaged in the business of the sold property.²⁵² However, the exemption applies only if the seller is not engaged in a business subject to the business and occupation tax or the public utility tax.²⁵³ This means Washington’s occasional sale exemption extends only to sellers the Washington Department of Revenue does not require to be registered.²⁵⁴ Further, even if the occasional sales exemption applies, the buyer generally continues to be liable for the payment of use tax if the buyer uses the purchased assets in Washington.²⁵⁵ Effectively, this means Washington does not have an occasional sale exemption applicable to Asset Sales.²⁵⁶ Thus, Washington is a trap for the unwary state.²⁵⁷

U. Wisconsin

Occasional sales are exempt from Wisconsin sales tax.²⁵⁸ Wisconsin has two occasional sale exemptions applicable to Asset Sales.²⁵⁹ First, isolated and sporadic sales by sellers not required to hold a seller’s permit are exempt occasional sales.²⁶⁰ The term “isolated and sporadic sales” means sales of TPP or taxable services that are infrequent in relation to other circumstances, including gross profit and sales price, supporting the inference that the seller is not in the

248. *Id.* § 3.316(b)(1).

249. *Id.*

250. *Id.* § 3.316(c); TEX. TAX CODE ANN. § 151.304(f) (West 2013).

251. *See supra* note 41 and accompanying text.

252. *See* WASH. REV. CODE ANN. § 82.12.020(1)(a) (West 2014); WASH. ADMIN. CODE § 458-20-106 (2014).

253. WASH. REV. CODE ANN. § 82.08.0251 (West 2014).

254. *See* WASH. REV. CODE ANN. § 82.12.020(1)(a) (West 2014); WASH. REV. CODE ANN. § 82.08.0251 (West 2014); WASH. ADMIN. CODE § 458-20-106 (2014).

255. *See* WASH. REV. CODE ANN. § 82.08.0251 (West 2014); *see also* Stern, *supra* note 24, at 77.

256. *See* Stern, *supra* note 24, at 77.

257. *See also* RIA Checkpoint, *supra* note 72; Stern, *supra* note 24, at 77.

258. *See* WIS. STAT. ANN. § 77.54(7)(a) (West 2013).

259. *See* WIS. ADMIN. CODE TAX § 11.33 (2014); WIS. ADMIN. CODE TAX § 11.34 (2014).

260. *See* WIS. STAT. ANN. § 77.51(9)(a) (West 2013).

business of selling the TPP or taxable services.²⁶¹ However, this first type of occasional sale exemption will not apply if the seller holds a seller's permit.²⁶² A possible way to satisfy the occasional sale requirements, even if the seller has a seller's permit, is for the seller to surrender the permit the day before the sale and not operate any business requiring a permit after surrender.²⁶³ While this solution may be workable in some situations, it would not be workable in an Asset Sale where the seller is selling one of multiple businesses and the business(es) not being sold by the seller require the seller to hold a seller's permit.²⁶⁴ Moreover, an administrative rule imposes a \$1000 gross receipt calendar year limit on occasional sales engaged in by sellers that do not have, and are not required to have, a seller's permit.²⁶⁵ This \$1000 gross receipts limitation would foreclose the occasional sale exemption from applying to most, if not all, Asset Sales.²⁶⁶

However, there is another occasional sale exemption that is set forth in section 11.34(3)(b) of the Wisconsin Administrative Rules that makes the occasional sale exemption available if the following requirements are satisfied: (1) the sale involves TPP (other than inventory) previously used by the seller in the conduct of a trade or business at a location; and (2) the sale occurs after the seller "ceased actively operating in the regular course of business as a seller of tangible personal property, items, property," certain other goods, or taxable services²⁶⁷ at that location.²⁶⁸

Although this exemption allows the seller to hold a seller's permit at the time of sale, the exemption will apply only if the sale of the subject business occurs after the seller ceases operating such sold business.²⁶⁹ What constitutes "ceasing business" is not entirely clear under the regulations.²⁷⁰ This requirement is a deviation from the Model Baseline Exemption and could be a trap for the unwary.²⁷¹

261. *See id.*; *see also* WIS. ADMIN. CODE TAX § 11.33 (2014); WIS. DEP'T. REV. TAX BULLETIN No. 122 (Oct. 1, 2000).

262. WIS. STAT. ANN. § 77.51(9)(a) (West 2013).

263. *See* Three Lions Supper Club, Ltd. v. Wisconsin, 241 N.W.2d 190, 192 (Wis. 1976).

264. *See* WIS. ADMIN. CODE TAX § 11.34 (2014).

265. WIS. ADMIN. CODE TAX § 11.33(4)(f) (2014).

266. *Id.*

267. Use of the term "taxable services" begs the question whether the exemption applies to an Asset Sale involving a seller that engages in non-taxable services, such as a law firm.

268. WIS. ADMIN. CODE TAX § 11.34(3)(b) (2014).

269. *See* Carrion Corp. v. Wis. Dep't of Rev., 507 N.W.2d 356, 361 (Wis. Ct. App. 1993) (holding that occasional sale exemption did not apply to the sale of two laundry businesses because seller did not surrender its permit prior to completion of the sales and it made table retail sales after sale of one of the businesses).

270. WIS. ADMIN. CODE TAX § 11.34(3)(a) (2014).

271. *See supra* note 41 and accompanying text.

V. Wyoming

Wyoming does not have an occasional sale exemption applicable to Asset Sales, but it does have an exclusion from the definition of the term “sale” that could apply.²⁷² More specifically, Wyoming does not impose sales tax on

[t]he sale of a business entity when sold to a purchaser of all or not less than eighty percent (80%) of the value of all of the assets which are located in this state of the business entity when the purchaser continues to use the tangible personal property in the operation of an ongoing business entity in this state.²⁷³

The term “business entity” means, “an individual, partnership, corporation, corporate division, joint stock company or any other association or entity, public or private, or separate business unit thereof.”²⁷⁴ Three conditions are imposed in order for this exclusion to apply: (1) the sale must involve the sale of all or not less than eighty percent of the value of all of the business entity’s assets located in Wyoming;²⁷⁵ (2) the buyer must continue to use the acquired assets in the operating of an ongoing business entity in Wyoming; and (3) the seller must have paid sales tax on the TPP transferred in the sale.²⁷⁶ Because these requirements are deviations from the Baseline Model Exemption, Wyoming is a trap for the unwary state.²⁷⁷

III. OBSERVATIONS AND POLICY CONSIDERATIONS

This part examines whether there are policy reasons that justify the trap for the unwary states having narrow, cumbersome, or counterintuitive requirements, or no occasional sale exemption at all.²⁷⁸ In addition, along with analyzing policy justifications, this part also examines in more detail the ramifications of the narrow, cumbersome, and counterintuitive requirements of the subject states.

In order to analyze the policy justifications, if any, it is first necessary to

272. See WYO. STAT. ANN. § 39-15-101(a)(vii)(M) (West 2014).

273. *Id.*

274. See *id.* The Wyoming Department of Revenue has stated that it considers a limited liability company to be included within the definition of “business entity.” See also WYO. DEP’T OF REVENUE, WYOMING SALES AND USE TAX BULLETINS NO. 14 (2014).

275. The Wyoming Department of Revenue requires that an owner submit a balance sheet to its office reflecting the value of all assets of the business sold in order to determine if the eighty percent test has been satisfied. See WYO. DEP’T OF REVENUE, *supra* note 274. The Wyoming Department of Revenue will also review the Asset Purchase Agreement and any other transaction documents in determining whether the eighty percent requirements has been met. See *id.* It is unclear whether the Wyoming Department of Revenue requires that the balance sheet and transaction documents be reviewed prior to or after the subject sale.

276. *Id.*

277. See *supra* note 41 and accompanying text.

278. See discussion *supra* Part II.

understand the underlying purpose of the occasional sale exemption.²⁷⁹ A leading state and local tax expert has posed the following questions about the underlying purpose of the occasional sale exemption:

Is it the administrative impracticability of asking persons not generally engaged in retailing—such as a family conducting a garage sale—to collect the tax, or is it something more? Does the fact that the seller at a garage sale generally already paid tax when the item was purchased now help you answer this question? Compare the tax treatment of a retailer, both at the time inventory is purchased and the time it is resold to the ultimate consumer, with the tax treatment of a casual seller. Can these differing treatments be reconciled?²⁸⁰

Based on the foregoing, administrative impracticability appears to be one rationale of the occasional sale exemption.²⁸¹ For example, if an art collector sells two pieces of art over the course of five years, such art collector would generally not be required to obtain a sales tax permit (i.e., the seller is not regarded as a “retailer” for sales tax purposes).²⁸² To require this “casual” or “occasional” seller to collect sales tax on the sales would arguably be administratively impractical.²⁸³

This same analysis also applies to Asset Sales.²⁸⁴ That is, for the same administrative impracticability reasons, logic dictates that a seller who is not a retailer permitted to collect sales tax should receive occasional sale treatment with respect to the sale of the target business because such seller is not set up to collect sales tax.²⁸⁵ Likewise, one could argue that it is less appropriate for the occasional sale exemption to apply in an Asset Sale when the seller is a retailer. In this situation, the seller holds a sales tax permit, experiences no inconvenience, and is readily able to collect and remit tax on the sale.²⁸⁶ However, taken to its logical extreme, this rationale of the occasional sale exemption would support a rule where, by definition, a retailer cannot engage in an occasional sale.²⁸⁷

Notably, the above-discussed rationale for the occasional sale exemption, and especially its logical extreme, is at odds with another rationale for the occasional sale exemption. This second rationale is that it is inappropriate to impose sales tax on previously taxed TPP.²⁸⁸ Absent an exemption (e.g., the manufacturing

279. *See supra* notes 280-83 and accompanying text.

280. HELLERSTEIN ET AL., *supra* note 24, at 715-16.

281. *See id.*

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.* A type of Asset Sale that would fit into this category would be the sale of a service business where the services provided are not taxable services for sales tax purposes (e.g., a law firm).

286. *See id.*

287. *See id.*

288. *See id.*; *see also* Faber, *supra* note 39, at 2 (“The philosophy of a retail sales tax should

exemption), a business would have paid sales tax on any non-inventory TPP previously purchased for use in the business.²⁸⁹ A tension between these first two rationales exists because the rationale of administrative impracticability (or the flip side of administrative practicability) supports imposition of sales tax on the non-inventory TPP component of an Asset Sale involving a permitted seller, but the rationale of not pyramiding tax would not support the imposition of a tax.²⁹⁰ The rationale of no pyramiding of tax is logical because a basic tenet of sales tax is, in fact, no pyramiding of tax.²⁹¹ The existence of the resale exemption in each state having a sales tax system demonstrates this.²⁹²

The Baseline Model Exemption incorporates both of the above rationales.²⁹³ For example, under the Baseline Model Exemption, the occasional sale exemption applies when a seller, either permitted or non-permitted, sells TPP that such seller is not regularly engaged in the business of selling.²⁹⁴ Thus, in the case of an Asset Sale with a non-permitted seller, one can see the underlying rationales of administrative impracticability as well as the absence of the pyramiding of tax.²⁹⁵ In the case of an Asset Sale with a permitted seller, one can see the underlying rationale of no multiple pyramiding of tax.²⁹⁶

A third rationale for the occasional sale exemption in the context of Asset Sales is that Asset Sales are simply not appropriate transactions to tax.²⁹⁷ Arguably, this is because the buyer will likely continue the sold business and it is not appropriate to impose tax on the sale of assets that the buyer will continue to use; only with a different owner.²⁹⁸

With the above rationales for the occasional sale exemption in mind, a question posed in this Article is whether there are policy reasons justifying the

exempt the sale of a business when its products are subject to sales tax so as to avoid pyramiding multiple layers of tax.”). Not at issue here is inventory that that seller is transferring that has not been previously taxed. The transfer of inventory is exempt under the resale exemption, which has a different underlying rationale and purpose. *See supra* notes 46-48 and accompanying text.

289. *See supra* notes 24-48 and accompanying text.

290. A seller in an Asset Sale likely paid sales tax on all non-inventory TPP items that an Asset Sale would transfer. One exception would be manufacturing equipment where sales tax was not imposed at the time of purchase due to the subject state having a manufacturing exemption. *See generally* HELLERSTEIN ET AL., *supra* note 24, at 665-66. However, sales tax should also not result upon the subsequent sale of the manufacturing equipment in an Asset Sale because of the manufacturing exemption. *See id.*

291. *See supra* notes 46-48 and accompanying text.

292. *See supra* notes 46-48 and accompanying text.

293. *See supra* note 41 and accompanying text.

294. *See supra* note 41 and accompanying text.

295. *See supra* notes 279-92 and accompanying text.

296. *See supra* notes 279-92 and accompanying text.

297. *See infra* note 298 and accompanying text.

298. However, this begs the question of whether it matters if the target business will be continued by the buyer in its current form or, instead, whether the buyer will use the assets in a different business and/or in a different way from that of the seller. *See infra* Part III.B.

trap for the unwary states having narrow, cumbersome or counterintuitive requirements.²⁹⁹ Indeed, the decision of a state to not have an occasional sale exemption at all in the context of Asset Sales, or otherwise, is a policy decision in and of itself.³⁰⁰ A likely explanation for a state not having an occasional sale exemption is revenue generation.³⁰¹ The larger question upon which this Article focuses is whether policy reasons exist for the narrow, cumbersome or counterintuitive requirements of some of the subject states. The states at issue and the trap for the unwary categories are set forth below:³⁰²

Table 1.

Trap for the Unwary Category	State(s)
1. Must sell all assets or at least all operating assets	Alabama, Georgia, Texas, South Carolina
2. Buyer must continue to operate purchased business, and potentially in the same form	Idaho, South Carolina, Wyoming,
3. Asset Sale must occur in a single transaction, and perhaps also to a single purchaser	Alabama, Minnesota, Nebraska, Texas
4. Different requirements for permitted versus non-permitted sellers	California, Florida, Georgia, Kentucky, South Carolina, and Texas,
5. Timing restrictions	Florida
6. Separate place of business requirement	Georgia
7. Occasional sale exemption does not apply to certain industries or asset types	Illinois, Indiana
8. Seller cannot remain in same business being sold or seller must cease conducting business being sold prior to sale	Missouri, Wisconsin, Rhode Island
9. Asset Sale must not involve seller that is an LLC disregarded for federal income tax purposes (unless all assets are of a non-unitary business of the seller)	South Carolina
10. Seller must have previously paid sales tax on the non-inventory TPP being transferred	Florida, Nebraska, Wyoming

299. See discussion *supra* Part II

300. See *supra* Part II.B, II.D, II.K, II.N, II.O, II.R.

301. For example, the State of Texas estimated the value of sales tax exemptions in 2013 to be \$29,327,900,000. See TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, TAX EXEMPTIONS & TAX INCIDENCE—A REPORT TO THE GOVERNOR AND THE 83RD TEXAS LEGISLATURE 3 (2013).

302. Although Part II lists Alaska as a trap for the unwary state, it is not included in this Part III. This is because Alaska's trap for the unwary status results from it not having a statewide occasional sale exemption, which is a different circumstance as compared to the states discussed in this Part III.

A. *Category I: Must Sell All Assets or All Operating Assets (Georgia,³⁰³ South Carolina,³⁰⁴ Texas³⁰⁵)*

For the occasional sale exemption to apply to an Asset Sale in Alabama, Georgia, and South Carolina, the sale must involve the transfer of *all* assets.³⁰⁶ In Texas, the sale must involve the transfer of *all operating* assets.³⁰⁷ These requirements arguably are consistent with the rationale of exempting certain transactions from sales tax under the occasional sale exemption because it is inappropriate to tax such transactions (i.e., an Asset Sale arguably is an inappropriate transaction to tax because the buyer will likely continue operating the target business, and why should tax be imposed when there is no change in the target business except for a new owner?).³⁰⁸ Imposing a requirement to sell all the assets of a business, or at least all the operating assets, seemingly ensures that the buyer will obtain all necessary assets to maintain the operation of the target business post-sale.³⁰⁹ Notably, the requirement in Texas to transfer only all operating assets more rationally serves the related policy purpose because it is arguably only the operating assets that the buyer needs to continue operating the target business post-sale.³¹⁰ Thus, the requirement in Alabama, Georgia and South Carolina mandating that the Asset Sale involve the transfer of *all* assets is likely overly restrictive from a policy perspective.³¹¹

Further, the requirement to transfer all assets, and even Texas' more rational requirement of transferring all operating assets, is at odds with the practical nature of most Asset Sales. This is because it is common for a seller to negotiate the exclusion of some assets from the Asset Sale.³¹² For example, a seller might want to keep certain paintings that hang in a reception area or conference room because such paintings are personal to the seller.³¹³ Also, it is common for a seller to negotiate for the exclusion of trademarks, logos, trade names, or a certain amount of cash or receivables.³¹⁴ Notably, Texas offers some relief from its transfer requirement by having a *de minimis* exception.³¹⁵ For example, in a Texas

303. Georgia imposes other trap for the unwary requirements. *See supra* Table 1.

304. South Carolina imposes other trap for the unwary requirements. *See supra* Table 1.

305. Texas imposes other trap for the unwary requirements. *See supra* Table 1.

306. *See supra* Part II.A, II.F, II.P.

307. *See supra* Part II.S.

308. *See supra* notes 297-98 and accompanying text.

309. *See supra* notes 297-98 and accompanying text.

310. *See supra* Part II.S.

311. *See supra* Part II.A., II.F, II.P. *But see supra* note 70 regarding Alabama and a potential *de minimis* rule.

312. *See supra* note 71 and accompanying text.

313. *See supra* note 71 and accompanying text.

314. *See, e.g.*, TEX. COMPTROLLER OF PUB. ACCTS., TEX. LTR. RUL. NO. 9610139L (1996); TEX. COMPTROLLER OF PUB. ACCTS., TEX. LTR. RUL. NO. 9104L1105B10 (1991).

315. *See supra* Part II.Q.

Hearings Decision, the administrative law judge concluded that sixteen out of twenty-five thousand assets that were excluded from the Asset Sale “were so relatively insignificant, both in number and in value” that Texas’ occasional sale exemption still applied even though the entire operating assets of the target business were not transferred.³¹⁶

Taking the above into consideration, at a minimum, Alabama, Georgia and South Carolina should consider narrowing their transfer requirements to require only the transfer of *operating* assets rather than *all* assets.³¹⁷ Alabama, Georgia and South Carolina should also implement a de minimis exception like Texas has done.³¹⁸ A de minimis exception similar to the one that exists in Texas would be workable or, alternatively, Alabama, Georgia and South Carolina could amend their transfer requirements to provide that “all *or substantially all*” the assets of the target business must be transferred in the Asset Sale.³¹⁹ The term “substantially all” could be defined to mean a stated percentage value of the business as well as a stated percentage of assets.³²⁰ Such a requirement would be similar to the control requirement in section 351 transactions under the Internal Revenue Code.³²¹

While Texas’ transfer requirement more rationally serves an underlying policy purpose for the occasional sale exemption as compared to Alabama, Georgia, and South Carolina, especially with the existence of a de minimis exception, Texas should still consider making one notable modification to its occasional sale exemption. Texas should consider formally adopting the de minimis exception in an administrative rule or by amending the applicable statute. Texas’ de minimis exception is currently only set forth in a 1994 administrative hearings decision.³²² Many taxpayers, especially small business and/or pro se taxpayers, will not know to seek out comptroller decisions for additional information beyond what is contained in the statute or regulations.

316. *Comptroller of Public Accounts of the State of Texas, Hearing No. 32,398* (1994). *But see Comptroller of Public Accounts of the State of Texas, Hearing Nos. 28,823 & 28,824* (1994) (finding that the purchase of entire business assets except for three did not constitute a purchase of the entire operating assets of the business for purposes of occasional sale exemption). *See also supra* Part II.Q.

317. *See supra* notes 306-11 and accompanying text.

318. *See supra* notes 306-11. *But see supra* note 70 regarding Alabama and a potential de minimis rule.

319. Other states take this approach (e.g., Florida, Idaho, Minnesota, and Nebraska); *see supra* Part II.

320. Notably, such a rule has the potential to lead to skewed results and might not be workable in some situations. An example is an exclusion from the Asset Sale of a piece of art having an extremely high value. A workable solution could be a rule that allowed the taxpayer to petition the Department of Revenue for an individualized test when certain facts under the general rule are not workable.

321. *See* I.R.C. § 351 (2014).

322. *See* TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, *supra* note 301.

B. Category 2: Buyer Must Continue to Operate Purchased Business, and Potentially in the Same Form (Idaho, South Carolina,³²³ Wyoming³²⁴)

For the occasional sale exemption to apply to an Asset Sale in Idaho, the buyer must operate the purchased business in the same form.³²⁵ Likewise, in South Carolina, the buyer must continue to operate the purchased business, which presumably means in the same form.³²⁶ Wyoming has a similar rule, but it is not as restrictive. Wyoming requires the buyer to use the acquired TPP in the operation of an ongoing business entity in Wyoming.³²⁷

The rule in Idaho and South Carolina prevents a buyer from purchasing a business and then using the purchased assets in a way different from the seller.³²⁸ The rule in Wyoming prevents a buyer from purchasing a business and then not using the purchased assets at all.³²⁹ Like with Category 1, these requirements arguably are consistent with the policy rationale of exempting certain transactions from sales tax under the occasional sale exemption because it is inappropriate to tax such transactions (i.e., an Asset Sale arguably is an inappropriate transaction to tax because the buyer will likely continue operating the target business, and why should tax be imposed when there is no change in the target business except for a new owner?).³³⁰ Requiring the buyer to continue operating the target business post-sale directly implements this rationale.

However, the rule in Idaho and South Carolina is more restrictive than necessary from a policy perspective.³³¹ For example, assume the target business is a coffee shop. Should it really matter if the buyer uses the purchased assets to operate a coffee shop or, instead, uses the purchased assets to operate a donut shop that also sells coffee? Would Idaho consider the donut shop as operating in the same form? Would one consider the donut shop similar enough to show the seller used the purchased assets? These questions not only show the potentially overly restrictive nature of the rule in Idaho and South Carolina, but also the fact-intensive nature of the rule, which could be difficult to apply at times considering the myriad of businesses that exist.

The rule in Wyoming relates more rationally to the applicable policy purpose.³³² It only requires that the buyer continue to use the purchased assets in some manner.³³³ Indeed, if the rationale for these requirements is that the occasional sale exemption exists to not impose tax on Asset Sales because the

323. South Carolina imposes other traps for the unwary requirements. *See supra* Table 1.

324. Wyoming imposes other trap for the unwary requirements. *See supra* Table 1.

325. *See* IDAHO CODE ANN. § 63-3622K(b) (2014).

326. *See supra* notes Part II.R.

327. *See supra* notes 275-78.

328. *See supra* Part II.G, II.P.

329. *See supra* notes 275-78.

330. *See supra* Part III.A.

331. *See supra* Table 1.

332. *See supra* Part II.V.

333. *See supra* Part II.V.

business will be continued and, thus, it is an inappropriate transaction to tax (i.e., not ripe), why should it matter how the assets will be used by the buyer? Using section 351 of the Internal Revenue Code as a comparison is helpful.³³⁴ Section 351 provides non-recognition tax treatment to contributions of appreciated property to a corporation in exchange for stock.³³⁵ The rationale of section 351 is similar to the rationale discussed here; capital contributions of appreciated property to a corporation are not appropriate transactions to tax because the corporation, instead of the contributing shareholder, will continue to use the assets.³³⁶ That is, the contributing shareholder has not yet “cashed out” his or her investment in the asset, so the appropriate time to tax the transaction has not yet arrived.³³⁷ Notably, section 351 does not require the corporation to use the contributed asset in the same way that the contributing shareholder used the asset.³³⁸ Further, the partnership counterpart to section 351 of the Internal Revenue Code, section 721, also does not contain such a requirement.³³⁹

Taking the above into consideration, Idaho and South Carolina should consider amending their statutes and/or administrative rules to be more in line with Wyoming.³⁴⁰ Such a change would make the requirements in Idaho and South Carolina more rationally related to the underlying policy purpose.³⁴¹

C. Category 3: Asset Sale Must Occur in a Single Transaction, and Perhaps also to a Single Purchaser (Alabama,³⁴² Minnesota, Nebraska, Texas³⁴³)

For the occasional sale exemption to apply in Alabama, Nebraska, and Texas, one must restructure the sale as a single transaction to a single purchaser.³⁴⁴ In Minnesota, one must be structure the sale to occur “as a single transaction or a series of related transactions within a twelve-month period beginning on the date of the first sale of assets intended to qualify for the exemption.”³⁴⁵

The requirements in Alabama, Nebraska, and Texas would preclude the occasional sale exemption from applying to Asset Sales structured as a series of sales completed over time.³⁴⁶ Additionally, the requirements would preclude the

334. See I.R.C. § 351 (2014).

335. See *id.*; see also *id.* § 721 for a similar rule applicable to entities classified as partnerships for federal income tax purposes.

336. STEVEN A. LINDE ET AL., FUNDAMENTALS OF CORPORATE TAXATION 60-61 (7th ed. 2008).

337. See *id.*

338. See I.R.C. § 351 (2014).

339. See *id.* § 721.

340. See *supra* Table 1.

341. See *supra* note 307.

342. Alabama imposes other trap for the unwary requirements. See *supra* Table 1.

343. Texas imposes other trap for the unwary requirements. See *supra* Table 1.

344. See *supra* Part II.A, II.M, II.Q.

345. MINN. STAT. ANN. § 297A.68, subd. 25(a) (West 2014); see *supra* Part II.K.

346. See *supra* Parts II.A, II.N, II.S.

Asset Sale from involving multiple buyers, either related or unrelated.³⁴⁷ Most notably, from a practical perspective, the requirements would preclude the naming of both a parent and subsidiary as the purchaser in the Asset Purchase Agreement, which the parties might desire, for reasons associated with the indemnification provisions in the Asset Purchase Agreement or the representation and warranty provisions in the Asset Purchase Agreement.³⁴⁸ In contrast to Alabama, Nebraska, and Texas, Minnesota's requirement is somewhat less stringent in that it allows one to structure an Asset Sale as a series of related transactions as long as completed within a twelve-month period.³⁴⁹

The rationale for the single transaction requirement (or the less stringent related transaction requirement in Minnesota) likely exists in order to ensure the sale is, in fact, "isolated," "casual," and "occasional," as opposed to being a "retail" transaction.³⁵⁰ For example, if a seller sells a business in ten separate sales to ten unrelated purchasers, then such sales may be more indicative of a seller who is in the business of selling the business assets.³⁵¹ While each of the requirements in Alabama, Minnesota, Nebraska, and Texas may be rationally related to this underlying policy purpose, Minnesota has the better rule because it allows flexibility, which in turn accommodates the practical nature of some Asset Sales needing to be structured as a series of related transactions completed over time.³⁵² For example, it could be necessary to structure an Asset Sale as a series of related transactions over time due to cash flow issues associated with the buyer. Or it could be necessary due to issues with obtaining third-party consents associated with transferring certain assets.³⁵³ There could be any number of business reasons why one would need to structure an Asset Sale as a series of related transactions completed over time.

Alabama, Nebraska, and Texas should consider amending their "single transaction" requirements to be more like Minnesota in order to allow some amount of flexibility to accommodate the practical nature of Asset Sales. Indeed, Minnesota's more flexible rule does not counteract the policy that Alabama, Nebraska, and Texas' rule seeks to serve. For example, an Asset Sale structured as a single transaction is just as "isolated," "casual," and "occasional" as an Asset Sale structured as three separate sales to a single purchaser over time. At a minimum, the statutes and regulations of Alabama, Nebraska, and Texas should allow the seller the ability to petition the Department of Revenue for a special allowance from the single transaction requirement. And while Minnesota's "related transaction" requirement more rationally serves the related underlying

347. *See supra* Parts II.A, II.N, II.S.

348. *See supra* notes 311-20 and accompanying text.

349. *See supra* Part II.L. Based on the statutory text, it is not clear whether multiple related sales completed within the twelve-month period must be to the same purchaser or, instead, could be made to related parties.

350. *See supra* notes 279-92 and accompanying text.

351. *See supra* notes 279-92 and accompanying text.

352. *See supra* Part II.L.

353. *See supra* note 19 and accompanying text.

purpose for the occasional sale exemption, and is more in tune with the practical nature of Asset Sales, Minnesota should still consider making a notable modification. The suggested change is extending the “related transaction” time period beyond twelve months. Because legal and business issues within an Asset Sale can become complicated, it could be the case that the twelve-month time period is not adequate in all circumstances. At a minimum, like discussed above, Minnesota’s statutes and regulations should allow the seller the ability to petition the Department of Revenue for a special allowance.

The underlying rationale for the single purchaser requirement is not as clear. The rationale may be the same reason as set forth above with respect to the single transaction requirement.³⁵⁴ The underlying rationale may also relate to it being inappropriate to tax the transfer of a business when the only change is ownership (discussed above with respect to Categories 1 and 2).³⁵⁵ Whatever the rationale, the single purchaser requirements is at odds with the practical nature of some Asset Sales where it may be necessary for the joint naming of both the parent and its subsidiary as the seller in the Asset Purchase Agreement. For example, this may be necessary for the certification of certain representations and warranties included in the Asset Purchase Agreement or for purposes of the indemnification provisions contained in the Asset Purchase Agreement.³⁵⁶ While the single purchaser requirement in Alabama, Nebraska, and Texas may serve an underlying policy purpose related to the occasional sale exemption, these states should consider amending their statutes and/or regulations to at least allow occasional sale treatment to extend to Asset Sales where related parties are named as the purchaser to account for the practical nature of some Asset Sales.³⁵⁷

D. Category 4: Different Requirements for Permitted vs. Non-Permitted Sellers (California, Florida,³⁵⁸ Georgia,³⁵⁹ Kentucky, South Carolina,³⁶⁰ Texas,³⁶¹ Washington)

In California, when an Asset Sale involves a permitted business and the purchaser is an unrelated third party, California’s occasional sale exemption is narrow.³⁶² It applies only to exempt proceeds attributable to TPP not held or used by the business in the course of activities requiring the holding of the seller’s permit.³⁶³ In contrast, if the business sold through the Asset Sale is a non-

354. See *supra* notes 350-53 and accompanying text.

355. See *supra* Part III.A-B and accompanying notes.

356. See *supra* note 348 and accompanying text.

357. It is not clear from the face of Minnesota’s rule whether it allows only one purchaser or whether related parties can be named as the purchaser. See *supra* Part II.L.

358. Florida imposes other trap for the unwary requirements. See *supra* Table 1.

359. Georgia imposes other trap for the unwary requirements. See *supra* Table 1.

360. South Carolina imposes other trap for the unwary requirements. See *supra* Table 1.

361. Texas imposes other trap for the unwary requirements. See *supra* Table 1.

362. See *supra* Part II.C.

363. See *supra* Part II.C.

permitted business (e.g., non-taxable service business), then a broader occasional sale exemption applies in California.³⁶⁴ Under the broader rule for non-permitted businesses, California's occasional sale exemption will apply as long as the Asset Sale is not one of a series of sales sufficient in number, scope, and character to constitute an activity for which a seller's permit is required.³⁶⁵

Arguably, the underlying purpose of California's distinction between permitted and non-permitted sellers relates to administrative convenience.³⁶⁶ The administrative convenience rationale is premised on the idea that, because a sales tax permit is required to collect and remit sales tax, it would be administratively impractical to require non-permitted sellers in Asset Sales to collect and remit sales tax, but on the flip side, it would not be administratively impractical to require permitted sellers to collect and remit sales tax because such sellers already collect and remit sales tax with respect to sales that the business makes.³⁶⁷ However, this rationale of the occasional sale exemption is at odds with another rationale of the occasional sale exemption—the rationale that the occasional sale exemption is warranted in situations where sales tax has already been paid in order to alleviate the pyramiding of tax.³⁶⁸ As is evident by the resale exemption that exists in every state having a sales tax system, the pyramiding of tax on the same asset is not supposed to occur.³⁶⁹ Thus, even though administrative convenience is an underlying rationale for the occasional sale exemption, administrative convenience should not trump the rationale of alleviating the pyramiding of tax since the latter is a basic tenet of each state's sales tax system.³⁷⁰ Accordingly, California should consider amending its occasional sale exemption rules to delete the delineation between sales of assets used in a business requiring a sales tax permit versus sales of assets used in a business not requiring a sales tax permit. Such a requirement diverges from an important rationale of the occasional sale exemption as well as a basic tenet of sales tax.³⁷¹

Similar to California, Kentucky's occasional sale exemption does not extend to the transfer of non-inventory TPP in an Asset Sale where the seller engages in a business requiring a Kentucky seller's permit (to the extent such TPP relates to the permitted business), with the exception of when there is substantially similar ownership after the sale.³⁷² Thus, Kentucky's occasional sale exemption applies broadly only in the context of Asset Sales where the seller is engaged in a

364. *See supra* Part II.C.

365. *See supra* Part II.C.

366. *See supra* notes 279-87 and accompanying text.

367. *See supra* notes 279-87 and accompanying text.

368. *See supra* notes 288-92 and accompanying text.

369. *See supra* notes 288-92 and accompanying text.

370. *See supra* notes 288-92 and accompanying text.

371. *See supra* notes 288-92 and accompanying text; *see also* Faber, *supra* note 39, at 2 (concluding that California takes the wrong approach with respect to the occasional sale exemption as applied to Asset Sales).

372. *See supra* Part II.J.

business not requiring a Kentucky seller's permit.³⁷³ Like with California, the underlying purpose of Kentucky's distinction between permitted and non-permitted sellers likely relates to administrative convenience.³⁷⁴ However, just like discussed with California, the administrative convenience rationale for the occasional sale exemption is at odds with another rationale of the occasional sale exemption—that the occasional sale exemption is warranted in situations where sales tax has already been paid in order to alleviate the pyramiding of tax.³⁷⁵ As discussed above, even though administrative convenience is an underlying rationale for the occasional sale exemption, administrative convenience should not trump the rationale of alleviating the pyramiding of tax since the latter is a basic tenet of each state's sales tax system.³⁷⁶ Accordingly, Kentucky, just like California, should consider amending its occasional sale exemption rules to delete the delineation between sales of assets used in a business requiring a sales tax permit versus sales of assets used in a business not requiring a sales tax permit.

South Carolina and Texas have two different occasional sale rules that apply to Asset Sales.³⁷⁷ For non-permitted sellers, a broad occasional sale exemption exists.³⁷⁸ For permitted sellers, there is a different occasional sale exemption that has additional requirements that must be satisfied as compared to non-permitted sellers.³⁷⁹ As discussed above, the underlying purpose of this distinction between permitted and non-permitted sellers likely relates to administrative convenience.³⁸⁰ However, while that rationale might make sense in the context of determining whether or not the occasional sale exemption should extend *at all* to permitted sellers (even though not extending, as discussed above, would go against another rationale for the occasional sale exemption, which is to avoid pyramiding of tax), it arguably does not support a framework that imposes different and more stringent requirements on permitted sellers.

While it may be justified from a policy perspective for states to impose certain requirements on a taxpayer's ability to claim the occasional sale exemption in Asset Sales or otherwise,³⁸¹ making such requirements different and more stringent for permitted sellers does not appear rationally related to any underlying policy.³⁸² For example, consider an Asset Sale involving the sale of a law firm (non-permitted business) versus an Asset Sale involving the sale of a bookstore (permitted business). Why should different and more stringent requirements apply to the sale of the bookstore simply because of the type of product the business sells? Or consider an Asset Sale involving a business that

373. *See supra* Part II.J.

374. *See supra* notes 279-87 and accompanying text.

375. *See supra* notes 288-92 and accompanying text.

376. *See supra* notes 288-92 and accompanying text.

377. *See supra* Part II.R-S.

378. *See supra* Part II.R-S.

379. *See supra* Part II.R-S.

380. *See supra* notes 279-87.

381. *See generally supra* Part III.

382. *See supra* notes 278-302 and accompanying text.

sells taxable services (permitted business) versus an Asset Sale involving a business that sells non-taxable services (non-permitted business). Why should different and more stringent requirements apply to the sale of the taxable service business simply because the legislature has decided to tax the type of services it provides?

Based on the foregoing, South Carolina and Texas should consider amending their statutes and/or regulations to delete the differing requirements that must be satisfied for the occasional sale exemption as between permitted versus non-permitted sellers. Florida also delineates between permitted sellers and non-permitted sellers by way of its rules related to “isolated” sales applying only to permitted sellers.³⁸³ However, unlike the states discussed above, Florida’s exemption related to “occasional” sales applies to both permitted and non-permitted sellers so the “isolated” sale distinction appears effectively meaningless.³⁸⁴ Thus, while Florida’s delineation between permitted and non-permitted sellers does not create the same issue that exists in South Carolina and Texas, it should still consider amending its statutes and/or regulations to delete the delineation between isolated and occasional sales because the delineation appears not to serve a meaningful purpose.³⁸⁵

Lastly, Georgia may also have different rules as between permitted and non-permitted sellers, but it is not clear.³⁸⁶ If the delineation exists, then it would mean most, if not all, Asset Sales of non-permitted businesses would be ineligible for the occasional sale exemption.³⁸⁷ Although unclear from the face of the regulations, it is unlikely that Georgia intended this narrow interpretation.³⁸⁸ As discussed above, administrative convenience is one of the underlying rationales for the occasional sale exemption, which is premised on the idea that it is administratively impractical to require non-permitted sellers in Asset Sales to collect and remit sales tax but not impractical to require permitted sellers to collect and remit sales tax because such sellers already collect and remit sales tax.³⁸⁹ This rationale may support the occasional sale exemption applying to non-permitted sellers but not permitted sellers, but it would not support the opposite framework of the occasional sale exemption applying to permitted sellers but not non-permitted sellers.³⁹⁰ Thus, it would be an unusual result if the intent of Georgia’s occasional sale exemption really was to apply only to permitted sellers. Georgia should consider amending its statute and/or regulations to clarify the current ambiguity.

383. *See supra* Part II.E.

384. *See supra* Part II.E.

385. *See supra* Part II.E.

386. *See supra* Part II.F.

387. *See supra* Part II.F.

388. *See supra* Part II.F.

389. *See supra* notes 279-83 and accompanying text.

390. *See supra* notes 279-83 and accompanying text.

E. Category 5: Timing Restrictions (Florida³⁹¹)

One of the occasional sale exemption requirements in Florida is that the parties must complete the transfer of the business within thirty days from the “date of the agreement for the sale of the business.”³⁹² Due to the basing of the thirty-day timing requirement on the “date of the agreement for the sale of the business,” this provision is at odds with the practical nature of many Asset Sales.³⁹³ It is not uncommon for Asset Sales to have a closing date falling more than thirty days after the date the parties execute the Purchase and Sale Agreement.³⁹⁴ However, Florida’s timing requirement is watered down, because regulations contain an “out” by way of the exemption for occasional sales, which appears to be easily satisfied and does not contain the thirty-day transfer requirement.³⁹⁵ Thus, Florida’s timing requirement is effectively meaningless and, in any event, does not appear rationally related to any of the rationales for the occasional sale exemption.³⁹⁶ For example, the requirement does not appear rationally related to administrative practicability (or lack thereof), ensuring previous payment of sales tax, or the inappropriateness of taxing a transaction where the only change is the business owner.³⁹⁷ Accordingly, Florida should consider amending its statute to delete the thirty day requirement.³⁹⁸

F. Category 6: Separate Place of Business Requirement (Georgia³⁹⁹)

Georgia has a requirement for occasional sale exemption treatment that is somewhat unclear but arguably requires that the business sold in the Asset Sale must be at a separate location from any continuing business of the seller, if any.⁴⁰⁰ By way of example, this rule would preclude occasional sale treatment in the Asset Sale of a coffee shop where the buyer intends to move the subject assets to a new location and the seller would continue using assets excluded from the Asset Sale to operate a bakery at the location where the coffee shop used to be.⁴⁰¹

Georgia’s requirement does not appear rationally related to any of the purposes of the occasional sale exemption.⁴⁰² For instance, the requirement does not appear related to administrative practicability (or lack thereof), ensuring previous payment of sales tax on the transferred TPP, or the inappropriateness of

391. Florida imposes other trap for the unwary requirements. *See supra* Table 1.

392. FLA. ADMIN. CODE ANN. § 12A-1.037(2)(d) (2014); *see also supra* Part II.E.

393. FLA. ADMIN. CODE ANN. § 12A-1.037(2)(d) (2014); *see also supra* Part II.E.

394. *See supra* Part II.E.

395. *See supra* Part II.E.

396. *See supra* notes 279-98 and accompanying text.

397. *See supra* notes 279-98 and accompanying text.

398. *See supra* notes 392-97 and accompanying text.

399. Georgia imposes other trap for the unwary requirements. *See supra* Table 1.

400. *See supra* Part II.F.

401. *See supra* Part II.F.

402. *See supra* notes 278-98 and accompanying text.

taxing a transaction where the only change is the business owner.⁴⁰³ If one had to choose, the latter underlying purpose of the occasional sale exemption seems the most tangentially related to Georgia's requirement. That is, requiring the target business to be at a separate location from any continuing business of the seller arguably seeks to ensure that the buyer carries on the purchased business.⁴⁰⁴ However, this would not always be the case because, as indicated in the example above, the buyer may desire to use the purchased assets at a different location and Georgia's requirement would allow this under Georgia's requirement as long as the seller did not continue to operate a business at the location of the purchased assets.⁴⁰⁵ Thus, if this is the underlying purpose of Georgia's requirement, the requirement is not satisfying the intended purpose.⁴⁰⁶

Further, Georgia's requirement is not workable in Asset Sales where the seller will continue to operate a business at the same location of the target business.⁴⁰⁷ While this situation may not occur much in practice, because it is likely that the location of the purchased business is part of the buyer's desire to purchase the business, it could occur in a situation where the subject assets are the essence of the transaction and the seller's location is not. For example, consider a winery located in a downtown San Francisco warehouse where the buyer desires to purchase the winery assets and use them at a new location in Sonoma.

Because Georgia's requirement does not appear rationally related to an underlying policy purpose and is not workable in practice with respect to some Asset Sales, Georgia should consider amending its statute and/or regulations to delete the requirement in its entirety.⁴⁰⁸

G. Category 7: Occasional Sale Exemption Doesn't Apply to Certain Industries or Asset Types (Illinois, Indiana)

Illinois does not extend its occasional sale exemption to certain sales of TPP made by construction contractors or real estate developers.⁴⁰⁹ Indiana's occasional sale exemption does not apply to sales of rental property.⁴¹⁰

Not extending occasional sale treatment to certain industries or asset types does not appear rationally related to any underlying purposes of the occasional sale exemption.⁴¹¹ For example, the requirement does not appear related to administrative practicability (or lack thereof), ensuring previous payment of sales tax on the transferred TPP, or the inappropriateness of taxing a transaction where

403. See *supra* notes 278-98 and accompanying text.

404. See *supra* Part II.F.

405. See *supra* Part II.F.

406. See *supra* Part II.F.

407. See *supra* Part II.F.

408. See *supra* notes 279-98 and accompanying text.

409. See *supra* Part II.H.

410. See *supra* Part II.I.

411. See *supra* notes 279-98 and accompanying text.

the only change is the business owner.⁴¹² Because the limitations in Illinois (not extending occasional sale treatment to sales made by construction contractors or real estate developers)⁴¹³ and Indiana (not extending occasional sale treatment to sales of rental property)⁴¹⁴ do not appear rationally related to any of the underlying purposes of the occasional sale exemption, Illinois and Indiana should consider deleting such requirements from their statutes and/or regulations.⁴¹⁵

H. Category 8: Seller Cannot Remain in Same Business Sold or Seller Must Cease Conducting Business Sold Prior to Sale (Missouri, Wisconsin)

Missouri's occasional sale exemption does not allow the seller to remain in the same business sold.⁴¹⁶ Wisconsin requires that the seller cease conducting the target business prior to the sale.⁴¹⁷ What constitutes "ceasing business" for this purpose is not clear under Wisconsin's regulations.⁴¹⁸ For permitted sellers, Rhode Island requires that the "sale must occur after the retail business for which the retailer had a permit has ceased."⁴¹⁹

Missouri's requirement, to some extent, is the reverse of the requirement in some states that compel the buyer to continue operating the purchased business post-sale.⁴²⁰ As discussed above in Category 2, requiring the buyer to continue operating the target business rationally relates to the underlying purpose of the occasional sale exemption's premise that it is inappropriate to tax certain transactions, including a sale of a business when the only change is that of ownership.⁴²¹ However, the reverse does not rationally relate to this policy purpose. Notably, it is somewhat unclear whether Missouri's requirements means (1) the seller cannot operate a new business that is similar to the business sold in the Asset Sale (i.e., Asset Sale involves the sale of a coffee shop and seller cannot form a new business in the future that operates a coffee shop); or (2) the seller cannot continue as an owner in the target business post-sale.⁴²² However, under either interpretation, Missouri's requirement does not rationally relate to an

412. *See supra* notes 279-98 and accompanying text. *But see supra* note 36 and accompanying text regarding the occasional sale exemption generally not extending to motor vehicles and other titled assets. Excluding motor vehicles and other titled assets from occasional sale treatment is arguably different from the rules discussed in Category 7 related to Illinois and Indiana. Imposing tax on motor vehicles and other titled assets is rationally related to the underlying purpose of administrative practicability of ensuring title gets transferred in the name of the new owner.

413. *See supra* Part II.H.

414. *See supra* Part II.I.

415. *See supra* notes 278-98 and accompanying text.

416. *See supra* Part II.U.

417. *See supra* Part II.U.

418. *See* WIS. ADMIN. CODE TAX § 11.34(3)(a) (2014).

419. *See supra* Part II.Q.

420. *See supra* Part III.B.

421. *See supra* notes 278-98 and accompanying text.

422. *See supra* Part II.M.

underlying policy rationale for the occasional sale exemption. Why should it matter what future endeavors the seller engages in post-sale? Why should it matter if the seller continues to have a role in the target business post-sale? Indeed, it would not be uncommon for the business deal to involve the seller remaining a partial owner or as a consultant after the Asset Sale.⁴²³ Because Missouri's rule does not rationally relate to an underlying policy for the occasional sale exemption and is not workable in practice with respect to some Asset Sales, Missouri should consider amending its statute and/or regulations to delete the requirement.⁴²⁴

While Wisconsin and Rhode Island do not seem to preclude the seller from remaining in the business post-sale like Missouri, they do require the seller to cease conducting business prior to the sale of the target business.⁴²⁵ If the seller holds a sales tax permit, surrendering the sales tax permit prior to sale would likely satisfy this requirement.⁴²⁶ This requirement in Wisconsin and Rhode Island seems to relate, albeit tenuously, to the rationale of the occasional sale exemption not applying to the sale of a business when the only change is ownership.⁴²⁷ That is, requiring the seller to cease business operations means that the purchaser will begin operations, thus signifying the change in ownership. In practice, the requirement should not pose a problem because the point of an Asset Sale is for the seller to sell the business and for the buyer to operate it post-sale. The evidence deemed sufficient to satisfy the rule presents a difficulty with this requirement, though. Can the executed Asset Purchase Agreement satisfy the requirement? Is it required that the seller surrender his sales tax permit? How is the requirement workable if the seller is operating the business up until the time of sale? What if the sold business is a service business not requiring a sales tax permit?

To alleviate problems associated with these questions, Wisconsin and Rhode Island should consider adopting a set rule that is more workable with the practical nature of Asset Sales.⁴²⁸ For example, they should consider letting the Asset Purchase Agreement satisfy the requirement. Further, they should not require that the Asset Purchase Agreement be filed with the Department of Revenue, but rather, only require the parties keep such documents in their files for the statute of limitations period in the event of a future audit. If the Department of Revenue does deem it necessary for the seller to relinquish the sales tax permit of the target business, then it should allow the surrender to occur post-sale, perhaps within fifteen days after the sale. Requiring the surrender to occur on or before the time of closing would not permit the seller to operate the business up until closing,

423. See generally Peter A. Karl III, *Twenty Questions Answered in the Acquisition or Disposition of a Business: Strategies for Structuring Transactions and Business Entities*, C.P.A. J. 56, 60 (2008).

424. See *supra* notes 278-98 and accompanying text.

425. See Part II.Q, II.U.

426. See Part II.Q, II.U.

427. See *supra* notes 278-98 and accompanying text.

428. See *supra* notes 425-27 and accompanying text.

which is at odds with the practical nature of Asset Sales and does not seem to serve any rational purpose.⁴²⁹

I. Category 9: Asset Sale Must Not Involve Seller That Is an LLC Disregarded for Federal Income Tax Purposes (Unless All Assets Are of a Non-Unitary Business of Seller) (South Carolina⁴³⁰)

If the seller is an LLC disregarded for federal income tax purposes, then South Carolina requires that the Asset Sale involve the sale of a non-unitary business in order for the occasional sale exemption to apply.⁴³¹ This requirement is somewhat similar to the requirement in Missouri where the seller cannot remain part of the target business post-sale.⁴³² For instance, if a seller sells a non-unitary business, then presumably the seller will no longer be part of the target business. However, if the target business is part of a unitary business, then the seller would presumably continue to be involved in the target business by way of continuing to own the unsold unitary entities.

As previously discussed, mandating that the seller cannot remain in the sold business does not seem relationally related to a valid purpose of the occasional sale exemption.⁴³³ What South Carolina's requirement may be attempting to require is for the seller to transfer the entire assets of a business or division thereof in order for the occasional sale exemption to apply. Such a rule would be similar to those states discussed in Category 1.⁴³⁴ If this is, in fact, the underlying rationale for South Carolina's non-unitary rule, then South Carolina should consider amending its statute and/or regulations to expressly set forth this requirement instead of using the non-unitary approach.⁴³⁵ Otherwise, South Carolina should amend its statute and/or regulations to delete the non-unitary requirement.

J. Category 10: Seller Must Have Previously Paid Sales Tax on Non-Inventory TPP Being Transferred (Florida,⁴³⁶ Nebraska,⁴³⁷ Wyoming⁴³⁸)

Florida,⁴³⁹ Nebraska, and Wyoming require that the seller must have paid sales tax on the non-inventory TPP transferred in the Asset Sale in order for the

429. See *supra* notes 278-98 and accompanying text.

430. South Carolina imposes other trap for the unwary requirements. See *supra* Table 1.

431. See *supra* Part II.R.

432. See *supra* Part II.M.

433. See *supra* notes 278-98 and accompanying text.

434. See *supra* Part III.A.

435. See *supra* notes 278-98 and accompanying text.

436. Florida imposes other trap for the unwary requirements. See *supra* Table 1.

437. Nebraska imposes other trap for the unwary requirements. See *supra* Table 1.

438. Wyoming imposes other trap for the unwary requirements. See *supra* Table 1.

439. With respect to Florida, this requirement relates to the occasional sale exemption for isolated sales. See *supra* Part II.E.

occasional sale exemption to apply.⁴⁴⁰ This requirement relates to the underlying premise of the occasional sale exemption that an exemption should exist with respect to previously taxed TPP in order to prevent pyramiding of tax.⁴⁴¹

However, even though the requirement relates to an underlying purpose of the occasional sale exemption, it is not likely necessary because other sales and use tax rules typically exist to ensure that the business has paid sales or use tax on the purchase, use, or consumption of non-exempt TPP. For example, assume a business purchases 100 units of inventory for resale but later takes five units out of inventory for use in the operation of the business (e.g., a convenience store that also sells coffee takes milk cartons originally purchased for resale off the shelf to use as creamer for customers purchasing coffee). Generally, sales and use tax provisions would have already required the business to pay use tax on the consumption of such TPP. Thus, the requirement is likely “belts and suspenders” and not even needed because safeguards already exist in other sales and use tax provisions.

The “previously-paid” rule may also extend too far. For example, what if the subject TPP was purchased for resale or under the manufacturing exemption, so no sales tax was due at the time of purchase? The rule cannot mean that the occasional sale exemption is lost unless tax is paid on all previously un-taxed TPP, including exempt TPP. The requirement must only extend to non-exempt TPP, but the face of the rule is not clear. At a minimum, Florida, Nebraska, and Wyoming should consider clarifying this issue in its statute and/or regulations.⁴⁴²

CONCLUSION

There are a myriad of legal issues that the transactional attorney must assist his or her client in the sale of a business. One of these issues is determining whether to structure the deal as a sale of the underlying assets or as a sale of the equity interests. If the parties choose an Asset Sale structure, then one of the many issues that they must address is determining whether the transfer of the subject assets will create sales tax implications or, alternatively, whether an exemption from sales tax exists. A common sales tax exemption that applies in Asset Sales is the occasional sale exemption. Most states have an occasional sale exemption, however, the states are not uniform in the requirements that must be satisfied in order for the occasional sale exemption to apply. Some states have broad exemptions for occasional, casual or isolated sales, whereas other states have narrow exemptions.

The focus of this Article is on the states having narrow exemptions or cumbersome or perhaps counterintuitive requirements that must be satisfied in order for the occasional sale exemption to apply. Are there valid policy reasons for the narrow exemptions? Do the cumbersome requirements make sense and

440. *See supra* Part II.E, II.M, II.T. Florida and Wyoming also impose other trap for the unwary requirements. *See supra* Table 1.

441. *See supra* notes 278-98 and accompanying text.

442. *See supra* notes 278-98 and accompanying text.

are they really needed? Is there a policy reason behind the counterintuitive requirements or do they ultimately just serve as a “gotcha” to taxpayers and practitioners?

In many instances, there are valid policy reasons for the narrow, cumbersome, and/or counterintuitive requirements, but these requirements may be more restrictive than necessary. Moreover, in many cases where valid policy reasons exist, the requirements are oftentimes still troublesome because they are at odds with the practical nature of Asset Sales. For each of the subject “trap for the unwary” states, this Article makes recommendations for how the states should consider amending their statutes and/or regulations if policy reasons for certain occasional sale requirements do not rationally relate to a valid policy purpose, are overly restrictive, and/or if the requirements are unworkable from a practical standpoint.

A follow-up query resulting from the analysis set forth in the Article is whether a uniform occasional sale exemption among the states would be desirable to have from a policy perspective. While this Article does not specifically address this issue and does not come to a definitive conclusion on uniformity, it is certainly something to consider in view of the number of states fitting into the trap for the unwary category with respect to their occasional sale exemption requirements.