

Southeastern Association of Tax Administrators Conference 68th Annual Meeting

**Marketplace Sales Tax
Collection / Use Tax Reporting –
States Move to Capture More
Untaxed Remote Sales**

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Agenda

- Marketplace Providers
- Use Tax Notice & Reporting
 - *But what about Wayfair?*



Marketplace Providers

Marketplace Provider Overview

- Generally a “marketplace provider” is defined as:
 - a person who facilitates a retail sale by an online marketplace seller; listing or advertising for sale tangible personal property, services or digital goods on a website; collecting payment from the customer and transmitting it to the online marketplace seller; and providing fulfillment services on behalf of the online marketplace seller.
- Common examples of marketplace providers include Amazon, Newegg, eBay, Walmart, Sears, etc.

Marketplace Provider – State Approaches to Enforce Collection

- Require the Seller to Collect Tax
 - Physical presence in the state, click-thru, economic nexus, burdensome use tax reporting regimes, etc.
- Require the Marketplace to Collect
 - Enact legislation requiring marketplaces to collect on behalf of all marketplace sellers.
 - Enact legislation placing undue reporting regime on marketplace provider.
 - Use existing regimes to require collection for remote sellers whose orders are fulfilled by the marketplace, such as state consignment provisions.

Massachusetts Summonses

- On Sept. 25, 2017, the DOR filed a motion in the Suffolk Superior Court asking a judge to enforce summonses the agency sent to four Amazon subsidiaries and their affiliates requesting documents on their sales into and inventory stored in Massachusetts on or after January 1, 2012.
 - Administrative summonses issued on August 31, with a deadline of September 21.
- DOR officials are seeking third-party vendor sales and inventory data to help determine “certain vendors’ sales and/or use tax liability.”
- Amazon was diligent in responding, and participated in three conference calls with the DOR prior to the judicial enforcement action was requested.

California Letters to FBA Sellers

- In 2017, a number of FBA sellers received a letter from the California Department of Tax and Fee Administration.
- “We received information that indicates your business may use fulfillment by Amazon services for sales you make over the Internet. As such, if you have inventory that is stored in fulfillment warehouses in California for delivery to consumers in this state, you are required to register with the California Department of Tax and Fee Administration (CDTFA), file sales and use tax returns, and pay tax on sales to consumers in California.” (Rev. and Taxation Code 6203).

Marketplace Legislation Enacted

- Connecticut (S.B. 417, effective December 1, 2018)
 - Use tax reporting for referrers.
- Iowa (S.F. 2417, Laws 2018, eff. Jan. 1, 2019)
 - Use tax reporting for referrers.
- Minnesota (Minn. Stat. Ann. 297A.66)

Marketplace Provider - Minnesota

- Minnesota statutorily expanded its sales tax collection obligation to “marketplace providers” that provide their platforms to retailers to sell their goods.
- Minnesota enacted Minn. Stat. Ann. 297A.66 (effective on the earlier of (1) July 1, 2019, or (2) the date of a U.S. Supreme Court decision modifying its decision in Quill Corp. v. North Dakota, 504 U.S. 298 (1992)), which effectively creates a sales tax collection requirement for any retailer that makes sales through a “marketplace provider,” even if the retailer is not actually physically present in Minnesota. Requires a “marketplace provider” to collect and remit sales tax for the retailer’s sales it facilitates.
- A “marketplace provider” is defined as “any person who facilitates a retail sale by a retailer” by: (1) listing or advertising sales by the retailer; and (2) collecting payments from the retailer’s customers and transmitting those payments to the retailer.

Marketplace Provider Nexus Proposals this Year

- Kansas HB 2756
- North Carolina SB 81
- New Jersey
- New Mexico HB 4, SB 162, SB 175
- New York AB 9508, AB 9509, SB 7509
- Vermont H 587

Tax Reporting - Marketplaces

- Alabama (Act# 2018-539)
- Oklahoma (68 Okl. Stat. Ann. §§ 1391—1397)
- Rhode Island (Ch. 302 (H.B. 5175), Laws 2017)
- Pennsylvania (Act 43, Laws 2017)
- Washington (2017 3d Spec. Session, c. 28, §§ 201—214)

Marketplace Provider - Alabama

- Act 2018-539
- Marketplace facilitators eligible to participate in Alabama's simple sales tax collection system (SSUT)
 - All the benefits of the SSUT
- Provides relief to marketplaces sellers when facilitator collects
- Requires notice and reporting (January of 2019) if marketplace chooses not to collect
- Broad notice and reporting authority granted to Department
 - Rules under development now

Marketplace Provider - Oklahoma

- Oklahoma enacted H1019, requiring marketplace facilitators, remote sellers and referrers to either collect and remit Oklahoma sales tax or comply with notice and reporting requirements, effective April 10, 2018.
- By July 1, 2018, and by June 1 of each calendar year starting in 2019, a marketplace facilitator, remote seller or **referrer** who had at least \$10,000 in aggregate Oklahoma sales in the preceding 12 month calendar period must either file an election with the Oklahoma Tax Commission (OTC) to collect and remit sales and use tax due on tangible personal property (TPP) and obtain a sales tax permit; or comply with notice and reporting requirements.
- A “marketplace facilitator” facilitates a sale at retail of TPP if the person or an affiliated person lists or advertises TPP for sale at retail in any forum, and either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the person selling the property.

Marketplaces that Fulfill Orders – State Positions

- Seller has physical presence and is required to collect.
 - MTC Program
 - Indiana Initiative
- Marketplace is Consignee and obligated to collect
 - South Carolina litigation
 - Arizona guidance
 - Other states?

Marketplace Provider Litigation

Amazon Services LLC v. South Carolina Department of Revenue (No. 17-ALJ-17-0238-CC)

- South Carolina wants Amazon to pay more than \$12 million in uncollected taxes, interest, and penalties on marketplace sales from the first quarter of 2016.
- The DOR's position is that Amazon Services "mischaracterizes itself as a service provider and ignores the fact that it is deemed a seller under South Carolina law." The marketplace provider, "just like a consignee, is the seller and the legally liable taxpayer of the sales and use taxes due."
- The company's most recent quarterly report says "the assessment is without merit. If South Carolina or other states were successfully to seek additional adjustments of a similar nature, we could be subject to significant additional tax liabilities. We intend to defend ourselves vigorously in this matter."

South Carolina Provisions

- The term “gross proceeds of sales” includes “the proceeds from the sale of property sold on consignment by the taxpayer.” S.C. Code Ann. § 12-36-90(1)(a).
- Regulation 117-319, Warehousemen, provides the following:
 - Sales Made By: Receipts of warehousemen from their services in storing, handling, packing, crating, delousing, etc., property for others are not subject to the sales tax. Any materials used incidental to the rendering of such services are taxable on the sale to the warehousemen.
 - When, however, warehousemen buy and sell property as a regular course of business such sales, if not otherwise exempted, are subject to the sales tax, including sales of goods held on **consignment** and including transactions in which the warehouseman acts as a broker selling goods not actually owned by him or in his possession at the time he accepts the order.

Arizona Trans. Privilege Tax Ruling 16-3 (9/20/2016)

- A business that operates an online marketplace and makes online sales on behalf of third party merchants as evidenced by the marketplace providing a primary contact point for customer service, processing payments on behalf of the merchant and providing or controlling the fulfillment process, is a retailer conducting taxable sales.

Consignment Provisions

Illinois

- An Illinois regulation provides that a consignee/agent acting for an unknown principle is considered the owner of the property and subject to sales tax on the sale.
- Unknown or undisclosed principal: Every agent acting for an unknown or undisclosed principal, or entrusted with the possession of any bill of lading, custom house permit or warehouseman's receipt for delivery of any tangible personal property, or entrusted with the possession of any such personal property for the purpose of sale, is deemed to be the owner of that property. When the property is sold to a purchaser for use or consumption, he or she is required to file a return and to pay tax measured by the receipts. Ill. Admin. Code 86 §130.1915(a)(1).

Consignment Provisions

Illinois (Cont'd)

- Known or disclosed principal: The receipts from a sale made by an agent who is acting for a known or disclosed principal are taxable to the principal, if principal is engaged in the business of selling such tangible personal property at retail. For a sale to qualify, the principal must be clearly disclosed to the purchasers by the agent so that the purchasers are able to determine who owns the goods that are being sold. Ill. Admin. Code 86 § 130.1915(a)(2).
- A principal is deemed to be disclosed to a purchaser for use or consumption only when the principal's name and address is made known to the purchaser at or before the time of the sale and when the name and address of the principal appears upon the books and records of the agent. Ill. Admin. Code 86 § 130.1915(b).



Use Tax Notice & Reporting

Notice and Reporting Post Wayfair

Are the notice and reporting nexus / jurisdictional limits (*DMA*) any different from tax collection nexus / jurisdictional limits post *Wayfair*?

Does notice and reporting make sense in a post *Wayfair* world?

- Yes, at least for marketplaces, but maybe not for much more...

Use Tax Notice & Reporting

- A number of states require (by statute) retailers that are not obligated to collect and remit tax to comply with certain notice and reporting requirements
 - These requirements generally consist of (1) certain reports to customers and the state taxing authorities and (2) notices to customers at the point-of-sale that use tax may be due
 - These requirements are meant, in part, to increase purchaser awareness of their use tax obligation
 - They are also likely intended to induce remote sellers to voluntarily collect and remit tax as the requirements can be extensive and the penalties for noncompliance can be steep
 - Laws vary state to state
- Colorado was the first – adopted use tax notice and reporting requirements that applied to non-collecting retailers

Use Tax Notice & Reporting

- In *Direct Marketing Association v. Brohl*, the Tenth Circuit ruled that Colorado's use tax reporting requirements did not discriminate against or unduly burden interstate commerce
 - The issue has not been litigated in other federal circuits or in any other state court
- The three Colorado reporting requirements, which finally became effective on July 1, 2017, are as follows:
 - Notify purchaser at the time of sale that use tax may be due and purchaser is responsible for filing return
 - Notify each Colorado purchaser annually of the volume of goods purchased during the year, that use tax may be due, and that the purchaser must file a use tax return, usually with the income tax
 - Notify state tax authority annually of the amount of goods purchased by each Colorado customer along with a general description of the goods purchased

Use Tax Notice & Reporting

State	Transactional Notice(s)	Annual Report to Purchasers	Annual Report to Department
Colorado	Starting July 1, 2017	January 31, 2018	March 1, 2018
Georgia	Starting January 1, 2019	January 31, 2020	January 31, 2020
Kentucky ^x	Starting July 1, 2013	N/A	N/A
Louisiana ^x	Starting July 1, 2017	January 31, 2018	March 1, 2018
New York	Effective 1/1/2019 – check bill for dates		
Oklahoma	Starting October 1, 2010	February 1, 2017	N/A
Pennsylvania	Starting March 1, 2018	January 31, 2019	January 31, 2019 (quarterly)
Puerto Rico	Starting July 1, 2017	January 31, 2018	Quarterly Report: October 31, 2017
Rhode Island	Starting August 17, 2017	January 31, 2018	Non-collecting retailers: February 15, 2018 Retail Sale Facilitators: January 15, 2018
South Dakota ^x	Starting July 1, 2011	N/A	N/A
Vermont	Starting July 1, 2017	January 31, 2018	January 31, 2018
Washington	Starting Jan. 1, 2018	February 28, 2019	February 28, 2019

X = no penalties are specified for noncompliance

Use Tax Notice & Reporting Proposals this Year

- Alabama SB 307, HB 470
- Georgia HB 61, HB 329,
- Hawaii SB 161, HB 398, SB 620
- Illinois HB 3057
- Iowa HF 460
- Kansas 2235, SB 111
- Nebraska LB 564, LB 1088, LB 44
- New Jersey S 2051
- New York AB 9509, SB 7509
- Oklahoma SB 337, HB 2980, HB 3401
- Vermont H 587
- Washington HB 2186, SB 5855, SB 5856

Questions?

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