



MULTISTATE TAX COMMISSION

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Nexus Program Director's April 21, 2020 Update on Significant Nexus Law Developments Since November 5, 2019

See PowerPoint concerning states that have enacted economic nexus statutes or promulgated regulations or notices implementing economic nexus, as well as states that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales.

Legislation

Alaska

The Alaska Remote Seller Sales Tax Commission approved on 1/6/2020 the Alaska Remote Seller Sales Tax Code, which provides that local governments can opt to join the Commission for purposes of centrally administering their local sales taxes and requiring remote sellers and marketplace facilitators with gross annual sales exceeding \$100,000 or 200 transactions to commence collection of those local sales taxes. Several local governments have opted to join the Commission. Paul Jones, "Alaska Remote Seller Tax Commission Finalizes Remote Sales Tax Code," *Tax Analysts Tax Notes Today State* (Jan. 8, 2020).

Arizona

The Arizona Legislature has passed House Concurrent Memorial 2006, requesting that Congress adopt legislation to standardize and simplify remote seller sales tax remittance requirements. Paul Jones, "Arizona Lawmakers Push for National Sales Tax Rules," *Tax Analysts Tax Notes Today State* (Jan. 31, 2020).

Maine

LD 2011 was introduced in the 2020 Maine Legislature, providing for factor presence nexus for corporate income tax (\$250,000 in property or payroll, \$500,000 in annual sales, or 25% of any factor), effective 1/1/2021.

The Maine Legislature passed LD 1993 to clarify that out-of-state liquor suppliers do not have corporate income tax nexus resulting solely from the presence of inventory in state-controlled warehouses, reversing a prior Maine Revenue Services determination. However, the legislation has been tabled as a result of the Legislature's

departure on March 17, uncertain when it will resume. Aaron Davis, "Maine Lawmakers Pass Liquor Sales Nexus Bill, *Tax Analysts Tax Notes Today State* (3/19/2020).

Maryland

The Maryland Legislature passed HB 732, imposing a new digital advertising services gross receipts tax on such services sourced to Maryland. However, Governor Hogan has not yet signed the legislation and may veto it.

Tennessee

The Tennessee Legislature enacted SB 2182, requiring marketplace facilitators to collect sales/use tax (economic nexus threshold of \$500,000 in annual sales), effective 10/1/2020.

Utah

Utah Legislature enacted SB 114, exempting food delivery services from the marketplace facilitator collection and remittance requirements, effective 7/1/2020.

West Virginia

West Virginia legislature passed SB 163, extending its marketplace facilitator collection requirement to include local occupancy taxes. The governor has not yet signed the legislation.

Rulings or Administrative Actions

Alabama

Arizona

Arizona Department of Revenue published guidance for remote sellers and marketplace facilitators in its TPT Newsletter dated January 2020.

Georgia

Georgia Department of Revenue has published Policy Bulletin SUT 2020-01 to provide guidance on its new marketplace facilitator tax collection legislation.

Hawaii

Tax Information Release No. 2019-03 (Revised), Hawaii Department of Taxation, December 19, 2019 provides guidance to marketplace facilitators concerning marketplace facilitator tax collection requirements.

Illinois

Illinois Department of Revenue has published emergency regulation section 150.804 to implement marketplace facilitator collection legislation, and has also published a Compliance Alert dated February 2020. The Department has also published a taxability matrix concerning sales tax impositions and exemptions to provide guidance to remote sellers. P10-101 (R-12/10).

Louisiana

Louisiana Department of Revenue has published emergency rules dated January 2020 to implement economic nexus legislation.

Massachusetts

Massachusetts Department of Revenue has published regulation 830 CMR 64H.00 in the Massachusetts Register dated 12/13/2019 to provide guidance concerning implementation of economic nexus and marketplace facilitator collection legislation.

Michigan

Michigan Department of Treasury has published Notice 2019 Pas 143-146 to provide guidance concerning implementation of economic nexus and marketplace facilitator collection legislation.

Nevada

Nevada Tax Commission has published LCB File No. R014-201 dated 1/28/2020 to provide guidance concerning implementation of marketplace facilitator collection legislation.

New York

New York Department of Tax and Finance released November 2019 draft rules concerning nexus for the New York corporate income tax.

North Carolina

North Carolina Department of Revenue published Directive SD-20-1 on 1/28/2020 to provide guidance on implementing economic nexus and marketplace facilitator collection legislation.

Ohio

Ohio Department of Taxation has released guidance CAT 2005-02 November 2019 on nexus standards for the Ohio commercial activity tax. The Department released ST 2001-01 dated November 2019 to provide guidance on use tax nexus standards.

Oregon

Oregon Department of Revenue has released Draft Rule 150-317-1010 on 12/6/2019 providing substantial nexus guidance for the Oregon commercial activity tax.

Philadelphia, Pennsylvania

City of Philadelphia Department of Revenue released guidance 12/20/2019 on the economic nexus standard for its business income & receipts tax.

Rhode Island

The Department of Revenue, Division of Tax, Administration Hearing Office released Dec. No. 2020-04 (3/30/2020), granting the sales/use tax refund request of an out-of-state television subscription services provider of live television via streaming over the internet for time period 2015-16. The Department determined that the taxpayer did not have physical presence nexus, although the streaming services were not exempt, and because the time period at issue pre-dated overrule of *Quill* in *South Dakota v. Wayfair*, the refund was allowed.

Texas

Texas Comptroller of Accounts has published regulations implementing economic nexus and marketplace facilitator collection legislation at 34 TAC Section 3.334, 45 TexReg 98, 1/3/2020.

West Virginia

TSD-406A, TSD-442, West Virginia State Tax Department, December 2019 provide taxpayer guidance to remote sellers concerning its economic nexus and marketplace facilitator tax collection legislation.

Washington

In Washington Department of Revenue Det. No. 18-0070 (3/8/2020) the Department determined that audit of an affiliate entity was a prior contact precluding the taxpayer, which had economic nexus, from eligibility for Washington's voluntary disclosure program.

Wisconsin

Wisconsin Department of Revenue has published notice of proposed guidance document 100195 on 12/6/2019 and 100241 on 12/12/2019 concerning remote sellers and economic nexus.

Several state tax agencies have announced that they will not consider teleworkers in their states during the COVID-19 commuting restrictions imposed by “stay home” orders to create corporate income tax nexus for their employer companies: D.C., Mississippi, New Jersey, and Pennsylvania. More states are expected to adopt similar policies. Tripp Baltz and Laura Mahoney, “More States on Board with Telework,” *Bloomberg Law Daily Tax Report: State* (4/6/2020).

Cases

California

In *Grosz v. California Department of Tax and Fee Administration* filed in December 2019 in Los Angeles County Superior Court, a small retailer in the FBA Program claimed that Amazon, as marketplace facilitator, was required to collect and remit sales tax on facilitated transactions. Amazon and the California Department of Tax and Fee Administration (CDTFA) have argued that recent legislation requiring marketplace facilitators to collect was prospective only, and prior to that legislation, Amazon had no such obligation. Paul Jones, “Amazon, California Urge Dismissal of Back Sales Tax Suit,” *Tax Analysts Tax Notes Today State* (Dec. 18, 2019).

Florida

The District Court of Appeals of Florida upheld the lower court's determination that Airbnb was not a “dealer” for purposes of being required to collect the local Tourist Development Tax on residential rentals facilitated through its platform in *Gannon v. Airbnb*, No. 4D17-541 (3/25/2020).

Illinois

The Illinois Supreme Court has denied review of the appellate court's decision in *Labell v. City of Chicago* upholding the City of Chicago's amusement tax on online streaming services against a challenge that the tax violated the Illinois constitution's uniformity clause and the Internet Tax Freedom Act. Andrea Muse, “Illinois Supreme Court Won't Hear Chicago Streaming Tax Challenge,” *Tax Analysts Tax Notes Today State* (3/26/2020).

Louisiana

In *Normand v. Wal-Mart.com, USA, LLC*, No. 2019-C-00263 (La. 1/29/20), the Louisiana Supreme Court reversed the lower court decision and ruled against the parish in determining that Wal-Mart.com was not a “dealer” within the statutory definition, and was not required to collect and remit local sales taxes on facilitated retail sales transactions.

Maryland

In *Blue Buffalo Co., Ltd. v. Comptroller of the Treasury*, Md. Ct. Spec. App., No. 495, 12/20/19, the Maryland Court of Special Appeals affirmed a corporate income tax assessment, finding that Taxpayer's in-state activities exceeded P.L. 86-272 protection. Taxpayer, a pet food company, claimed that its employees and activities in Maryland were limited to solicitation of orders, which is immune from taxation under federal law. The court found that the taxpayer's employees engaged in systematic gathering of competitive information, which exceeded the P.L. 86-272 protection granted to solicitation. NYU State Tax Study Group, Current Developments Outline, February 6, 2020 meeting.

Michigan

In *Apex Laboratories Int'l Inc. v. City of Detroit*, Mich. Ct. App., No. 338218, 1/2/20, the Michigan Court of Appeals vacated decision for the taxpayer and remanded the case back to the lower court for reconsideration under *Wayfair*. The City of Detroit attempted to assess its corporate income tax against a Delaware corporation lacking physical presence and created to assist in the sale of stock in a Canadian company. The taxpayer had received income from the share and capital gains on the sale of the Canadian company. NYU State Tax Study Group, Current Developments Outline, February 6, 2020 meeting.

South Carolina

South Carolina Administrative Law Court ruled against Amazon Services LLC in its challenge of South Carolina Department of Revenue's assessment for uncollected sales/use tax on facilitated sales, determining that Amazon Services LLC fits within the state's statutory definition of "dealer" and was required to collect on those sales, going back to 2016. Amazon Services LLC has appealed. Amy Hamilton, "Amazon Appealing South Carolina Marketplace Decisions," *Tax Analysts*, October 16, 2019.

Oregon

In *Ooma Inc. v. Department of Revenue*, the Oregon Tax Court on March 2, 2020 held that an out-of-state VOIP provider with no physical presence in Oregon was liable for failure to collect \$677,000 in E911 taxes, interest and penalties, and the due process and commerce clauses did not invalidate that obligation. The court determined that the taxpayer had thousands of VOIP lines and over \$1 million in annual revenues from Oregon customers, so demonstrated "purposeful availment." Andrea Muse, "VoIP Provider Has Sufficient Contacts to Owe Oregon 911 Tax," *Tax Analysts Tax Notes Today State* (Mar. 4, 2020).

Congress and Other Federal Activities

Senators Tester (MT), Merkley (OR), Hassan (NH), and Shaheen (NH) introduced in the U.S. Senate on June 28, 2018 S. 3180 (**re-introduced 1/16/19**), the “Stop Taxing Our Potential Act of 2018,” which would essentially codify *Quill*. The senators represent states that do not impose sales tax. These senators also introduced the “Online Sales Simplicity and Small Business Relief Act” on **July 31, 2019** (a re-introduced version of S. 3725, introduced in late 2018), which would prohibit states from retroactively require remote sellers to collect sales/use tax on sales prior to the *Wayfair* decision, also prohibit states from imposing sales/use tax collection duties on remote sellers until January 1, 2021. The act would include a “small remote seller” exception for remote sellers with annual U.S. sales of \$10 million or less, and prohibit states from imposing sales/use tax collection duties on them until 30 days after states had adopted a Congressionally approved compact including required sales tax simplification provisions.

Representatives Gibbs (OH) and Wilson (SC) introduced the Protecting Businesses from Burdensome Compliance Cost Act of 2018 (H.R. 6724) on September 6, 2018 (**re-introduced as H.R. 379 1/9/19**), which imposes a moratorium on enforcement of *Wayfair* until January 1, 2020, and prohibits local jurisdictions from requiring collection or reporting by remote sellers. It also imposes certain restrictions on local rates.

Representatives Sensenbrenner (WI), Eshoo (CA), Duncan (SC) and Lofgren (CA) introduced the Online Sales Simplicity and Small Business Relief Act of 2018 (H.R. 6824) on September 13, 2018 (**re-introduced in March 2019**). The bill prohibits retroactive enforcement of *Wayfair*, imposes a small business remote seller exemption of \$10 million or less in annual gross national sales, and prohibits states from enforcing *Wayfair* until they have entered into a compact approved by Congress providing for certain simplification measures for sales tax administration.

Representatives Chabot (OH) and Scott (VA) have re-introduced the Business Activities Tax Simplification Act of 2019 (BATSA), H.R. 3063, in June 2019. The bill is similar to prior versions of the BATSA, restricting states' ability to tax multistate businesses and significantly expanding the Congressional pre-emption of state taxing power contained in P.L. 86-272 (15 U.S.C. Section 381 et. Seq.).

The House Small Business Subcommittee on Economic Growth, Tax and Capital Access held a hearing, “*South Dakota v. Wayfair Inc.: Online Sales Taxes and Their Impact on Main Street*,” on March 3, 2020. Four witnesses appeared to complain about the lack of uniformity among the states implementing economic nexus and marketplace facilitator collection laws and the difficulty for small remote sellers in complying with such laws. One witness represented the AICPA, and three witnesses were from small remote sellers. The witnesses generally urged Congress to develop a uniform threshold of sales volume activity that would shield small remote sellers from state tax collection requirements.

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