



# THE PROBLEM OF LOCALITY TAXES

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## WHAT GIVES LOCALITIES THE RIGHT?

- Home rule v. non-home rule
  - Home rule – local jurisdictions with significant autonomy/authority to impose taxes.
    - Generally, limited only by express preemption provisions at the state level.
  - Non-home rule – local jurisdictions generally precluded from taxing unless express authority is provided.
    - Generally, state statute provides authority to enact specific taxes (*i.e.*, local sales rate, utility taxes, etc.).
- All locals must abide by U.S. and state constitutional principles.

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## COMPLIANCE CHALLENGES AND LOCAL TAXES

- Significant Costs and Burdens of Local Administration of Taxes:
  - Registering separately in each locality
  - Tax remittance and filing of returns in each locality
  - Differing laws, rates, deadlines
  - Audit compliance
  - Impact of noncompliance
- Locality audits and litigation can be aggressive and expensive.

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## COMPLIANCE CHALLENGES—LOCAL LODGING TAXES

- There are approximately 3,000 – 4,000 locally administered lodging or accommodations taxes
  - Impacted facilities or accommodations vary across states and often across jurisdictions within a state.
- Local administration
  - Collection and remittance
  - Local-level audits
  - Marketplace facilitator laws

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## COMPLIANCE CHALLENGES & PORTLAND

- A taxpayer doing business in Portland could be subject to up to seven different business taxes
  - Portland Business License Tax (BLT)—2.6% tax on income apportioned to Portland.
  - Multnomah County Business Income Tax (MCBIT)—2% tax on income apportioned to Multnomah county.
  - Metro District Supportive Housing Services Tax (2021)—1% tax on income apportioned to the Metro District.
  - Pay ratio surtax—10% or 25% surtax on publicly traded companies with a CEO-to-average wage ratio (as determined for purposes of the SEC) of >100:1 and >250:1, respectively.
  - Clean energy “surcharge”—1% tax on gross receipts from retail sales made by “large retailers” (\$1B in ww retail gross receipts and \$500k in Portland retail gross receipts).
  - Other misc. taxes/fees: heavy vehicle use tax; residential rental registration fee.

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## LOCAL MARKETPLACE FACILITATOR CHALLENGES

- All states have now adopted marketplace facilitator/provider laws...
- But what local taxes (if any) do they apply to?
- These determinations can be very nuanced and technical and differ significantly from state to state.
- Some locals (such as Colorado home rule localities) have adopted their own marketplace facilitator laws on a city-by-city basis.
- The bifurcation of taxes/fees headache can be significant and is something many industries (including tech) are dealing with nationwide.

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## SOME ATTEMPTS AT SIMPLIFICATION

- Alabama's Simplified Sellers Use Tax
  - Requires seller to collect 8 percent statewide tax; distributed by DOR based on population
- Alaska's Remote Sales Tax Information Portal
  - Intergovernmental agreement entered into in 2019 to coordinate sales tax collection for remote sellers
- Colorado's Sales and Use Tax System (SUTS)
- Louisiana's Sales and Use Tax Commission for remote sellers

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## POTENTIAL CONSTITUTIONAL LIMITATIONS ON LOCALITIES (AND STATES)

- Due Process Clause
  - Minimum contacts
  - Sufficient notice
- Commerce Clause
  - *South Dakota v. Wayfair*
    - The U.S. Supreme Court overturned physical presence test
    - Held that *Quill* was “unsound and incorrect”
    - **“Economic or virtual”** presence is sufficient for nexus – but case was remanded to discuss discrimination & undue burden

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## THE “PIKE” BALANCING TEST

- To be constitutional, the burdens a state or local law imposes on out-of-state commerce must not be “clearly excessive” in comparison to the local benefits.
- Allows for a fact sensitive balancing of state actions.



## QUESTIONS?

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