



**MULTISTATE TAX COMMISSION**

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*Maximizing the synergies of multi-state tax cooperation*

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## **Director's Update on Nexus Law Developments since December 13, 2016**

### **Cases**

#### **Alabama**

Alabama enacted legislation effective October 1, 2015, the Simplified Sellers Use Tax Remittance Act, permitting remote retailers collecting Alabama use tax to qualify for a program allowing them to collect a flat 8% combined state and local use tax rate on their remote sales to Alabama customers. In return, those remote retailers can retain a 2% vendor discount from remitted proceeds, and will be subject only to state-level audits. The Alabama Department of Revenue also published its Rule 801-6-2-.90.03 last fall stating that remote retailers must commence collecting Alabama use tax on remote retail sales to Alabama customers if the remote retailer has at least \$250,000/yr. in remote sales to Alabama customers. In May, 2016, the Alabama Department of Revenue issued use tax assessments against some large remote retailers, and in June, 2016, Newegg has filed an appeal with the Alabama Tax Tribunal of the use tax assessment it received, seeking a determination that the rule and assessment is unconstitutional. The parties are currently involved in discovery.

#### **California**

*Swart Enterprises, Inc. v. Cal. FTB*, California Court of Appeals, No. F070992 (1/12/17) FTB assessed Swart Enterprises, an out-of-state corporate member owning a .2% interest in an LLC manager-managed investment fund "doing business" in California the minimum \$800 for franchise tax liability. Under the management agreement, Swart Enterprises had not right to participate in management decisions, but had the right to vote to replace the manager, along with other members. The Court of Appeals held that Swart Enterprises was not "doing business" in California. The FTB indicates it will not appeal, so substantial refunds may be owed to similarly situated taxpayers receiving franchise tax assessments. The ruling is inconsistent with FTB Legal Ruling No. 2014-01. See "California May Owe Refunds to Out-of-State LLCs," Laura Mahoney, Bloomberg BNA Daily Tax Report (2/23/17).

## Colorado

*Direct Marketing Association v. Brohl*

Direct Marketing Association's ("DMA") petition for certiorari to the U.S. Supreme Court concerning the Tenth Circuit's ruling earlier this year (following the U.S. Supreme Court opinion holding that the Tax Injunction Act did not bar DMA's lawsuit) upholding the Colorado notice and reporting statute against DMA's Commerce Clause challenge and determining that *Quill* did not apply, was denied on December 12, 2016. Colorado Department of Revenue is currently engaged in settlement discussions with DMA.

## Connecticut

*Allen v. Comm'r of Rev. Services*, No. SC 19567, 2016 BL 432872 (12/28/16)

Taxpayer received unqualified stock options from employer while employed and domiciled in Connecticut and later exercised those options as a nonresident, receiving income, paying income tax to Connecticut. Taxpayer later filed refund claims, contending the tax violated due process because value of stock options accrued after employment and residency ended. The Commissioner denied the refunds. The Connecticut Supreme Court upheld the denial, sufficient nexus existed: taxpayer received stock options as compensation for employment in Connecticut.

## Florida

In *American Business USA Corp v. Florida Department of Revenue*, the Florida Supreme Court recently upheld under Commerce Clause nexus the Florida "origin-sourced" sales tax imposed on a florist taking internet orders for flowers in Florida that are delivered out of state. The florist's petition for certiorari to the U.S. Supreme Court was denied on 2/21/17.

## Illinois

*Hertz Corporation v. City of Chicago*, 2017 IL 119945 (1/20/17)

Illinois Supreme Court held that the City could not enforce its personal property tax on motor vehicle short-term rentals entered into at suburban rental locations within 3-mile radius of the City when the renter was a Chicago resident, in that this exceeded the City's home rule authority. The court did not address the due process and commerce clause arguments also raised by the taxpayer.

## Indiana

*Orbitz, LLC v. Indiana Department of Revenue*, Indiana Tax Court, 49T10-0903-TA-00010 (12/20/16)

Online travel company (OTC) was held not subject to Indiana sales or innkeepers' tax on hotel room rentals, because it did fall within the statutory definition of "retail merchant."

## Ohio

The taxpayers in *Crutchfield Corp. v. Testa*, *Newegg Inc. v. Testa*, and *Mason Cos. Inc. v. Testa*, in which the Ohio Supreme Court upheld as constitutional the factor presence/economic presence nexus provisions of the Ohio commercial activity tax (CAT, a “gross receipts” tax), are expected to petition for certiorari to the U.S. Supreme Court, which recently extended the date to file to 4/16/17.

## South Dakota

South Dakota enacted SB 106, signed by the governor on March 22, 2016, providing that remote retailers with no physical presence in the state and sales to South Dakota customers exceeding \$100,000/yr. or 200 transactions/yr. are required to commence registration, collecting, reporting and remitting South Dakota use tax on remote retail sales to South Dakota customers. The act is based on model language developed and promoted by the NCSL. The act itself contains a self-imposed injunction against enforcement until the courts have validated it. Two declaratory judgment actions concerning the act’s constitutionality are pending : the first filed April 28 by South Dakota Revenue Department against 4 prominent online retailers: Wayfair Inc., Systemax Inc. (later dismissed out), Overstock.com Inc., and Newegg Inc., seeking a declaration of constitutionality; the second filed April 29 by American Catalog Mailers Association and Netchoice against the Secretary of the South Dakota Revenue Department, seeking a declaration of unconstitutionality. The defendants in the first case sought removal of the action to federal district court. The U.S. District Court for South Dakota granted the state’s motion for remand to the state court on January 17, 2017 and denied the taxpayers’ motion for summary judgment.

## Washington

In *Avnet, Inc. v. Washington Department of Revenue*, No. 92080-0, 2016 BL 391123 (Wash. Nov. 23, 2016), the Washington Supreme Court affirmed the Court of Appeals decision upholding the Department’s assessment of B&O tax against Avnet, Inc., an out-of-state distributor of electronic components (with an in-state sales office at Redmond), determining that B&O tax transactional nexus existed for its “national sales” and drop shipments. Although expected, no petition for certiorari was filed.

## **Regulations and Rulings**

### Massachusetts

Massachusetts Governor Charlie Baker announced on January 26, 2017 his intent to have regulation proposed challenging *Quill*, requiring remote vendors with over \$500,000 in Massachusetts sales to collect sales tax.

See Shira Schoenberg, “Governor Charlie Baker to Propose FY18 State Budget,” *The Republican*, 1/26/17

## Mississippi

### Proposed Regulation

Remote retailers with sales of tangible personal property to Mississippi customers exceeding \$250,000/yr. required to register and collect sales/use tax effective July 1, 2017. Remote retailers failing to register are subject to retroactive liability without regard to statute of limitations.

## Tennessee

Tennessee Department of Revenue proposed in 2016 Regulations 1320-05-01-.63 and 1320-05-01-.129, requiring remote retailers register by March 1, 2017 and begin collecting by July 1, 2017 sales/use tax on remote sales to Tennessee customers if their annual gross sales exceeded \$500,000. The proposed regulations are currently being considered for approval by the Tennessee Legislature. Administrative challenge has been filed by Net Choice, American Catalog Mailers Assoc. See “Tennessee Online Retailer Rule Sparks Challenge,” Andrew Ballard, *Bloomberg BNA Daily Tax Report* (2/10/17)

## Washington

Department of Revenue Determination No. 16-0149 (12/23/16)

Out-of-state bakery was held subject to Washington B&O tax on receipts from sale of baked goods to Washington customers, even though title passed to customers at the out-of-state bakery location from which seller shipped the goods by common carrier. Independent commissioned sales representative took orders in Washington and created nexus.

## **2017 State Legislative Proposals**

See the MTC website ([www.mtc.gov](http://www.mtc.gov)) under “Resources” and “Legislation” for a list of tax-related legislation by state, with the current status of such legislation; see also “Economic Nexus is the Most Prevalent Type of Sales Tax Compliance Legislation This Year,” *Multistate Insider*, MultiState Associates, Inc. (1/27/2017)

Notice and Reporting Proposals (similar to Colorado’s)

Such bills have been introduced in the following states:

Alabama, Arkansas (HB 1388 passed House), Kansas (SB 111, HB 2235), Georgia (notice only), Hawaii (notice only), Nebraska (notice only), Pennsylvania (HB 542 notice only), Utah (notice only), Vermont (SB 62 applicable only to sellers with remote sales over \$100,000)

### Anti-*Quill* Legislative Proposals (similar to South Dakota's)

Such bills have been introduced in the following states:

Arkansas (SB 140 passed Senate), Georgia (HB 61 passed House), Hawaii, Indiana (SB 545 passed Senate), Mississippi (HB 480 passed House), Nebraska, New Mexico, North Carolina, North Dakota (SB 2298 passed Senate), Utah, Washington, Wyoming (HB 19 passed both Houses)

### Marketplace Provider Proposals

Amazon has indicated that as of March 1, 2017, it will be collecting use tax on its remote sales in all states with sales tax except: Hawaii, Idaho, Maine and New Mexico. It does not collect use tax on remote sales of its Amazon FBA sellers, unless the seller directs it to. Legislative proposals have been introduced in Minnesota, Mississippi, New Mexico, New York, Rhode Island that would require a marketplace provider to collect use tax on behalf of sellers using the marketplace.

New York Governor Cuomo has proposed requiring marketplace providers with over \$100 million in annual sales to collect sales tax when they facilitate a sale to a New York resident—whether or not the seller is located in the state.

“Internet Companies Urge New York to Nix Digital Sales Tax Plan,” Gerald B. Silverman, *Bloomberg BNA Daily Tax Report*, 2/8/17

### Click-thru/Affiliate Nexus Proposals

Click-thru/affiliate nexus proposals have been introduced in Minnesota (SF 45) and South Carolina (SB 214).

### Market-based Sourcing of Services/Intangibles Income Proposals

Market-based sourcing proposals have been introduced in Oregon (HB 2048) and Virginia (HB 1499).

### Single Sales Factor Apportionment Proposals

A single sales factor apportionment proposal has been introduced in Virginia (HB 1499).

### Simplified Seller Use Tax Remittance Act

Legislation (HB 1413) has been introduced in Hawaii similar to Alabama's simplified program to encourage voluntary registration of remote sellers.

### Factor Presence Nexus Proposals

Washington governor has proposed HB 1549/SB 5112 applying B&O gross receipts tax “factor presence” nexus standard (sales to Washington customers exceeding

\$267,000 yr. or 25% of sales) to out-of-state retailers. See “Remote Retailers Could Face Washington State B&O Tax,” Paul Shukovsky, *Bloomberg BNA Daily Tax Report* (2/10/17)

### **Enacted Legislation**

Virginia (HB 2058)

Owning tangible personal property (i.e. inventory) “for sale located in the Commonwealth” provides sales/use tax nexus, effective July 1, 2017.

### **Federal Legislation**

No federal legislative proposals have yet been introduced in the current Congress concerning the issue of remote retailer use tax collection authority.

### **Streamlined Sales and Use Tax Agreement**

The State and Local Government Advisory Council will be meeting on March 6-7, 2017 in Tucson, Arizona and will consider finalizing and recommending to the Governing Board for approval and adoption a new “disclosed practice” concerning voluntary disclosure agreements that will require Member States to identify as part of the taxability matrix the point in time during the voluntary disclosure process when a taxpayer may begin collecting and remitting sales/use tax without jeopardizing voluntary disclosure status.

### **New Tax Amnesties**

Virginia (HB 2246)

Tax Commissioner will announce dates, which will occur between 7/1/17 and 6/30/18 and last not less than 60 days or more than 75 days. Amnesty will apply to all taxes administered by the Department of Taxation and may include waiver of penalties on one-half of interest.

Richard Cram  
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