



SALT WATCH

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States Targeting Internet Retailers for Sales Tax Purposes, Now Congress Getting Involved

The Attack

The past twelve months have seen rampant movement by several states attempting to reign in internet and online retailers for purposes of sales and use tax collection and filing requirements. Initially, New York State launched its attack on internet retailers in the 2008-2009 Budget Bill, and the retailers' responsibility to collect sales tax on taxable sales made in the state, regardless of physical presence, or taxing connection to the state. Suitably phrased by some as "the Amazon Tax", the New York Budget Bill is considered a direct attack on the internet retail giant from which the legislation is likely to generate the most sales tax revenue. As a result of New York's enacted legislation and subsequent successful defense in the New York Supreme Court, several states have introduced similar, aggressive legislation targeting online retailers seeming to have only a virtual presence in their states, absent any other physical connection.

Overview

The specific language of the New York Budget Bill speaks directly to the online retailer relationships stating, the out-of-state seller "shall be presumed to be soliciting business through an independent contractor or other representative" as a result of entering into website linking agreements with New York residents. The shift of nexus standards away from the traditional physical presence standard required for a state to impose its sales tax jurisdiction on an out-of-state retailer is certainly a sign of the times. Rest

assured, there will be significant additional costs related to registration, collection, and remittance requirements in states in which companies are making online sales where they don't necessarily have any other taxing connection.

Other States

Additional states currently exploring legislation or already having introduced similar legislation include Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, North Carolina and Rhode Island. The California State Board of Equalization conducted an informational hearing intended solely to address the Amazon Tax for purposes of California sales and use tax. Knowing Amazon has a distribution center in Irving, the Texas State Comptroller's Office also recently took a hard look at the activities of the large online retailer's activities in their state. However, because the Amazon distribution center is actually operated by a separate legal Amazon entity, Amazon.com itself was not considered to have a physical presence in the state.

In the states' defense, there's no doubt sales tax revenues are not what they should be as a result of the ever increasing virtual shopping taking place on such internet websites as Amazon.com, Overstock.com, eBay, and several others. Merely relying on purchasers, whether individual or corporate, to remit appropriate use tax to the appropriate state where sales tax has not been charged is not sufficient enough to ensure the state is rightfully collecting all taxes due. Such introduced legislation in the aforementioned



states is an effort to force more online retailers to collect their state sales tax up front on such transactions.

Within each piece of legislation, thresholds have been set as to when the nexus presumption actually creates a filing requirement, meaning the presumption only applies when the retailer's cumulative gross receipts from sales to customers referred to the retailer by in-state entities exceeds a set dollar amount. New York law sets the threshold at \$10,000; Hawaii, Minnesota, and North Carolina have followed suit. However, the threshold in Connecticut is set at \$5,000. In each case, the presumption could be rebutted by proof that the in-state entity did not engage in any solicitation in the state on the retailer's behalf that would satisfy nexus requirements.

Congressional Involvement

Congress is expected to introduce a bill in the very near future that will ultimately end tax-free online shopping. Details of the bill will not be known until the bill is made public, however it has support in both the House and Senate, and is meant as a measure toward uniformity sought under the Streamlined Sales Tax Project. Until now, Congress has opted to remain silent on the particular issue of state tax nexus, deferring to the Commerce and Due Process Clauses of the US Constitution. Nexus standards have been left to be decided in state courts. Even recent attempts at appeal have gone unheard at the US Supreme Court level.

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Action Items

GBQ SALT professionals will continue to monitor the activity in the several states considering implementation of legislation similar to that in New York, as well as the introduction of Main Street Fairness Act. In the meantime, please contact a member of GBQ's SALT team regarding the impact of such developments on your business.

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