

# THE ISSUE OF ONLINE SALES TAXES AND FEDERAL LEGISLATION

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# WHY CAN'T STATES COLLECT SALES TAXES FROM OUT OF STATE SELLERS?

The Supreme Court ruled in the 1967 *Bellas Hess* case and the 1992 *Quill v. North Dakota* case that consumers owe sales tax when they purchase goods through catalogues or over the Internet, but ruled that states cannot force out of state retailers to collect the tax as it puts an undue burden on interstate commerce.

# WHY IS THIS A PROBLEM?

- Online remote sellers simply are not required to collect the tax in the same way that local businesses do – which puts local businesses at a disadvantage.
- In some states, this can mean a 5 to 10% price advantage for out of state retailers.
- A study by the University of Tennessee found that States will be unable to collect as much as \$23 billion in owed taxes for FY 12. A number that will only increase with the expansion of electronic commerce.

# UNCOLLECTED USE TAX FROM ALL REMOTE SALES IN 2012 FOR SELECTED STATES

	Out of State Electronic Sales	All out of State Sales
Arizona	369,800,000	708,628,254
Arkansas	113,900,000	236,311,930
California	1,904,500,000	4,159,667,947
Florida	803,800,000	1,483,690,010
Illinois	506,800,000	1,058,849,588
<b>Iowa</b>	<b>88,700,000</b>	<b>181,012,560</b>
Louisiana	395,900,000	808,311,357
Massachusetts	131,300,000	268,002,460
Minnesota	235,300,000	455,219,250
Mississippi	134,900,000	303,286,360
Missouri	210,700,000	430,191,928
Nevada	168,900,000	344,923,618
New York	865,500,000	1,766,968,251
North Carolina	213,800,000	436,517,492
Ohio	307,900,000	628,613,189
Tennessee	410,800,000	748,480,889
Texas	870,400,000	1,777,090,593
Vermont	<b>25,100,000</b>	<b>44,759,329</b>
Virginia	207,000,000	422,651,971
Washington	281,900,000	540,968,704
<b>Total (For All Sales Tax States)</b>	<b>11,392,700,000</b>	<b>23,260,009,564</b>

# WHAT ARE THE OPTIONS FOR STATES?

Become a Member of the Streamlined Sales Tax and Use Agreement

Pass an Affiliate Nexus or "Amazon Law"

Enact notice laws that require the remote vendor to provide information about the use tax to buyers

Urge Congress to pass legislation that would give states remote collection authority

# THE STREAMLINED SALES TAX AND USE AGREEMENT (SSTUA)

- The Streamlined Sales and Use Tax was created by the National Governor's Association (NGA) and the National Conference of State Legislatures (NCSL) in the fall of 1999 to simplify sales tax collection.
- The Agreement minimizes costs and administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states. It encourages volunteer "remote sellers" selling over the Internet and by mail order to collect tax on sales to customers living in the Streamlined states.
- To date, 24 of the 45 states that have statewide sales taxes have passed the conforming legislation.

# STREAMLINED SALES TAX MEMBER STATES COLLECTION TOTALS

	2011 Totals	October 2005 to present
Arkansas	\$ 9,545,195	\$ 39,811,513
Georgia	\$ 2,023,450	\$ 2,023,450
Indiana	\$ 11,979,601	\$ 49,164,067
Iowa	\$ 9,483,000	\$ 51,763,638
Kansas	\$ 14,244,034	\$ 55,842,015
Kentucky	\$ 9,542,628	\$ 37,919,582
Michigan	\$ 17,400,998	\$ 82,798,183
Minnesota	\$ 13,180,220	\$ 47,537,290
Nebraska	\$ 14,515,925	\$ 70,878,879
Nevada	\$ 9,927,409	\$ 50,129,216
New Jersey	\$ 16,509,112	\$ 74,838,264
North Carolina	\$ 22,409,757	\$ 100,179,513
North Dakota	\$ 2,382,838	\$ 10,556,316
Ohio	\$ 21,834,339	\$ 81,907,739
Oklahoma	\$ 20,590,757	\$ 69,696,661
Rhode Island	\$ 1,734,340	\$ 6,463,426
South Dakota	\$ 2,154,443	\$ 10,063,899
Tennessee	\$ 17,456,916	\$ 83,505,772
Utah	\$ 4,551,292	\$ 15,888,361
Vermont	\$ 1,299,154	\$ 5,424,441
Washington	\$ 9,895,784	\$ 30,558,457
West Virginia	\$ 3,357,016	\$ 11,360,975
Wisconsin	\$ 1,884,526	\$ 4,532,107
Wyoming	\$ 1,852,205	\$ 8,947,077
	<b>\$ 239,754,940</b>	<b>\$ 1,001,790,843</b>

**As of April 2012, member states of the Streamlined Sales Tax and Use Agreement have collected over \$1 Billion in sales taxes from remote transactions from volunteer retailers since collection began in 2005.**

*Note: Rhode Island and Washington joined in 2007, Wisconsin joined in 2009 and Georgia joined in 2011.*

# AFFILIATE NEXUS OR "AMAZON" LAWS

- Amazon taxes (also known as affiliate nexus taxes or affiliate taxes) require retailers that have contracts with "affiliates" -- independent persons within the state who post a link to an out-of-state business on their website and get a share of revenues from the out-of-state business -- to collect the state's sales and use tax.
- The approach presumes that certain individuals and organizations in the state that have a specified relationship with the out-of-state vendor are affiliates of the vendor that constitutes the requisite physical presence in the state to allow the state to require the vendor to collect sales tax.
- To date, 9 states have passed a version of this law: New York, North Carolina, Rhode Island, Illinois, Arkansas, Connecticut, Vermont, California, Georgia



## EFFECTIVENESS OF "AMAZON" LAWS

- States enacting affiliate nexus provisions projected significant revenue gains. California estimated that full compliance with the new law would generate an additional \$317 million of sales tax for FY 2012-2013 (this represents revenue to be collected from vendors that customers would otherwise have been paying as use tax).
- However, it is unlikely that any of the states, other than New York, realized or will realize an appreciable increase in tax collections. This is because in the nine states, two large Internet vendors— Amazon and Overstock, canceled their in-state affiliate arrangements (Amazon did not cancel in New York though). Other vendors may have done the same. The Performance Marketing Association estimates that about 200 remote vendors cancelled their contracts with New York residents.

## EFFECTIVENESS OF "AMAZON" LAWS

- Cancellation of such contracts not only means that the affiliate nexus law won't apply, but also that state income revenues will drop due to the reduced income of the affiliates. The PMA estimates that prior to enactment of affiliate nexus legislation in Illinois, the approximate 9,000 affiliates there paid about \$22 million in state income tax.
- The new laws have also resulted in litigation. Both Amazon and Overstock filed lawsuits in New York challenging the constitutionality of the provision. Others have also filed suits.
- Finally, the affiliate nexus laws only potentially reach remote vendors with affiliate arrangements. Thus, states continue to face use tax collection challenges for sales by other remote vendors.

## NOTICE LEGISLATION

- A few states, including Colorado, South Dakota, Oklahoma and Vermont, enacted notice laws that require the remote vendor to provide information about the use tax to buyers.
- While this legislation does not require the vendor to collect the tax, it reminds consumers that they are responsible for remitting it.
- Vermont's reporting requirement for online retailers:  
*For any Internet purchase made pursuant to this section, the invoice notice shall occur on the electronic order confirmation. The notice shall be sufficient if the noncollecting retailer provides a prominent linking notice that reads as follows: "See important Vermont sales and use tax information regarding the tax you may owe directly to the state of Vermont."*

## FEDERAL LEGISLATION

In *Quill Corps. v. North Dakota*, the Supreme Court ruled that a business must have a physical presence in a state for that state to require it to collect sales taxes. However, the court explicitly stated that Congress can overrule the decision through legislation

*Congress has the power to protect interstate commerce from intolerable or even undesirable burdens.” In this situation, it may be that “the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.” - Justice Scalia in Quill Decision*

# FEDERAL LEGISLATION

- The bottom line is that states will never be able to collect the full amount of taxes that are currently owed to them without federal action.
- The **Main Street Fairness Act** was introduced by Senators Mike Enzi (R-WY) and Dick Durbin (D-IL) in the Senate and Representative John Conyers (D-MI) in the House.
- In the House, **The Marketplace Equity Act** (HR 3179), was introduced by Representatives Steve Womack (R-AR), Jackie Speier (D-CA) and Representative Peter Welch (D-VT) .
- In the Senate, **The Marketplace Fairness Act** (S 1832) was introduced by Senators Mike Enzi (R-WY), Dick Durbin (D-IL), Lamar Alexander (R-TN), Roy Blunt (R-MO), John Boozman (R-AR), Bob Corker (R-TN), Mark Pryor (D-AR), and John Rockefeller (D-WV).
- The introduced federal legislation addresses the concerns of the two Supreme Court decisions and gives states the authority to collect the over \$23 billion that will be owed to them for FY 12.

## WOULD PASSAGE OF FEDERAL LEGISLATION BE CREATING A NEW TAX?

No. Consumers are required under state laws to pay sales and use taxes on the goods they purchase, but online remote sellers simply are not required to collect the tax in the same way that local businesses do – which puts local businesses at a disadvantage. Consumers can be audited and charged with penalties for failing to pay sales and use taxes, but too often States are unable to enforce this requirement.

# MAIN STREET FAIRNESS ACT

- Grants the consent of Congress to the Streamlined Sales and Use Tax Agreement.
- Authorizes each state that is a party to the Agreement to require all remote sellers not qualifying for the small seller exception to collect and remit sales and use taxes on remote sales owed to each such member state under the terms of the Agreement.

# MARKETPLACE EQUITY ACT

- **Authorizes states to require all sellers making remote sales to collect and remit sales and use taxes if such states implement certain requirements. Including:**
  - (1) an exception for remote sellers with gross annual receipts in the preceding calendar year from remote sales not exceeding \$1 million in the United States or not exceeding \$100,000 in the state,
  - (2) a single sales and use tax return for use by remote sellers and a single revenue authority within the state, and
  - (3) a uniform tax base throughout the state.
- **Requires remote sellers to collect sales and use tax under one of three rate structures—**
  - (1) a single State-wide blended rate that includes both the State rate and applicable rates of local jurisdictions, as determined by the State;
  - (2) the maximum State rate, which is the highest rate at which sellers are required by the State to collect tax, exclusive of tax imposed by or for the specific benefit of local jurisdictions; or
  - (3) the applicable destination rate, which is the sum of the State rate and any applicable rate for the local jurisdiction into which the sale was made. If a State requires that remote sellers collect at the applicable destination rate, the State must make available adequate software to remote sellers that substantially eases the burden of collecting at multiple rates within the State.



# MARKETPLACE FAIRNESS ACT

- Authorizes each member state under the Streamlined Sales and Use Tax Agreement to require all sellers not qualifying for a small-seller exception (sellers with annual gross receipts in total U.S. remote sales of less than \$500,000) to collect and remit sales and use taxes with respect to remote sales under provisions of the Agreement.
- Allows a state that is not a member state under the Agreement to require sellers to collect and remit sales and use taxes with respect to remote sales sourced to such state if the state adopts and implements certain minimum simplification requirements, including:
  - (1) providing a single state agency to administer all sales and use taxes,
  - (2) establishing a uniform sales and use tax base,
  - (3) relieving remote sellers from liability to the state or a locality for collection of the incorrect amount of sales or use tax based on information provided by the state,
  - (4) requiring remote sellers and single and consolidated providers to collect sales and use taxes pursuant to the applicable destination rate, which is the sum of the applicable State rate and any applicable rate for the local jurisdiction into which the sale is made, and
  - (5) providing adequate software and services to remote sellers and single and consolidated providers.

# THE LAME DUCK SESSION

- At this point in time, most FY 2012 (fiscal year that ended September 30, 2012) funds are already obligated.
- Looking ahead to FY 2013 funding, Congress recently passed a six-month continuing resolution (CR) that will fund the federal government through March 2013.
- Budget Sequestration is set to take effect on January 2, 2013.
- Expiration of the Bush-era tax rates

# ONLINE SALES TAX LEGISLATION IN THE LAME DUCK

- House and Senate sponsors are currently drafting a final version of the legislation that will be introduced as part of a package before the end of the year of the beginning of the next Congress.
- Sponsors in both chambers have made passage of the bill a top priority and plan to have the final version as part of an omnibus bill that would include the expiring tax cuts.

# THE NATIONAL CONFERENCE OF STATE LEGISLATURES

- NCSL has made passage of Federal Legislation a top priority and has passed resolutions that support the Main Street Fairness Act, the Marketplace Equity Act and the Marketplace Fairness Act.
- We are asking state legislators to contact their members of the United States Senate and House to urge them to support the final bill.
- NCSL held a Lobby Day on December 5, during NCSL's Fall Forum in Washington, on this issue.

# NCSL MARKETPLACE FAIRNESS ACT LOBBY DAY

- Hundreds of State Legislators from across the country met with 68 Senators, including leadership, Representatives and Leadership in the House and the White House to push for enactment of the Marketplace Fairness Act. NCSL has placed the tax bill's passage as part of our deficit reduction program.
- Senator Enzi (Wyoming) and Congressman Womack (Arkansas) told state lawmakers that the internet sales tax would help during the current fiscal cliff talks since it would provide a new dedicated revenue source for state and local governments. Womack, a former mayor, noted that while revenues are decreasing from other sources, local governments need to fund such services as police, fire, parks and roads.
- "It is not a new tax, it is a due tax." Representative Womack

## GOVERNOR BRANSTAD AND SENATOR HARKIN

*In Governor Branstad's letter to Sens. Chuck Grassley (R) and Tom Harkin (D), he noted: "I understand that the coalition supporting this legislation is now very broad, which gives me hope that, under your leadership, this legislation can be passed yet this year.... The Internet is now a robust, mature, and dynamic marketplace that does not warrant special protections. The application of sales taxes only to 'brick-and-mortar' retailers, many of which are small businesses, puts those very entities at a competitive disadvantage."*

*Sen. Harkin: "It is simply unfair for some retailers to be responsible for proper local taxes and for others to avoid that responsibility, which would deny state and local governments their properly owed funds," he noted to The Hill in a statement. "I have long supported requiring remote sellers to collect sales taxes, and I am hopeful the bill will pass Congress this year."*

# QUESTIONS?

If you have any questions or need more information, please contact Max Behlke in NCSL's Washington D.C. Office: 202-624-5400

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