

## State Tax Observations

# Sales Tax Filing Obligation without Physical Presence: New Reality for Retailers

By Sandy Weinberg, Principal and Jill Cantor, Manager

Can states ignore a U. S. Supreme Court decision in order to raise additional tax revenue? They can certainly try. In fact, a handful of states are now doing just that in disregarding *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and asserting a sales tax collection and remittance responsibility for out-of-state sellers. The list of states is expected to grow.

Under *Quill*, in order for a state to require an out-of-state seller to collect sales tax from an in-state customer, the seller must have physical presence in the state. Currently, six states have adopted sales tax economic nexus standards, ignoring the physical presence standard. However, in one of the states — South Dakota — the sales tax economic nexus law was recently struck down in court (See: *South Dakota v. Wayfair, Inc.*, et al, S.D. Cir. Ct., No 32 Civ. 16-000092, 3/6/17), pending an appeal to the state's highest court.

For the states where the laws are live, the effective dates and new bright line sales tax economic nexus standards for a forced sales tax filing/collection responsibility for remote retailers is as follows:

State	Effective Date	Threshold Upon Which a Filing/Collection Obligation Is Imposed on a Remote Retailer
Alabama	January 1, 2016	Alabama sales exceed \$250,000 in the year
Massachusetts	April 3, 2017	Previous year's sales exceed \$500,000 in Massachusetts or there were 100 or more Massachusetts-destined sales transactions
South Dakota	April 30, 2016	<i>Currently struck down, pending appeal. If upheld, the threshold is for retailers with South Dakota sales exceeding \$100,000 annually or engaging in 200 separate transactions with South Dakota customers</i>
Tennessee	January 1, 2017	Tennessee sales exceed \$500,000 in the previous 12-month period
Vermont	July 1, 2017	Vermont sales in the past 12 months exceed \$100,000 or 200 or more individual Vermont-destined sales transactions
Wyoming	July 1, 2017	Wyoming sales exceed \$100,000 for the year or there were 200 or more separate transactions with Wyoming customers

An additional dozen states are considering sales tax economic nexus legislation or other tax authority for remote retailers.

### **Why are the states becoming so aggressive?**

It's no secret that internet commerce, with sales by remote retailers (i.e., retailers without physical presence) continues to grow in the U.S. According to the National Conference of State Legislatures, states lost over \$23 billion in revenue in 2012 from uncollected tax on internet sales. This amount has certainly continued to increase. Many states need to collect additional revenue to cover their growing budget deficits.

For years, states expanded sales tax filing requirements through legislation imposing "affiliate" nexus (i.e., asserting affiliated companies caused nexus for the taxpayer at issue) and "click-through" nexus (i.e., asserting that an unaffiliated person or entity that was paid a commission by the out-of-state taxpayer for online click-through sales caused nexus for the taxpayer).

More recently, a handful of states are requiring out-of-state sellers to inform their buyers about the obligation to pay tax on their purchases as well as provide state revenue departments with their customer information. In Colorado, this law has been hotly contested, and its ultimate survival is still in question.

Further, the U.S. Congress has attempted to resolve the remote sales tax debate. But proposals, including the Marketplace Fairness Act, have fizzled.

Taken as a whole, the revenue generated by the sales tax tactics discussed above has not sufficed. This shortfall has led to the sales tax economic nexus legislation trend. According to Kevin Sullivan, Connecticut's Commissioner of Revenue Services, "states have waited... in the hope that Congress would help, but that is clearly not going to happen, so it's up to the states to assure the promise of the federal Commerce Clause that neither in-state nor out-of-state retailers will have an unfair advantage in the marketplace and in taxes paid to help maintain that marketplace."

### **How will it all play out?**

Will the state high courts uphold the new sales tax economic nexus laws? Will the U.S. Supreme Court grant a *writ certiorari* to a case with the issue? If it does, will the Court "kill *Quill*" or uphold the physical presence standard? These are vexing questions without certain answers. Nevertheless, in states where they have sales, remote retailers need to be aware of the myriad of different (and perhaps impermissible) sales tax nexus rules.

### **Contact Us**

If you have questions regarding the current status of sales tax nexus or other state and local situations, contact Sandy Weinberg at [sweinberg@pkfod.com](mailto:sweinberg@pkfod.com) or Jill Cantor at [jcantor@pkfod.com](mailto:jcantor@pkfod.com).

### **About PKF O'Connor Davies**

PKF O'Connor Davies, LLP is a full-service certified public accounting and advisory firm with a long history of serving clients both domestically and internationally. With roots tracing to 1891, nine offices in New York, New Jersey, Connecticut and Maryland, and more than 700 professionals, the Firm provides a complete range of accounting, auditing, tax and management advisory services. PKF O'Connor Davies is ranked 28th on Accounting Today's 2017 "Top 100 Firms" list and is recognized as one of the "Top 10 Fastest-Growing Firms." PKF O'Connor Davies is also recognized as a "Leader in Audit and Accounting" and is ranked among the "Top Firms in the Mid-Atlantic," by Accounting Today. In 2017, PKF O'Connor Davies was named one of the 50 best accounting employers to work for in North America, by Vault.

PKF O'Connor Davies is the lead North American representative in PKF International, a global network of legally independent accounting and advisory firms located in 440 locations, in 150 countries around the world.

Our Firm provides the information in this e-newsletter for general guidance only, and it does not constitute the provision of legal advice, tax advice, accounting services, or professional consulting of any kind