State Tax Observations

How to Survive in a *Wayfair* Sales Tax Nexus World

By Sandy Weinberg, JD, Principal and Austin Legenos, JD, Manager

A year ago this month, states began enacting remote seller sales tax nexus legislation. The legislation mirrored – or at least rhymed with – the test case legislation upheld in the United States Supreme Court's *South Dakota v. Wayfair* decision. That case had been handed down four months earlier. *Wayfair* and the legislation it spawned have revolutionized the state sales tax landscape for out-of-state retailers. Distributors and manufacturers also have been impacted.

The case overturned decades-old precedent that required physical presence before a state could impose a sales tax collection obligation on a seller. In some cases, *Wayfair* legislation has driven sellers out of business despite sales tax not technically being the seller's tax. The seller is only responsible for collecting and remitting sales tax owed by the buyer.

For sellers, keeping apprised of the current sales tax landscape and growing trends (including income tax trends) is critical. This article summarizes those trends while suggesting opportunities to minimize exposure and the administrative burden.

Which Are the Wayfair States?

If last October you bet against 40 separate state legislatures passing similar tax laws to each other within a year – you lost. In fact, as of this writing, over 40 of the 46 jurisdictions (including the District of Columbia) that impose sales tax now have *Wayfair*-like economic nexus rules.

The stragglers should soon follow. After all, state legislatures don't easily ignore free tax revenue from non-constituents (i.e., remote sellers). Online, catalogue and any other remote seller, including those in other countries, should understand that the economic nexus laws are pervasive among the states – and they apply to you.

Are There Taxpayer Friendly States?

The sales tax economic nexus laws are not equal throughout the states. Certain newly enacted or recently changed state laws are significantly more taxpayer friendly than the South Dakota law upheld in *Wayfair*. South Dakota requires remote sellers to register in the state, collect sales tax and file returns if total sales in the state exceed $100,000 or there are 200 or more separate transactions.

Taxpayer friendlier states:

- Increased the sales threshold before subjecting a remote seller to any sales tax obligation. Tennessee's threshold, for example, is now $500,000;

- Made the sales and transaction requirement conjunctive. Connecticut, for example, requires $100,000 in sales **and** over 200 transactions before subjecting a seller to nexus;

- Eliminated the transaction threshold altogether. In the state of Washington, for example, a seller with 900 separate sales transactions of $100 each into Washington, but no presence there, has no sales tax obligation;

- Eliminated wholesale and/or nontaxable sales and/or services from their threshold calculation. For example, only taxable sales in Colorado count when determining if the nexus threshold is met.

How Do Marketplace Facilitator Laws Help Sellers with Their Sales Tax Obligations?

Amazon, Etsy, eBay, and Walmart are examples of marketplace facilitators. A marketplace facilitator primarily serves to facilitate sales (all types of sales, including tangible personal property, digital goods, and services) through its online marketplace. A growing majority of states have adopted legislation requiring marketplace facilitators to collect and remit sales tax on behalf of their third party sellers. This shifts the sales tax burden from the remote seller to the seller's marketplace facilitator. All 46 sales tax jurisdictions will likely have marketplace facilitator laws in place in the not too distant future.

But seller beware – not all marketplace facilitator states remove the registration and/or filing requirement for the seller itself. Also, multichannel sellers using both their own website and a marketplace facilitator for sales don't relinquish their sales tax obligation.

Do Remote Sellers Need to Worry about Income Tax Consequences?

Sales tax collection was at the heart of *Wayfair,* but states are beginning to parlay the decision by expanding their income tax nexus rules. For example, Hawaii recently enacted an income tax economic nexus rule, effective beginning in 2020, that provides that a business or person must pay income tax in Hawaii if there are $100,000 in sales (or gross income) or 200 transactions in the state.

More than a dozen states now have income tax economic nexus rules. More are expected to follow. There is, however, one crucial bright spot. Public Law 86-272 protects remote sellers of tangible personal property only from creating nexus, even if the income tax economic nexus thresholds are surpassed.

What Next Steps Should Sellers Take?

In order to avoid potential and significant future state tax exposure (which could include penalties and interest, and put the sales tax burden on the seller instead of the buyer), remote sellers should, as soon as possible:

- **Know where you owe (or at least need to collect).** Conduct a nexus study analyzing sales data and state physical presence and economic nexus threshold rules for both income and sales tax.

- **Learn whether your particular sales are subject to sales tax.** For example, software sales are subject to sales tax in certain states, not taxable in some, and only taxable if prewritten in others.

- **Where appropriate, identify whether marketplace facilitator rules can reduce the compliance burden.**

- **Create a plan to register, collect, and remit sales tax** in states where the company has nexus, and sales tax must be remitted. The plan should consider automated sales tax compliance.

- **For manufacturers and distributors, understand whether you are properly collecting resale certificates.** Know if they are collected in all relevant states (generally based on where the products are delivered), from all relevant customers, and whether they are current.

- **Where appropriate, minimize back year exposure through voluntary disclosure agreements.**

Contact Us

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