Corp. v. North Dakota, 504 U.S. 298 (1992), the seminal ruling that prohibits states from taxing remote businesses without an in-state presence.

Dec. 20, 2017

2017 has been a big year for sales and use tax, and 2018 promises to be even bigger. States will likely continue to creatively redefine physical presence nexus, impose use tax reporting requirements, and tax third-party (marketplace) sales. They'll almost certainly have to adjust their sales tax laws if Congress succeeds in enacting federal tax reform.

[This article first appeared on the Avalara blog.]

And 2018 could be the year the Supreme Court of the United States reconsiders Quill

Although Amazon now collects tax in all states with a sales tax, it only does so on its own sales; sales by its marketplace sellers go untaxed unless the seller specifically asks (and pays) Amazon to collect it. That will change in 2018 — at least in one state.

Starting Jan. 1, Amazon will collect tax on all of its Washington state sales, marketplace transactions included. The ecommerce giant is complying with Washington state's new marketplace fairness law, which requires it to either collect the tax or comply with new use tax reporting requirements for non-collecting retailers. Why Amazon has chosen to comply with this law is unclear, though Washington is its home state.

Minnesota, Pennsylvania, and Rhode Island have enacted similar laws. Although Minnesota won't require collection on these sales until the middle of 2019, Pennsylvania expects marketplace facilitators to register and collect by March 1, 2018, and the Rhode Island law took effect last August. It's unclear how many businesses are complying with it, or how the state plans to enforce it in the coming months.

These states aren't going after marketplace facilitators only. All hold the marketplace seller liable if the facilitator doesn't collect and remit tax on its behalf. They also impose collection or use tax reporting requirements on certain referrers.

Since Amazon is complying with Washington's law, there's a good chance we'll see more of these laws in 2018. Keep an eye on New York, North Carolina, and Texas, three states that considered taxing marketplace facilitators 2017.

Identify your third-party sellers

Massachusetts and Connecticut are taking a different tactic. They've asked Amazon to identify all marketplace sellers with inventory in their states.

Last spring, Connecticut Revenue Services Commissioner Kevin B. Sullivan told

Here's looking at you, seller

Virginia hasn't asked Amazon to identify its third-party sellers. However, it does hold marketplace sellers liable for sales tax if they keep inventory in Virginia. States will be watching to see if Virginia actually brings in the more than $20 million it expects to get from this in the 2018 fiscal year. Could it be that easy to get remote sales tax revenue?

And as of Dec. 1, 2017, Mississippi is holding certain remote vendors who "purposefully or systematically" exploit the Mississippi market liable for tax on their sales. If it succeeds in getting remote vendors to comply, other states may enact similar legislation in 2018.

Just give us the money

South Carolina has taken still another stance. Earlier this year, it handed Amazon a bill for millions in uncollected tax on its marketplace sales, and that's just for the first quarter of 2016. The state wants Amazon to collect tax and place it in trust until this issue can be resolved, which could happen when the case goes to trial in November 2018.

If South Carolina wins, expect other states to follow its lead.

Hungry for sales tax

If not, Connecticut, Massachusetts, Ohio, and Rhode Island have a plan. They all maintain that out-of-state internet companies establish a physical presence in the state when they place software or web cookies on in-state devices, like computers, phones, and tablets. While this might not impact catalog sellers that don't advertise online, it will surely affect online sellers.

It will be interesting to see how these laws play out in the coming year. Rhode

to the state. Non-collecting vendors also have to send all customers an annual report detailing the total amount of their purchases that year, at minimum, and send states annual reports of the total amount of customer purchases.

This is a way to pressure non-collecting vendors to collect without enacting litigious remote sales tax laws — the lengthy legal battle over use tax reporting has already come and gone. If the first states to enact these (Colorado, Vermont) see an uptick in sales tax collections, other states are likely to consider similar requirements in 2018.

The ongoing battle to kill Quill

Let the Supreme Court decide

The slow-burning battle to kill Quill is likely to heat up in 2018. South Dakota has petitioned the Supreme Court of the United States to hear a case involving its remote seller compliance law, which was created specifically to challenge the physical presence precedent upheld by Quill. If the court takes the case, all states will be watching. If it abrogates Quill, states will have a clearer path to tax sales by remote vendors. If the court doesn't take the case, states will aggressively enact the preceding concepts.

Let Congress decide

Many states are hoping the court will intervene because Congress hasn't, despite repeated calls for it to do so. Yet Congressman Bob Goodlatte, Chairman of the House Judiciary Committee, recently asked the court to not "give up on Congress." He says his committee "has been working diligently and assiduously" to solve the problem of untaxed remote sales and urges the court to let Congress finish what it's started.

Does this mean we can expect to see more congressional action on this in 2018? Time will tell.

Federal tax reform fallout

Taxing sin, exempting essentials

State and local governments are still grappling with how to tax specific products: those that aren’t all that good for us (i.e., candy and soda), and those some of us absolutely need (i.e., diapers, tampons).

Arkansas is raising the sales tax rate on both candy and soda as of Jan. 1, the same day new taxes on sweetened beverages take effect in San Francisco and Seattle. And a group in Oregon is looking to put a sugar-sweetened tax to voters some time in 2018. On the other hand, the Cook County soda tax was recently repealed, and a Michigan lawmaker is looking to prohibit local governments from imposing any sort of tax or fee on the manufacture, distribution, or retail sale of food.

Like Wisconsin, the Florida legislature will consider a sales tax exemption for diapers and incontinent products in 2018. They’ll likely be joined by several other states, including California and Texas.

Already on the calendar are an exemption for feminine hygiene products in Florida (effective Jan. 1), and an exemption for both diapers and feminine hygiene products in Connecticut (as of July 1, 2018).

Taxing ... wheels?

Starting Jan. 1, sales-tax-free Oregon will tax sales of bikes and vehicles. Be warned, if it has wheels, it could be taxed.

Oregon isn’t the only state getting creative with vehicle taxes. Fuel-efficient cars are better for the environment, but they take a bite out of the gas tax revenue cities states rely on to fund roads. California, Utah, and Seattle are all starting or considering pilot projects to tax miles driven rather than fuel. Expect to see more of this in 2018.

Rate changes

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Gail Cole began researching and writing about sales tax for Avalara in 2012 and has been fascinated with it ever since. She has a penchant for uncovering unusual tax facts, and endeavors to make complex sales tax laws more digestible for both experts and laypeople.

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