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offered by online ecommerce platforms means even small clients can suddenly be mired in complexities of multistate tax rules from their very first sale.

Michael T. Dillon • Mar. 12, 2018

Accountants are being pulled in to the trend of the online marketplace. The ease offered by online ecommerce platforms means even small clients can suddenly be mired in complexities of multistate tax rules from their very first sale. The following article is the final in a three part series discussing policy changes brought on by the growth of ecommerce sales.

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In light of declining sales tax revenues, as more commerce involves remote sellers

adopted economic nexus standards, through which nexus is attributed to a remote seller whose sales exceed a certain threshold, despite the lack of physical presence, direct or attributed.

These theories below demonstrate the lengths to which states will go to assert jurisdiction over out-of-state businesses for sales tax purposes.

Click-Through and Affiliate Nexus Laws

Since New York initiated the trend in 2008, states have begun changing their laws, regulations and even tax policies to address Internet linking agreements and affiliated entities, and their impact on a retailer's nexus in a state. These laws and rules are commonly known as Amazon-type Click-Through Nexus laws, named for the company targeted by such measures.

The objective of these standards is to create a presumption of nexus for remote sellers that have Internet linking agreements with in-state sellers, whereby the in-state sellers receives a commission for "click-through" sales on their linked websites, on the premise that they are an agent of the remote seller.

Similar laws attributing nexus to an out-of-state company based on the in-state activities of an affiliated entity, commonly referred to as Affiliate Nexus Laws, have taken effect in several dozen other states. [*Click-Through Nexus states include:* AR, CA, CO, CT, GA, IL, KS, LA, ME, MI, MN, MO, NV, NJ, NY, NC, OH, PA, RI, TN, VT, WA; *Affiliate Nexus states include:* AR, CA, CO, DC, FL, GA, ID, IL, IA, KS, MD, ME, MO, NE, NY, ND, OK, PA, SC, SD, TX, UT, VA, WV, WA]

Remote Seller Standard

Several states have effected a Remote Seller Standard: District of Columbia, Louisiana, Maryland, New Mexico, North Dakota, Pennsylvania, South Carolina,

Tennessee and Washington State. This standard would take effect upon enactment

customers to notify customers on their website and on each invoice of the customer's use tax reporting obligation, and to provide annual information to each customer and to the Colorado Department of Revenue regarding all sales customers in the state. Failure to do so results in penalties that typically are larger than the remote sellers sales in that state.

In considering a challenge to the constitutionality of the Colorado law by Direct Marketing Association, the federal Appeals Court for the 10th Circuit stated that the state law "does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce". As such, this standard has been upheld on challenge, at least for states in the 10th Circuit. [*Direct Marketing Association v. Brohl*, 12 F.3d 1175 (10th Cir. February 22, 2016)]

Similarly, other states, including Pennsylvania and Washington, have enacted notification laws to combat use tax avoidance by their residents. The reality of these reporting and notification requirements, when combined with economic nexus standards (explained below), is to create an untenable position for remote sellers, under which they must concede nexus and register to collect sales tax, comply with the more onerous notification standards, or face financially crippling penalties for non-compliance. These laws in Pennsylvania and Washington have resulted in negotiated agreements between Amazon and the respective taxing authorities, under which Amazon will collect and remit sales tax on behalf of remote sellers selling on the Amazon platform. Of course, this also means that Amazon will be handing over the names of every seller on whose behalf they are collecting sales tax, enabling the respective taxing authorities to then contact and audit each seller for prior period sales.

Prior to the 10th Circuit's decision in *Direct Marketing Association v. Brohl,* the U.S. Supreme Court granted a petition to review whether, simply put, a federal court had jurisdiction to hear the case. [*Direct Marketing Association v. Brohl,* 575 U.S. ___

(2015)] The Supreme Court unanimously determined that the Tax Injunction Act did

find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess* in light of the Internet and changes in technology. These words marked the first overture by the Supreme Court indicating that it may entertain a sales tax nexus case.

Economic Nexus

Despite the Supreme Court's long-standing and binding requirement that there must be a substantial nexus, meaning physical presence, between a taxpayer and a state before the state can require sales tax compliance, several states have recently enacted economic nexus, or sales factor presence, standards for sales tax purposes. For example, South Dakota's economic nexus law requires sales tax collection and remittance for any entity exceeding, in the previous or current calendar year: (1) an annual sales threshold of $100,000; or (2) 200 separate sales transactions into South Dakota. (S.B. 106, Laws 2016). Similarly, AL, CO, CT, IN, MA, OK, VT, WA and WY have adopted similar economic presence rules. These laws are commonly referred to as "Kill *Quill*" laws, given that their intent is to respond to Justice Kennedy's perceived invitation to provide "an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*".

On September 13, 2017, upon challenge by Wayfair, Overstock and NewEgg, the South Dakota Supreme Court ruled the state's "economic presence" nexus law (SDCL 10-64-1 et seq.) to be unconstitutional as it is contrary to the physical presence requirement for state sales and use taxes reaffirmed by the Supreme Court in *Quill Corp v. North Dakota*, 504 U.S. 298 (1992). [*South Dakota v. Wayfair et. al.*, Inc., 901 N.W.2d 754 (S.D., September 13, 2017)] The Court concluded that "[h]owever persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled." [*Id.*] In turn, the state of South Dakota petitioned the U.S. Supreme Court for writ of certiorari, presenting the single question of whether the US Supreme Court should "abrogate *Quill's* sales-tax-only, physical-presence requirement." [Petition for Writ

of Certiorari, South Dakota v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), *cert.*

As such, now the questions are: (1) Will Quill survive? and (2) If the Court overturns Quill, will it apply retroactively? This latter question was one of the reasons the *Quill* Court upheld the "physical presence" standard set forth in *National Bellas Hess,* hoping that Congress would take action with a prospective focused legislation.

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Michael Dillon is an attorney, and the founder and President of Dillon Tax Consulting. With more than twenty years of state and local tax experience, Mike has both public accounting expertise leading the State and Local tax department for two of the country's largest accounting and consulting firms, as well as serving as Tax Director for a publicly traded e-commerce retailer and as a tax attorney in one of the world's largest communications companies. With his focus primarily on the state and local tax needs of businesses, Mike provides solutions and planning recommendations to clients' questions regarding sales tax, , business license tax, various other state and local tax matters, and other business compliance requirements.

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