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SALTrends – Economic Nexus After Five Years: Exploring the Aftermath of Wayfair

March 9, 2023

Note

1. This presentation is intended to make participants aware of tax issues that may apply to this audience.
2. Information presented herein is not intended to be tax advice.
3. Please consult with a qualified practitioner for tax advice related to specific transactions.



Speakers



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Agenda

- The Reach of Wayfair
- The Good, Bad and Ugly of Economic Nexus Administration
- Trends in State Administration of Sales Tax





The Reach of *Wayfair*

The Reach of *Wayfair*

- Legislative Update
 - All states imposing a sales tax (including Alaska locals) have enacted economic nexus and marketplace facilitator law
 - Missouri effective January 1, 2023
 - Cities/Home Rule Jurisdictions
 - Updates and revisions to original economic nexus laws
 - Trending away from transaction requirement
 - Nexus analysis may take into account multiple thresholds
- Enforcement
 - Some economic nexus laws are approaching five years old
 - Audit cycles
 - Questionnaires
 - VDAs/Amnesty Programs

The Reach of *Wayfair*

Marketplace Facilitators

- Broad definition extend reach beyond “traditional” marketplace facilitators (i.e., Amazon/eBay)
 - Food delivery services
 - Ticketing platforms
 - Local Buy/Sell/Trade websites
- Notification and Collection Requirements
 - Marketplace facilitators are ultimately responsible for collection and remittance of tax (with limited exceptions)
 - Some states require the facilitator to notify the seller that tax will be collected and remitted on their behalf
 - Format and timing of the notice
 - Penalties for non-compliance
 - Who bears audit responsibility?

The Reach of *Wayfair*

Marketplace Facilitators (cont.)

- Additional Consideration
 - Limited state guidance available
 - Reliance on statutes and administrative rules
 - Effect of the department of taxation publications
 - Multi-channel sales considerations
 - Brick & Mortar
 - Company operated web sites
 - Sales through a marketplace facilitator
 - Registration/Account Requirements
 - Opt out clauses – Typically limited to “mega” retailers

The Reach of *Wayfair*

Income/Franchise Tax Implications

- States imposing bright line sales factors for income/franchise taxes
- Attempting to harmonize sales tax and income tax nexus rules
- State-specific rules
 - Gross Receipts Taxes
 - Ohio CAT (\$500,000 Threshold)
 - Oregon CAT (\$750,000 Threshold)
 - Washington B&O (\$100,000 Threshold)
 - Texas Franchise (\$500,000 Threshold)
 - Tennessee Income/Franchise (\$500,000 Threshold)

The Reach of *Wayfair*

Income/Franchise Tax Implications

- State-specific rules (continued)
 - Income Taxes
 - Alabama (\$596,000 threshold adjusted annually for inflation)
 - California (\$637,252 threshold adjusted annually for inflation)
 - Pennsylvania (\$500,000 threshold)
 - Colorado (\$500,000 threshold)
 - New York (\$1,138,000 threshold)
 - Michigan (\$350,000 + active solicitation threshold)
 - Massachusetts (\$500,000 threshold)
- PL 86-272 protection is still available for qualified taxpayers

A black and white photograph of two hands shaking in a firm grip, symbolizing a business deal or agreement. The hands are wearing white shirt cuffs and dark suit sleeves.

The Good, Bad and Ugly of Economic Nexus Administration

Economic Nexus Administration – The Good

- States have been quick to act to provide updated rules and regulations
 - Detailed information releases
 - Providing of specific examples
 - More taxpayers becoming compliant, limiting potential use tax exposure
- VDA/Amnesty Programs
 - Process is generally streamlined and straightforward
 - Goal is to get taxpayers into compliance as quickly and efficiently as possible
 - States have generally been deferential to data submitted
- Technology
 - Availability of multiple software platform options for all business types
 - Opportunity to automate and/or implement more robust sales tax processes

Economic Nexus Administration – The Good

- Audit Activity
 - Outside of a few states, sales audits have remained minimal
- State Revenue
 - Increased collections have led to strong financial performance
 - Allows states to re-think tax policy/reduce other tax burdens

Economic Nexus Administration – The Bad

- Increased Compliance Burden
 - Annual/semi-annual nexus review
 - Return/footprint tracking
 - Trailing nexus determination
 - Understanding sales tax law in all jurisdictions
 - Cost of Compliance
- Definition of “sales” and what is included in nexus determination
 - Gross vs. retail
 - Tangible vs. service
 - Inclusion/exclusion of exempt sales
 - Resale
 - Specific exemptions

Economic Nexus Administration – The Bad

- Contact from state taxing authorities
 - Increase in notices (often in error or timing related)
 - Nexus questionnaires
 - Other taxes
 - New “supply” of taxpayers to evaluate
- Registration Process
 - Timing vs. first return due dates
 - Delays in processing requests
 - Hard copy registration documents

Economic Nexus Administration – The Ugly

- Bulk registrations
 - Filing in jurisdictions where not required
 - Withdrawal
- Exemption Certificates
 - Updating for full customer base
 - Validating accuracy
 - Understanding certificate rules / requirements by state
 - Software requirements
- Nexus "Gray Areas"
 - Marketplace facilitators
 - Physical presence

Economic Nexus Administration – The Ugly

- Impact on small retailers
 - Transaction Threshold
 - Micro-transaction retailers
 - Small sellers in multiple states
 - Dollar Thresholds
 - One-time sales
- Remote employee impact to sales tax
 - Physical presence
 - Non-sales tax implications
- Other State Tax Implications



Trends in State Administration of Sales Tax

Trends in State Administration of Sales Tax

- State Budget Surpluses – Rainy Day Funds
 - Increase in sales tax collections
 - Inflation / Cost of goods
 - Consumer spending
 - Additional Exemptions
 - “Necessity” items
 - Food – elimination / rate reduction / phase-out
 - Sales tax holidays – clothing
 - Feminine hygiene products
 - Baby related items
 - Shift in reliance on other taxes
 - PIT – rate reductions
 - Property Tax
 - Sin Taxes – Marijuana / Gambling

Trends in State Administration of Sales Tax

- Changes in Economic Nexus Standards
 - Removal of Transaction Threshold
 - Increase or modification to dollar threshold
- Taxation of Service Revenue
 - Economy is trending away from tangible property and towards service revenue
 - Software/Cloud-based Solutions
 - Digital products
 - Professional services
- Other Transactional "Taxes"
 - Colorado Retail Delivery Fee
 - Maryland Digital Advertising Tax (legality of law currently pending on constitutionality grounds)

Trends in State Administration of Sales Tax

- Home-Rule States
 - Increased filing complexity
 - Uncertainty surrounding nexus determinations
 - Efforts by some states to simplify
- State Compliance vs. Cost to Comply
 - Balancing cost/benefit of VDA against go forward registration
 - Risk analysis of actual tax liability
- Financial Statement Audits
- Transactional Due Diligence

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Sales Tax Implications for a Remote Workforce

Sales Tax Implications for a Remote Workforce

- Remote workforce can trigger sales and use tax filing obligations in multiple states
- Depending on the activities of an employee, traditional nexus rules may apply
 - Substantial Nexus
 - Administrative or back-office function
 - Customer facing/active engagement activities
- Materiality analysis
- Establishment of withholding or another tax account may trigger notice/inquiry
- Other State Tax Considerations
 - Property Tax
 - Income/Franchise
 - Local Taxes

Questions



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