The Ever-Changing Tax Law – What’s New?

Craig B. Fields, Esq.
Partner
Morrison & Foerster LLP
New York, NY

Mark A. Loyd, Esq.
Partner
Bingham Geenebaum Doll LLP
Louisville, KY
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NEXUS-RELATED LEGISLATIVE AND POLICY CHANGES
Background: **Bellas Hess and Quill**

**National Bellas Hess v. Department of Revenue (1967)**
- The U.S. Supreme Court reversed the Illinois Supreme Court’s decision that National Bellas Hess, a mail order business with no physical presence in Illinois, was required to collect and remit the State’s use tax.

- The U.S. Supreme Court reversed the North Dakota Supreme Court’s decision, which “declined to follow Bellas Hess because ‘the tremendous social, economic, commercial, and legal innovations’ of the past quarter-century have rendered its holding ‘obsolete.’”
- Justice Scalia’s concurrence, joined by Justices Kennedy and Thomas, explained that he “would not revisit the merits of [Bellas Hess], but would adhere to it on the basis of *stare decisis*.”
Direct Attacks on Quill: By Statute

**South Dakota**: First state to enact legislation challenging Quill.
- Effective May 1, 2016, sellers must remit sales tax if they have (1) $100,000 or more of gross revenue from sales in the State or (2) 200 or more separate transactions in the State.
  - **South Dakota v. Wayfair, Inc.** (6th Cir. Mar. 6, 2017), the State trial court enjoined the State from enforcing the law, stating that it was “duty bound to follow applicable precedent of the United States Supreme Court . . . even when changing times and events clearly suggest a different outcome.”
  - Pursuant to the enacting legislation, the appeal must be made directly to the State Supreme Court and the “appeal shall be heard as expeditiously as possible.”

**Wyoming and Indiana**: Enacted similar statutes, effective July 1, 2017.

**Vermont and North Dakota**: Enacted similar statutes, but effective only if Quill is overturned.
Direct Attacks on Quill: By Regulation

- Alabama and Tennessee have promulgated regulations directly challenging Quill.
  - **Alabama**: Effective January 1, 2016, sellers must remit sales tax if they have over $250,000 in sales in the State.
    - *Newegg v. Department of Revenue*, filed June 8, 2016, is currently pending at the Alabama Tax Tribunal.
    - Alabama reported that it received $4.3 million in fiscal 2016, and $15 million as of January 2017 for fiscal 2017, which began October 1, 2016.
  - **Tennessee**: Effective January 1, 2017, sellers must remit sales tax if they have over $500,000 in sales in the State.
    - On March 30, 2017, two trade associations filed a complaint challenging the Regulation in Tennessee Chancery Court.
    - The Tennessee General Assembly recently passed legislation prohibiting the collection of “any internet sales or use taxes authorized under [the regulation] and permitted under a ruling of any court, until such court’s ruling has been fully reviewed and the [regulation] has been approved by the general assembly.”
Direct Attacks on **Quill**: By Guidance

- **Massachusetts**: Issued administrative guidance requiring an “Internet vendor” to collect sales tax beginning on July 1, 2017, if, during the preceding 12 months:
  - It had over $500,000 in Massachusetts sales; and
  - It made sales for delivery into Massachusetts in at least 100 transactions.
- Establishes an “administrative bright line rule” based on interpretation of current law, rather than passing regulation or statute.
- Justifies position by, among other things, claiming that cookies establish a physical presence.
- On June 9, 2017, two trade associations filed a complaint challenging the Directive in Massachusetts Superior Court, and moved for a preliminary injunction to block its enforcement.
Indirect Attacks: Notice and Reporting

- Direct Marketing Association v. Brohl (10th Cir. Feb. 22, 2016), upheld Colorado’s notice and reporting statute.
  - The court limited Quill to sales and use tax collection and found that the statute was neither facially discriminatory nor discriminatory in effect.
  - Justice Gorsuch, then a judge on the 10th Circuit Court of Appeals, concurred.
  - The U.S. Supreme Court denied review. The parties agreed that the notice and reporting requirements will become effective July 1, 2017.
- Similar statutes have been enacted in Alabama (effective July 1, 2017), Louisiana (enacted July 1, 2017), Oklahoma (effective November 1, 2016), and Vermont (effective July 1, 2017).
  - Vermont and Oklahoma laws do not require remote sellers to report purchasers’ information to the state.
Indirect Attacks: Marketplace Providers

Marketplace Provider

Customer

Good/Service

Retailer

E.g., Amazon, eBay, Etsy

$ minus fee

$
Indirect Attacks: Marketplace Providers

Minnesota

• Effective on the earlier of (1) July 1, 2019 or (2) the date that Quill is overturned, retailers must collect and remit sales and use tax if its sales are facilitated or processed by a marketplace provider that maintains a place of business in Minnesota.
  • De minimis exception for retailers with less than $10k in annual Minnesota sales.
• A marketplace provider must collect and remit sales and use tax for all sales facilitated for a retailer, unless: (1) the retailer provides the marketplace provider with proof of registration before the marketplace provider facilitates a sale; or (2) upon inquiry by the marketplace provider, the commissioner discloses that the retailer is registered to collect Minnesota sales and use tax.
Indirect Attacks: Marketplace Providers

Minnesota (continued)
- Estimated annual increase in revenue of $10 million to $20 million.
- Similar bills died during New York’s and Texas’ most recent legislative sessions. Another was vetoed by the Governor of New Mexico.

Arizona
- Through a letter ruling, the Arizona Department of Revenue has taken the position that a marketplace provider must collect and remit transaction privilege tax on receipts from sales on behalf of retailers, provided the marketplace provider has nexus with Arizona.
  - Utah, also through letter ruling, reached the opposite conclusion with respect to the State’s sales and use tax—marketplace providers have no collection obligations.
**Indirect Attacks: Affiliate Nexus**

**Minnesota:** Enacted an expanded definition of the term “affiliate” to include:

- An entity that has the same or similar business name as the retailer and sells from a Minnesota location products that are similar to those products sold by the retailer;
- An entity that maintains a place of business in Minnesota and uses trademarks, service marks, or trade names in Minnesota that are the same or substantially similar to those used by the retailer.
Indirect Attacks: Click-Through Nexus

**Illinois:** Amended regulation provides that a retailer may rebut the presumption of nexus based on click-through agreements with persons located in Illinois if the retailer maintains the following records:

1. Retailer Agreements—An agreement prohibiting the persons operating under the agreement from engaging in solicitation activities in Illinois.
2. Annual Certification—A certification, on a Department prescribed form, by the person operating under the agreement that they have not engaged in any prohibited solicitation activities in Illinois at any time during the previous year.

- Solicitation—a direct or indirect communication to a specific person, including emails or text messages, done in a manner that is intended and calculated to incite a person to purchase tangible personal property from a specific retailer. Solicitation does not mean advertisement.

**Nevada:** Recently adopted a similar regulation.
EXPANDING THE BASE
Expanding the Base: Services

**Illinois:** Legislation is currently pending that would impose tax on gross receipts from sales of direct-to-home satellite services and direct broadcast satellite services to customers located in Illinois.

- The legislation would also impose tax on the following services:
  1. Providing space for storage
  2. Laundry, drycleaning, cloth pressing, dyeing, or linen services
  3. Private detective, private alarm, and private security services
  4. Structural pest control services
  5. Tattooing and body piercing
Expanding the Base: Services

Kentucky: Modernizing the Sales Tax
Increase the Rate?
Local Sales Taxes?
Eliminate “Tax Expenditures”?:
  • Food
  • Labor or Services Used in Property Sold
  • Non-profit
  • Prescription Medicine
  • Residential Utilities
  • Farm Exemptions
  • Excluded Services
Expanding the Base: Services

South Carolina

Tax Expenditures

- Motor Fuel
- Prescription Medicine
- Unprepared Food
- Residential Electricity
- Federal Gov. Sales
- Vehicle Sales Tax Cap
- Coal and Fuel Used in Manuf.
- Livestock

- Manuf. Machines
- Telecom.
- Livestock Feed
- Lottery Tickets
- Containers & Wrapping
- Out-of-State Retailer
At the time of the Council’s review, Senate Bill 8 was intended to achieve at least three policy goals:

- Increase revenues by broadening the sales tax base to include services. The tax rate would not necessarily be as high as the current state rate, but would be set to generate roughly $10 billion in its first year and increasing amounts thereafter. Local jurisdictions would not be authorized to impose a sales tax on services, as they now are authorized to do with goods.
- Provide tax relief to low-income households to help offset the impact of taxing services.
- Phase in additional tax relief for individuals and corporations after the sales tax on services is fully implemented.
Expanding the Base: Services

North Carolina: Enacted legislation that imposes sales and use tax on gross receipts derived from repair, maintenance, and installation services.

Oklahoma: Governor’s effort to expand the sales tax base to services was rejected by the Legislature.

West Virginia: It has been reported that the Legislature is considering expanding the sales tax base to include certain services, including telecommunication and electronic data processing services.
Expanding the Base: Services

New York: The Department of Taxation and Finance recently sought to classify certain on-line services as taxable “protective” or “detective” services.

• Advisory Opinion, TSB-A-15(16)S (May 7, 2015): An on-line “fraud management service” that provides risk score of credit card transactions, based on risk tolerance of merchant, constitutes a taxable protective or detective service.

• Advisory Opinion, TSB-A-16(20)S (May 27, 2016): On-line “portal” and “trusted identity framework” services, which acted as a “gatekeeper” that allowed only authorized Internet users access to a client’s computer network or other on-line resources, constitute a taxable protective or detective service.
Expanding the Base: Digital Products

Pennsylvania: Enacted amended extensive revenue bill that included a provision applying the state’s sales tax to the purchase of digital products delivered to a customer electronically, digitally or by streaming.

- Notably, reference to “streamed or accessed” digital products was explicitly included in the statute.
- Departmental guidance states that the location of a sale is determined based on the customer’s billing address.
- Notably, the legislation does not apply to newspaper and magazine subscriptions.
  - In Pennsylvania print newspaper and magazine subscriptions are statutorily exempt from tax.
Expanding the Base: Digital Products

Illinois: Legislation is currently pending that would impose tax on gross receipts from sales of digital audio-visual works to customers located in Illinois.

- “Digital audio-visual works” — a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any, sold to an end user with rights of less than permanent use.

West Virginia: It has been reported that the Legislature is considering imposing sales tax on digital goods.
Expanding the Base: Home Rentals

**Delaware**: Bill introduced to require homeowners to collect 8% lodging tax, except in owner’s primary residence

**Virginia**: Enacted law to authorize localities to require owners of short-term rentals to comply with licensing requirements
Expanding the Base: Local Taxes

North Carolina: A pending bill would enable municipalities to levy a .25% sales and use tax if approved by local referendum.

Maine: A bill that would have enabled municipalities to levy a 1% sales tax on meals and lodging recently died in a Senate committee.
Expanding the Base: Not So Fast

**North Dakota:** Effective July 1, 2017, all charges for internet access are exempt from sales and use tax.
- North Dakota had been one of the few states permitted to tax internet access under the Internet Tax Freedom Act.

**Rhode Island:** Pending bill would reduce the sales tax rate from 7% to 3%

**Missouri:** In November 2016, voters approved an amendment to the State constitution, which states:
In order to prohibit an increase in the tax burden on the citizens of Missouri, state and local sales and use taxes (or any similar transaction-based tax) shall not be expanded to impose taxes on any service or transaction that was not subject to sales, use or similar transaction-based tax on January 1, 2015.
MISCELLANEOUS
Miscellaneous: Crossing State Lines

Washington, D.C.: A new proposal for a sales tax dedicated to transportation would be imposed not only in D.C., but also in nearby areas of Maryland and Virginia.
Miscellaneous: Move From Income To Consumption Taxes

**West Virginia**: Amended tax reform proposal
- Lower and slowly eliminate personal income tax
- Increase in sales and use tax rate from 6% to 6.95%

Passed the Senate 19-11
Miscellaneous: Experimentations with Gross Receipts Taxes

- **Arizona, Hawaii, and New Mexico**: Gross Receipts or Transaction Privilege Taxes
- **Ohio**: Commercial Activity Tax (CAT) (2005)
- **Texas**: Margin Tax (2006) (considering repeal)
- **Nevada**: Commerce Tax (2015)
- **Oregon**: Measure 97 (rejected in 2016)
- **Louisiana, Oklahoma, Oregon, and West Virginia**: All considered Gross Receipts Taxes this year due to fiscal challenges
  - All proposals modeled after Ohio’s CAT
Questions?
Contact Us

Craig B. Fields  
Morrison & Foerster LLP  
New York, NY  
(212) 468-8193  
cfields@mofo.com

Mark A. Loyd  
Bingham Greenebaum Doll LLP  
Louisville, KY  
(502) 587-3552  
mloyd@bgdlegal.com