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SALES & USE TAX COMPLIANCE

Issue of Nexus Is Evolving With Web Transactions and Internet Servers (Quick Code 061317)

Businesses without a physical presence in a state may at times be challenged to know if they should collect sales and use tax. The issue can become even more complex when considering the issue of nexus for online businesses and the nexus consequences of the use and location of internet servers (see sidebar on facing page). Many businesses don't even think about where their servers are—particularly if they have a hosting agreement with a third party.

What Is Required of Companies Selling Goods Over the Internet?

"If you are selling goods over the Internet, and your company has a presence in the state of delivery, your company has established nexus and will be required to register to collect sales tax on all taxable items regardless of method of order placement," says sales tax consultant Diane Yetter of YETTER.

"Whether the order is placed over the Internet or through traditional means, if a company has nexus with the state to which the product is being shipped, sales tax should be billed and collected. For example, if a Pennsylvania company ships to Pennsylvania, there is nexus, and tax is collected. If the Pennsylvania company ships out of Pennsylvania, whether they collect sales tax or not depends on whether or not they have nexus with the state into which they are shipping," adds Yetter.

The Issue of Physical Presence

The issue of whether to require online retailers to collect sales tax in states where they have no physical presence has been a controversial and ongoing question in many states and also at the federal level.

Currently, businesses that sell goods in brick-and-mortar stores are required to collect state sales taxes at the point of sale for all orders transferred to the customer at the store (cash and carry sales). "Brick and Mortar" stores often claim to be at a disadvantage when compared with large online vendors, such as Amazon, that have traditionally only collected sales tax in a limited number of states in which they have a physical presence.

When consumers are not charged sales tax at the time of sale, the consumers are responsible for paying the use tax when they file their yearly state tax return. However, most of these sales taxes go uncollected, costing states billions of dollars in lost revenue.

Related Tools and Resources

The following related content can be found online at **ap.iofm.com** by typing the Quick Code into the search box.

Sales and Use Tax: Challenges from the AP Perspective *(Quick Code 041315)*

Related Premium Resources

See Training Resource Library at **ap.iofm.com** to order.

Accounts Payable Compliance & Tax Reporting Handbook

New laws have been passed in many states that require large online sellers to collect sales tax even with no physical presence in the state if they use some in-state solicitation or fulfillment. The laws, sometimes called "Amazon laws," are being discussed and proposed in other states as well.

In addition, the Marketplace Fairness Act of 2013 is being considered by the federal government. On May 6th, the U.S. Senate voted to approve the Marketplace Fairness Act in a bipartisan vote of 69 to 27. If the legislation is enacted, it would help ensure that large web-based retailers play by the same rules as traditional retail.

The proposed federal law would allow states to require sellers not physically located in their state to collect taxes on online and catalog sales made to people in their state.

"The Marketplace Fairness Act would not impose any new taxes," says U.S. Senator Sheldon Whitehouse (D-RI), cosponsor of the bill. "It would simply allow states to require web-based retailers to collect sales tax, just as smaller brick-and-mortar businesses are already required to do."

"Online retailers that make $1 million or less in annual sales and have no physical presence in the state would be exempt from this requirement. States would have to meet certain criteria to simplify their sales tax laws and make sales tax collection easier before they could require sellers to collect the tax," reports Nolo.com, a legal internet site.

Although the focus has been on internet sellers, Diane Yetter explains that it is important to note that the Marketplace Fairness Act, if enacted, would apply to all remote sales made by any retailer that exceed the small business threshold. The bill, as currently drafted, applies if remote sales into states where the seller doesn't already have nexus exceed $1 million annually.

What State Tax Departments Have to Say About Nexus From a Web Server

In its *2013 Survey of State Tax Departments*, Bloomberg BNA surveyed senior state tax officials in every state, including the District of Columbia and New York City. Every state responded to the survey and clarified the state's position on sales and use tax administration, with an emphasis on nexus policies.

The survey focused on the nexus consequences of internet servers. Here are some key findings:

- In 36 states and the District of Columbia, several jurisdictions said they would find nexus even if the corporation did not make sales into the state.
- Twenty-six jurisdictions would find nexus for an out-of-state corporation that leased space on a third-party's internet server located within their borders.
- Having data on an in-state leased server would trigger nexus in 24 jurisdictions, regardless of whether the data was stored on the server for more or less than six months.
- Only 12 states and the District of Columbia said nexus would arise from using the services of a web-hosting provider with a web server in their jurisdiction.

Steven Roll, blogging for Bloomberg BNA, further explained the survey findings. "The survey results indicate that sales tax nexus can be triggered by an out-of-state corporation that leases space on a third party's web server located within their borders," he reports.

"However, some states also indicated that nexus would not be created by an out-of-state corporation that pays a web hosting provider with a server located in their jurisdiction to provide the corporation with web services that enables the firm to sell products over the Internet," he adds.

Roll revealed that the 2013 survey asked each of the states if sales tax nexus would result for a corporation that makes remote sales of tangible personal property in the state and:

- Owns an internet server located in the state;
- Owns an internet server located in the state and hires third-party technicians located in the state to keep the server functioning;
- Leases a third party's internet server in the state (assume that the server is used exclusively by the corporation);
- Leases space on a third party's internet server in the state (assume that space on the third party's server is also leased to several other unrelated corporations);
- Leases space on a third party's network of internet servers, some of which are located in the state (assume that the corporation's data is on the third party's internet server in you're the state for less than six months during the year);
- Leases space on a third party's network of internet servers, some of which are located in the state (assume that the corporation's data is on the third party's internet server for more than six months during the year); and/or
- Does not own or lease property in the state, but pays a web-hosting provider with a server located in the state to provide the corporation web services to sell products over the Internet.

Arizona was among several states that indicated that nearly all of the above listed activities would trigger sales tax nexus, reveals Roll. "The sole exception for Arizona was paying for services to a web hosting provider with an in-state server."

Nolo.com has available links to each state that provide a breakdown of the current rules on internet sales taxes in each state (go to www.nolo.com/legal-encyclopedia/50-state-guide-internet-sales-tax-laws.html). Note that the information may change if either the Marketplace Fairness Act of 2013 or a similar bill proposed by the House becomes law. ❑

Editor's Note: The primary source for this article is Diane Yetter, CPA, MST, and founder of YETTER (www.yettertax.com), a sales tax consulting and tax technology firm. Material is also drawn from *Nolo Law For All* (www.nolo.com), an online legal publisher; and from releases by www.whitehouse.senate.gov, from the *Key Findings* document of the *2013 Survey of State Tax Departments*, and from the Bloomberg BNA blog, "State Tax Snapshot: Web Servers Can Trigger Sales Tax Nexus."