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III. OKs Sourcing Change For Remote Seller, Marketplace Tax

By **Paul Williams**

Law360 (November 14, 2019, 7:33 PM EST) -- Illinois would require remote sellers and marketplace facilitators to collect local taxes at the rate imposed at the destination of their sales under a bill the state General Assembly approved Thursday.

S.B. 119 was given final approval in the Senate by a 48-5 vote, sending the measure to Democratic Gov. J.B. Pritzker. The legislation **offers a host of changes** to the state's existing remote seller and marketplace provider laws that state officials and business organizations had agreed upon. Chiefly, the bill would alter the sourcing rules for the local retailers' occupation tax to ensure localities receive revenue from sales made by out-of-state retailers.

Starting Jan. 1, 2021, the bill would make marketplace facilitators and remote sellers responsible for the retailers' occupation tax, which is levied at different rates in cities and counties on top of the state's 6.25% tax rate. Currently, the occupation tax is imposed at the rate levied in a sale's place of origin, so changing it to a destination-based tax would enable the tax to be collected on remote sales.

Rob Karr, president and CEO of the Illinois Retail Merchants Association told Law360 on Thursday that the sourcing shift was essential to promote fairness between Illinois retailers and out-of-state businesses.

"The remote seller is competing with the Illinois retailer in the jurisdiction where the product is shipped," Karr said.

The sourcing mechanism was one of several tweaks to the state's existing marketplace laws that were necessary because the current structure of the state's taxation of marketplace provisions **enacted via the state budget** in June were "unworkable," a summary of the bill said. For example, the current law would compel remote sellers to collect the occupation tax as of July 1, 2020, but not marketplace facilitators selling goods from retailers located outside Illinois.

However, the bill does not alter the nexus thresholds of \$100,000 in sales or 200 transactions for remote sellers and marketplace facilitators during a 12-month period, or the requirement for marketplaces to collect and remit the state's use tax as of Jan. 1.

While the sourcing for the occupation tax for remote sellers and marketplace providers will become destination-based, it will still be origin-based for intrastate sales. That inconsistency is likely to raise constitutional concerns, Diane Yetter of the Sales Tax Institute told Law360.

Yetter said that under the proposed landscape for the occupation tax, remote sellers selling into Chicago would have to collect 10.25% total tax to account for the 4% occupation tax, but in-state sellers in cities without a local tax would only collect and remit the state's 6.25% tax.

"The change in the sourcing rule might be unconstitutional," Yetter said. "This is going to make it so that an out-of-state seller selling into the state's most populated city will collect more tax than most in-state sellers."

Yetter said that appears to violate the 1994 U.S. Supreme Court decision in **Associated Industries v.**

Lohman, which held Missouri discriminated against interstate commerce in taxing goods purchased out of state at a higher rate than in-state transactions.

The bill employs a safeguard if the occupation tax is struck down in court, as it also reinstates certain use tax provisions that were eliminated from the June budget. Yetter said that Carol Portman of the Taxpayers' Federation of Illinois informed her that the use tax language was added back to the bill to ensure that the state could continue to tax remote sellers and marketplace facilitators if a challenge to the occupation tax is successful.

Portman did not immediately respond to a request for comment. However, a summary of the bill states that the use tax, 1.25% of which is distributed to localities based on population, will protect local governments "in the event of an adverse court decision on the [retailer's occupation tax] provisions."

To ease compliance burdens for retailers that have to navigate the various local occupation tax rates, the bill would also authorize the state to enter into contracts with certified service providers, or tax software companies that will file tax returns on behalf of sellers.

Certified service providers are used by the 24 state members of the Streamlined Sales and Use Agreement, which the U.S. Supreme Court **cited in its 2018 decision** in **South Dakota v. Wayfair** as one way states might avert imposing undue burdens on out-of-state retailers that they require to collect and remit sales and use tax.

Sen. Jason Plummer, R-Vandalia, who voted against the bill, told Law360 that he objected to the measure because he couldn't support making technical corrections to a budget that he had also opposed. Plummer called the budget unbalanced and the largest spending plan in the state's history.

"We have some of the highest taxes in the country," Plummer said. "We should be getting our fiscal house in order and exercising fiscal restraint instead of spending money like drunken sailors."

The bill's chief sponsor, Sen. Heather Steans, D-Chicago, said on the Senate floor before the vote that the legislation would fulfill the intent of the state's remote seller and marketplace laws that were already enacted. She did not respond to a request for comment.

Pritzker spokeswoman Jordan Abudayyeh did not respond to a request for comment.

--Editing by Neil Cohen.