



In-State Duel Over Kansas Remote Sales Tax Ruling Sows Confusion

Printed By: TBALTZ1 on Tuesday, October 8, 2019 - 11:53 AM

Bloomberg Law News Oct 8, 2019

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By Tripp Baltz and Christopher Brown Oct 2, 2019

- Tax consultants unsure of how to advise remote sellers
- Legislative solution must happen, but will it come before a court challenge?

Confusion reigns over remotes sales taxation in Kansas.

A requirement that all out-of-state sellers, regardless of sales volume, collect and remit the Sunflower State's 6.5% sales tax was set to kick in Oct. 1 when Kansas Attorney General Derek Schmidt (R) said the policy was "invalid" and "inconsistent with *Wayfair*," the U.S. Supreme Court's groundbreaking decision on remote sales taxation.

Leaders in the Republican-majority Legislature immediately urged Kansas Gov. Laura Kelly (D) to rescind the policy.

After Schmidt delivered his Sept. 30 opinion, Mark Burghart, Kansas secretary of revenue and a Kelly appointee, issued a statement saying the department would stick to its interpretation that a 2003 state law ensures the obligation of out-of-state retailers to collect and remit sales taxes.

"The Department of Revenue cannot select which laws it enforces," he said, adding that the department will enforce the obligation of remote vendors to collect and remit until a court says otherwise.

The conflicting stances have left tax practitioners, accountants, and software companies nationwide unsure as to how to advise their clients.

'Clear as Mud'

"The situation in Kansas is about as clear as mud for remote vendors, given state officials are not on the same wavelength at the moment," said Eric D. Carstens of McDermott Will & Emery LLP in Washington, D.C. "Everyone involved would benefit from the enactment of a clear remote sales tax policy by the Legislature consistent with *Wayfair* that doesn't require a constitutional scholar to understand."

In *South Dakota v. Wayfair*, the court tossed out the 1992 physical presence standard that barred states from compelling remote vendors to collect and remit sales taxes. The court didn't rule on the constitutionality of the South Dakota statute at the center of the case, but it said certain things about the law meant it could pass legal muster.

One of those attributes was a small business safe harbor—if a company didn't exceed \$100,000 in sales or 200 transactions annually, it was exempt from having to collect and remit South Dakota sales taxes. Since the June 2018 ruling, nearly every sales tax state has asserted its authority to require out-of-state sellers—as well as online marketplaces like Etsy and Amazon that facilitate sales—to collect and remit taxes.

Some tax counselors are advising clients to play it safe.

"I would never advise someone not to collect," said Bruce Johnson, former chair of the Utah State Tax Commission and of the Multistate Tax Commission Executive Committee.

Kansas is a full member of the Streamlined Sales and Use Tax Agreement. Under the agreement's certified service provider program, remote vendors can file tax returns to the state for free, he said.

"If you're using the CSP, turning on Kansas isn't a problem," he said. "It's not going to put you at a competitive disadvantage to go ahead and collect."

David Campbell, CEO of TaxCloud, one of the five Streamlined Agreement-certified service providers, said his company tweeted out a message Oct. 1 that, to be safe, clients should comply with the Kansas notice as issued by the department.

Evaluate Risk

"Given that the Secretary of Revenue said they're not going to rescind it without a court action, remote sellers will have to evaluate the risk to their business if they don't comply," said Diane Yetter, a sales tax consultant in Chicago.

Yetter said she expects a vendor or association to sue Kansas over the requirement at any point. Since Schmidt would have to defend Burghart in such a case, and doesn't agree with what the department has done, "it'll be very interesting to see how that will turn out," she said.

After Schmidt and Burghart released their dueling positions, Kelly issued a statement endorsing the department's policy as reaffirming tax fairness.

Senate President Susan Wagle (R) said critics of the department policy were seeking advice, but had no announcement to make regarding possible next steps.

House Speaker Ron Ryckman (R) was more emphatic in rejecting the department's policy.

"The Governor's failure to rescind this unlawful tax mandate makes Kansas the first test case in the nation with such an aggressive burden on interstate commerce," he said.

Democratic Rep. Tom Sawyer, House minority leader and an outgoing member of the House Taxation Committee, rejected the notion the department notice creates an undue burden for out of state businesses, given that the state is a member of Streamlined.

"All retailers who want to sell in Kansas have to do is register with SSUTA, and the complexities of collection are pretty much taken care of for them," said Sawyer, who is an accountant in private life.

Partisanship at Play

Sen. Anthony Hensley (D), the Senate minority leader, accused the Republican legislative leadership of playing politics with an issue that has broad bipartisan support.

Attempts to pass a remote tax bill in Kansas failed during the state legislative session earlier this year. Lawmakers included remote sales tax authority in larger bills that included tax cuts and other changes in tax policy Kelly opposed. She vetoed two such bills. Kelly told lawmakers what she was looking for in a remote sales tax bill, but legislators didn't send her such a measure.

After those failures, the department issued its policy notice saying an existing Kansas law requires the state to compel remote vendors to collect and remit—no exceptions for volume of sales. With that, Kansas became the only state post-Wayfair to assert its authority to tax remote sales without a small business safe harbor.

Given that, it will likely be found that the Kansas policy imposes an undue burden on small businesses by requiring them to collect and remit on every sale, said Eric Fader, tax managing director in the Chicago office of BDO USA LLP.

“I agree with the AG’s analysis that what the department is doing by categorically saying all retailers must file is just contrary to the commerce clause,” Fader said. “I would advise a taxpayer that is a small business with a very low sales threshold and very few sales into the state, below the amounts in the South Dakota statute, they would not need to register in Kansas,” although circumstances will drive each company’s individual decision making, he said.

Matthew Schaefer of Brann & Isaacson—the Lewiston, Maine firm that represented Wayfair in the Supreme Court case—said the AG’s opinion means the department policy has no force or effect.

“Revenue officials do not have authority to override constitutional limitations on state taxing power set by the United States Supreme Court,” he said. Retailers will need to make a “company-by-company” determination as to what to do next, he said.

Legislative Fix

Schaefer agreed with others it’s highly likely the Kansas legislature will return to this issue in short order when the new session begins in January 2020.

Kansas Rep. Steven Johnson (R), chairman of the House Taxation Committee, stressed the importance of the legislature creating a safe harbor for small businesses. “Businesses really need that uniformity,” Johnson said.

Until then, Kansas could be running some legal risks, said Bruce Johnson, of the Utah State Tax Commission.

“As a former tax administrator, I wouldn’t want to be the first state to go after a person just for selling one \$6 t-shirt to an address in my state,” he said.

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