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Localities Overstepping In Taxing Remote Sellers, MTC Told

By **Paul Williams**

Law360 (October 10, 2019, 6:11 PM EDT) -- A handful of local jurisdictions with autonomous taxing authority are inappropriately using state economic nexus laws to compel remote sellers to collect and remit tax directly to the political subdivisions, a business representative told a Multistate Tax Commission panel Thursday.

Colorado is among the states that have localities asserting they can compel remote sellers to collect and remit sales and use tax to them, according to Diane Yetter of the Sales Tax Institute. (AP)

Two Colorado cities with home-rule authority have issued notices asserting that they have economic nexus provisions despite not passing any local laws regarding the treatment of remote sellers, said Diane Yetter, founder of the Sales Tax Institute, during a Thursday teleconference meeting with the MTC Wayfair Implementation and Marketplace Facilitator Work Group.

The MTC work group is gathering input from state officials and the business community as it prepares to **draft a white paper** on marketplace facilitators that it will issue later this year. One of the issues that the white paper will include is collection and remittance of local sales and use taxes, which was the primary focus of the meeting.

Yetter said that a disconnect appears to be forming between certain local governments that independently administer sales and use taxes and statewide remote seller laws. In addition to the Colorado cities, she said a Louisiana locality has told a remote seller that it must file a sales tax return for that state despite the return being **optional until Louisiana mandates** remote seller tax collection next year.

“I think there’s definitely some confusion out there about what the locals can and cannot do,” Yetter said.

Colorado has remote seller and marketplace laws on the books, but Department of Revenue spokesman Daniel Carr previously told Law360 that the state’s 72 self-collecting cities **are not subject** to those laws’ provisions.

Josh Pens, director of tax policy analysis at the Colorado Department of Revenue, said during the meeting that the state hopes to have a centralized filing system for all of its local tax rates available next year. The department hopes that home-rule localities will voluntarily sign onto using the system but added that the Legislature in general cannot overrule the local governments' taxing decisions.

Yetter said that, in her opinion, states should make clear to the localities that they cannot impose any tax on remote sellers without a specific local law allowing them to do so.

"There needs to be some communication from the states down to the locals that they don't have economic nexus unless they pass it," she said.

She also pointed to an ordinance that the city of Nome, Alaska, approved in August that requires remote sellers with more than $100,000 in gross revenue or 100 separate transactions into the state on an annual basis to **remit tax to the city**. Alaska does not have a statewide sales tax, but more than 100 of its local jurisdictions impose their own sales taxes.

But Yetter questioned if it is constitutional for a locality to count sales made into the state, instead of just the locality, to meet the nexus thresholds in a city's law. She said that sellers should have to meet individual local thresholds in cities that administer their own taxes.

Nome Mayor Richard Beneville did not immediately respond to a request for comment.

The work group also discussed how states that allow remote sellers to collect and remit taxes at a combined flat local tax rate, such as Alabama and Texas, will address remote sellers that also sell through a marketplace facilitator that holds inventory and thus have physical presence in those states.

Yetter asked if the marketplace's inventory would count as physical presence for the remote seller, even on sales that the seller makes directly into the state without using the marketplace. If so, then it would be unfair to bar remote sellers from using a flat-rate return based on inventory that the seller has no control over, she said.

A representative from Alabama said he would have to check the state's definitions before he could answer her question.

Texas is considering how to tackle that issue, according to work group chair Tommy Hoyt, who is the assistant director of tax policy for the Texas Comptroller of Public Accounts, and the state will accept public comments about it when it issues forthcoming rules **on its marketplace policy**.

To date, the tax agency has heard arguments from both sides on the topic, Hoyt said. However, he added that when it comes to a state having a hand in overseeing local tax policies, "no matter what you decide on, somebody is not going to be happy with you."

--Editing by Neil Cohen.
