

Marketplace Seller Tax Liability Still Murky, Panelist Says

By **Paul Williams**

Law360 (August 13, 2020, 8:42 PM EDT) -- How states will assess tax liabilities against marketplace facilitators and marketplace sellers for uncollected sales and use taxes is one of the key questions remaining about the tax administration of internet sales, according to a tax conference panelist.

States offer a range of statutory tax liability protections for marketplace facilitators such as Amazon.com and marketplace sellers, but it remains to be seen how those laws will play out in practice, said Diane Yetter of the Sales Tax Institute and Yetter Tax Consulting. Yetter spoke at a previously recorded session of the Virtual Advanced State and Local Tax Institute at Georgetown University Law Center in Washington, D.C., that was released Wednesday.

For example, Yetter said, while many state laws will hold a marketplace seller liable for tax on marketplace sales only if the seller provided the facilitator with insufficient or incorrect information, those phrases are vague because states haven't yet defined those terms.

"I think that states have to come out with very clear guidance" on when they will hold a marketplace seller liable for uncollected tax on sales through a marketplace, she said.

"Right now, I think there's just too much silence on the matter," Yetter said.

Sellers and facilitators may also run into technical issues, such as when a facilitator doesn't have an appropriate category to assign certain niche products from a seller — like vitamins, supplements or certain food products — because of varying state definitions, she said. And if the facilitator doesn't have the capacity to handle the taxability of those items, Yetter said, whether it will be incumbent upon the seller to ensure that the tax is collected is an open question.

Similar issues may also arise for other charges in a transaction, such as telecommunications taxes and battery fees, that some facilitators may not be equipped to handle, she said. In those instances, Yetter said, there's some concern that those taxes and fees could become the seller's responsibility, but that the seller may not be in a position to collect the taxes.

Panelist Richard Cram, director of the Multistate Tax Commission's national nexus program, also said it's important for businesses to understand the nuances of the state laws, noting that Nebraska holds marketplace facilitators and sellers jointly and severally liable for uncollected tax.

States only began imposing tax on remote sellers and marketplaces in 2018 after the U.S. Supreme Court's **Wayfair** decision, which **eliminated the physical presence requirement** for sales and use taxes. Yetter said not enough time has passed since that ruling to answer some nuanced questions that marketplace sellers may have about their tax liabilities.

Until businesses see how state audits unfold in the coming years and how aggressive states will assess facilitators and sellers, Yetter said, sellers should keep their guard up and not assume that states won't pursue them for taxes that a facilitator didn't collect.

"I think it's way too early in the process for any seller to be completely comfortable that they will not be held liable," she said.

--Editing by Neil Cohen.

All Content © 2003-2020, Portfolio Media, Inc.