Bloomberg BNA

Daily Tax Report™: State

Tax Policy

The U.S. Supreme Court's *Quill* physical presence requirement has been a challenge for states seeking sales tax revenue from remote online retailers. Federal legislation has been introduced to address this challenge and simplify sales tax collection, but hasn't progressed very far. In this article, the Council On State Taxation's Fredrick J. Nicely and Nikki E. Dobay discuss proposed federal legislation, local sales tax simplification, and how the Streamlined Sales and Use Tax Agreement (SSUTA) could benefit the non-member states.

To Be or Not to Be: Will Colorado and Other Non-SSUTA States Join the SSUTA?

By Fredrick J. Nicely and Nikki E. Dobay

While some may argue the Streamlined Sales and Use Tax Agreement ("SSUTA") is now stale, SSUTA remains relevant and the best solution for the 45 states that impose statewide sales taxes to obtain Congressional support for remote sales tax collection authority without the physical presence requirement in *Quill*. [*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).] Thus, all the non-SSUTA states with sales taxes should continue to work toward SSUTA membership. As used in this article, "sales tax" refers to both the states' sales taxes and their compensatory use taxes.

Fredrick J. Nicely is a senior tax counsel with the Counsel On State Taxation. Nikki E. Dobay is also a senior tax counsel with the Counsel on State Taxation. *The authors extend a special thanks to Sonia Shaikh (COST Research Fellow) for her assistance with this article.*

One reason non-SSUTA states have likely not sought membership is because of the introduction of Federal legislation over the past several years that would give states a two-path approach to obtain remote seller collection authority, *i.e.*, the Marketplace Fairness Act (S. 976) and the Remote Transaction Parity Act (H.R. 2193) were both reintroduced in Congress this session. Under such legislation, an SSUTA state would automatically obtain remote seller collection authority. On the other hand, a non-SSUTA state may obtain remote seller collection authority by meeting certain minimum simplification requirements set forth by the same legislation (*e.g.*, a single entity administers the tax for remote sellers and relieves remote sellers and certified software providers of liability for errors made by the state). This alternate path raises several concerns including the: 1) uncertainty as to who will monitor and enforce the minimum simplification requirements; 2) failure to require uniform definitions; 3) ambiguity as to the process non-SSUTA states would use to certify software service providers; and 4) failure to afford sellers with nexus the same protections as those provided to remote sellers.

This article will first focus on a handful of states with historically complicated sales tax systems that allow local governments to impose and administer their local sales taxes separately from the states' sales tax and

 ISSN 1534-1550

their recent efforts towards simplification and uniformity. Secondly, recommendations for each of those states, which are all generally precluded from becoming SSUTA members because of their complicated local sales tax systems, are provided regarding additional steps these states should take to move towards membership or at the least greater simplification. Finally, this article will conclude with a discussion as to why these states and other non-SSUTA states would benefit from becoming full members of the SSUTA—regardless of whether federal legislation is enacted.

Colorado

Colorado is one of the most problematic states when it comes to sales tax collection and administration. Colorado has over 300 jurisdictions that impose sales and use tax—many of which have different statutory tax bases and/or interpretations of what is taxable. Fortunately, the Colorado Department of Revenue administers over half of those local jurisdictions' sales taxes; however, over 70 jurisdictions self-administer their own sales taxes. In Colorado, various types of local jurisdictions are authorized to impose local level sales taxes, including cities which are granted such authority by the Colorado Constitution (which are referred to as Home Rule Cities) as well as other cities not specifically granted such authority in the Constitution (which are referred to as ''statutory cities''), counties and other special taxing jurisdictions. In an effort to promote greater uniformity, several bills have been introduced over the past four years, but all without avail. It was not until this year that Colorado lawmakers passed legislation creating the Sales Tax Simplification Task Force (''Task Force''), which held its first meeting on July 11, 2017. [*See* 2017 Act, H.B. 1216.] Over the next three years, the Task Force will be required to take a hard look at Colorado's very cumbersome sales tax system and to make recommendations to the legislature regarding changes to simplify its system. The Task Force is precluded from making recommendations that would require a change to Colorado's Constitution, it will be required to use a carrot and stick approach to get the Home Rule Cities to move towards greater simplification. Thus, although Colorado is currently unable join the SSUTA (because of its local sales tax regime), it is taking steps in the right direction, which could allow it to someday pursue SSUTA membership.

Other Problem Sales Tax States

Alaska – Although Alaska does not have a state-wide sales tax, it does allow local jurisdictions to levy their own sales taxes. Currently, there are approximately 108 localities that separately impose and administer a sales tax in Alaska. [*Avalara, as of April 2017*.] The State presently asserts limited oversight over these jurisdictions' imposition and administration of their taxes; therefore, the overall system lacks uniformity. While there are some restrictions imposed by the State [*see* Alaska Stat. §29.45.650, 700], the local bases are not uniform and there is no central administration of the tax. With the downturn in oil and gas revenues, however, Alaska has explored the imposition of a statewide sales tax. If Alaska decides to pursue this route, it should ensure that any such legislation requires both the State's sales tax and the local jurisdictions' sales taxes to conform to the SSUTA. This would include a central state agency that administers the sales taxes for both the local jurisdictions and the state.

Alabama – Alabama is yet another state that does not require central administration of all its local sales taxes. While it does administer the tax for some localities, many of the State's localities still conduct their own audits (including the use of private auditing firms). As part of the Department of Revenue's initiative to encourage remote sellers to collect the state sales tax, the legislature enacted the Simplified Seller Use Tax Act in 2015. [Legislative Act No. 2015-448*; see also* Ala. Code §40-23-191(b)(4).] Pursuant to that law, remote sellers approved by the Alabama Department of Revenue may collect using an 8 percent rate for sales to any purchaser in Alabama. In theory, this may seem like an amenable compromise; however, some localities have combined state and local rates that are above or below the flat 8 percent tax rate. Additionally, manufacturing and agricultural equipment is only subject to a 1.5 percent tax rate at the state level (instead of 4 percent). Depending on the local tax rate, this leads to advantages and disadvantages for both in-state and remote sellers. According to the Sales Tax Handbook, the average local sales tax in Alabama is only 3.82 percent, a figure based purely on jurisdictions [*available at* https://www.salestaxhandbook.com/alabama]. The Tax Foundation, weighted by population in each jurisdiction, lists an average local sales tax rate of 5.01 percent [*available at* https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017/]. Although the law affords a purchaser the ability to obtain a refund for tax paid to a remote seller under the program when the combined state and local tax rate is lower at the purchaser's location, such a system creates inequities for certain purchasers and certain sellers located within and outside the state.

One saving grace is Alabama's law generally requires all local jurisdictions imposing a local sales tax to use the same tax base as the state. The tax base is only subject to minimal differences such as local tax jurisdictions are allowed to elect in or elect out which items are subject to back-to-school state tax holidays [*see* Ala. Code §11-51-201(a)]. Alabama further improved in 2014 when the State's legislature passed the Independent Tax Tribunal Act. This legislation allows taxpayers to appeal an assessment from a self-administered local jurisdiction to the State's tax tribunal. Unfortunately, the Act also permitted several of the local jurisdictions to opt out of that process. [*See* 2014 H.B. 105.] The opt-out provision has allowed 15 local jurisdictions to require appeals of their tax to be made at the local level. Although Alabama is taking positive steps towards simplification, it has not done enough to become an SSUTA state. To do so, Alabama must require all its local sales taxes to be centrally administered for all sellers and it must address the tax rate differential for manufacturing and agricultural equipment.

Arizona – The Arizona sales tax is known as the Transaction Privilege Tax (''TPT''). Historically, there has been a disconnect between the State's imposition of the TPT and that of its local jurisdictions. In 1987, to remedy some of the local versus state level differences, the Arizona legislature adopted the Model City Tax Code (''MCTC''), which was a set of rules and guidance for imposing and administering the tax. [*See* Ariz. Rev. Stat. Ann. §§42-6051, 6055.] Although each locality imposing a TPT adopted the MCTC in 1987, some failed to

  TM-WSTR ISSN 1534-1550

implement it in its entirety. In addition to this failure, the document itself has several infirmities, including allowing local jurisdictions to use a tax base that is different than the State's TPT tax base. Nevertheless, Arizona continues to take additional steps towards greater uniformity. In fact, in January 2017, after several administrative delays, the Arizona Department of Revenue took over all registration, collection, audit, and appeal functions for both the local-level TPTs and the state-level TPT. It is also encouraging that an Arizona Department of Revenue representative—at least in the past—has participated in the SSUTA's State and Local Advisory Council (''SLAC'') activities. The State and Local Advisory Council includes both SSUTA members and non-SSUTA states, both of which have voting authority on SLAC issues. SLAC is charged with vetting and voting on many of the amendments to the SSUTA. Although Arizona has made progress by removing some of the hurdles of local tax administration, the State still needs to address its non-uniform local tax bases before it can become a full SSUTA state.

Louisiana – In 2003, Louisiana sought to harmonize its parishes' sales tax bases with the state's sales tax base by requiring parishes to follow the Uniform Local Sales Tax Code (''UTC''). [Act 73 of 2003 Leg. Session, codified as RS §47:337.] The UTC sets forth specific rules for localities in terms of administering and collecting sales and use taxes. The UTC generally enables uniformity; unfortunately, some state-only, local-option, and locality-specific exclusions and exemptions continue to exist. Additionally, the UTC does not require the parishes' taxes be centrally administered. Rather, the parishes are permitted to administer their tax (including registration, payments, and appeals) separately from the State. Louisiana is attempting to resolve these issues, and, in 2015, the State made some improvements by granting taxpayers the right to appeal the parishes' sales tax assessments to the Louisiana Board of Tax Appeals, an independent tax dispute forum. [*See* 2015 Act 210, LRS §§47:1401 to 1486.] This year, the legislature created the Louisiana Sales and Use Tax Commission for Remote Sellers, which is an independent agency housed within the Louisiana Department of Revenue, to deal with the administration and collection of tax from remote sellers. [*See* 2017 Act 274; H.B. 601.] A major problem with this bifurcated approach is that the State's sales tax and local sales taxes could be administered differently, depending on whether or not a seller has a physical presence in the state. Louisiana is an example of a state that could potentially qualify for remote seller collection authority under some of the proposed federal laws. Of course, this lack of central administration for all sellers would preclude it from being SSUTA compliant.

SSUTA Membership Remains the Best Solution

Since 2014, the number of full member states to the SSUTA has stagnated at 23, with one associate member state. [List of SSUTA states available at: http://www.streamlinedsalestax.org.] Although some states have introduced legislation that take steps towards membership, no additional states have been successful in following through to completion. [*See., e.g.*, Missouri; S. 105 (2017) and H. 763 (2017).] Still, non-SSUTA states should continue to consider becoming members because the SSUTA both provides a clear path to remote seller collection authority upon the passage of certain federal legislation and also offers a host of other advantages from which non-member states may benefit.

SSUTA members states are generally required to treat in-state sellers the same as remote sellers—which should be the model used by all states. The SSUTA states are required to treat in-state and remote sellers the same, except that remote sellers are eligible for compensation for their use of certified service providers. Although congressional action through either the Marketplace Fairness Act (S. 976) or Remote Transaction Parity Act (H.R. 2193) would seem to provide uniformity for taxpayers, one concern is that some of the minimum simplification requirements apply only to remote sellers. In-state sellers should also be able to rely on and be afforded liability relief based on a tax agency's guidance. The Council On State Taxation has a policy statement on this: ''Simplification of the Sales, Use or Similar Transaction Tax System,'' [available at: http://cost.org/Page.aspx?id=3140]. Unlike the proposed federal legislation, SSUTA member states are required to provide such guidance and afford relief to all taxpayers.

In addition to addressing some of the remote seller collection authority concerns raised above, there are numerous other advantages to a state that joins the SSUTA as opposed to going it alone. First, the SSUTA is fully implemented and has been a working agreement between member states since October 2005. The SSUTA provides uniform definitions and a taxability matrix with disclosed practices that all sellers can rely upon for collection purposes, and it requires central administration of the states' state-wide and local sales taxes (including audits). Also, the SSUTA states police each other for compliance and, while there continues to be room for improvement, SSUTA states have actually found fellow member states out of compliance with the SSUTA on several occasions. While expulsion from the SSUTA is a possible outcome (see SSUTA §808), the goal is to move a state back into compliance with the SSUTA.

In addition, the SSUTA has established a process, and more importantly contracts that member states can use to reimburse Certified Service Providers. These providers assist remote sellers in determining what is taxable and, if taxable, imposing and collecting their taxes. [*See* SSUTA §601.] The SSUTA also has a standardized exemption certificate and a process for sellers to accept that certificate which facilitates sellers making sales to purchasers claiming their purchases are exempt from a destination state's sales tax. Further, the SSUTA establishes time restraints on when states can change their tax rates and make boundary changes to enable sellers to update their systems to collect the tax. In general, the states must provide at least sixty-days' notice and the change must take effect at the beginning of a calendar quarter. [*See* SSUTA §305.] And, finally, the SSUTA is not a static agreement. Rather, member states, consulting with the business community have frequently made reasonable amendments to the SSUTA to address issues a petitioning state or a current SSUTA member state has with a provision of the SSUTA. The SSUTA has a provision that requires it to consult with a Business Advisory Council, which is made up of business

and industry members. [*See* SSUTA §811.] Examples of the SSUTA being amended are the SSUTA states addressing a compliance issue Georgia had with its state and local tax base [*see* SSUTA §302] and the SSUTA was also amended to allow origin sourcing of intrastate sales, which allowed Ohio and Utah to become full member states. [*See* SSUTA §310.1.]

Conclusion

It is promising to see states with local-level sales taxes taking steps to reduce the complexities sellers face to collect and remit taxes in those jurisdictions. Ultimately, these states and the other non-SSUTA states should seriously entertain becoming a full member state to the Agreement. One issue that the SSUTA states must continue to address is engaging the six most populous states (California, Florida, Illinois, New York, Pennsylvania and Texas), which represent 40 percent of U.S. population, to become members of, or be more actively engaged with, the SSUTA. Membership in the SSUTA does not strip a state of its sovereignty, as a state can still choose what it wants to tax within the parameters of the SSUTA definitions (*e.g.*, a state retains its ability to tax or not tax a defined product, known as toggles). Further, increasing the number of SSUTA member states enhances Congress' ability to pass a federal law that grants those states remote seller collection authority.

  TM-WSTR ISSN 1534-1550