



Sales Tax Nexus – The Road to *Wayfair* - Continued

- The United States Supreme Court, as per the 1992 *Quill Corporation v. North Dakota* decision, generally required physical presence for remote sellers in order for a jurisdiction to confer sales tax nexus upon a remote seller
- Among the activities which *Quill* noted suffice for a jurisdiction to confer sales tax nexus included, but are not limited to:



© 2018 Cramer LLP

Sales Tax Nexus – The Road to *Wayfair* (Continued)

- Two factors leading to fiscal pressures upon sales and use tax revenue collections by the jurisdictions:
 - Nature of the Economy - Significantly higher percentage of our budget is on services versus tangible personal property
 - Remote sellers - Significantly higher percentage of our economy is web-driven via remote sellers.

© 2018 Cramer LLP

**The June 21, 2018
Wayfair Decision**



The June 21, 2018 *Wayfair* Decision

- In 2016, South Dakota enacted economic sales tax nexus provisions to confer sales tax nexus upon remote sellers provided:
 - More than \$100,000 in annual sales into South Dakota; or
 - Engage in 200 or more separate transactions for the delivery of goods or services
 - No retroactive application of the South Dakota law until the law's Constitutionality was settled



The June 21, 2018 *Wayfair* Decision (Continued)

- In 2017, the South Dakota Supreme Court ruled that the law violated *Quill* and was thus unconstitutional. Case was appealed to U.S. Supreme Court
- On June 21, 2018, the U.S. Supreme Court, in a 5-4 decision, ruled in favor of the state of South Dakota when it reversed the decades long physical presence requirement of *Quill* and ruled that the economic sales nexus requirements of the South Dakota law were Constitutional
- Court concluded that "...the physical presence rule of *Quill* is unsound and incorrect and the Court's decisions in *Quill*...should be and now are overruled."

© 2018 Cramer LLP

7

The June 21, 2018 *Wayfair* Decision (Continued)

- In overruling the decades long physical presence requirement of *Quill* with respect to both domestic companies and foreign companies with Inbound US Sales, Justice Kennedy noted:

Quill is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing state... Second, *Quill* created rather than solves market distortions... And third, *Quill* imposes the sort of arbitrary formalistic distinction that the Court's modern Commerce Clause precedents disavow.
- The dicta of the majority decision is telling:
 - Streamlined Sales Tax
 - No retroactivity
 - Thresholds are Rational

© 2018 Cramer LLP

8

The June 21, 2018 Wayfair Decision (Continued)

- *Ironic that South Dakota has not implemented Wayfair since case was remanded back to the South Dakota Supreme Court by the United States Supreme Court.*
- *The Supreme Court ruled the physical presence rule of Quill is unsound and incorrect.*
- *The Supreme Court did not opine on whether the law is valid under the Commerce Clause (can't unduly interfere or burden interstate commerce).*

- **Current status –South Dakota Senate**
 - i. 200/Transactions/\$100K Annual Sales threshold remains, but the effective date would be November 1, 2018, and;
 - ii. Marketplace facilitators would be required to obtain sales tax licenses and remit sales tax on behalf of sellers that utilize their services

© 2018 Cramer LLP

The June 21, 2018 Wayfair Decision (Continued)

- What type of Companies does the Wayfair Decision affect?
 - a. Domestic Companies Only
 - b. Domestic & International Companies
 - c. Internet Based Companies Only
 - d. Manufacturers
 - e. Software Companies
 - f. Service Companies
 - g. Healthcare Companies
 - h. All of the Above

© 2018 Cramer LLP

**Economic Nexus;
Legislative Snapshot as of
October 1, 2018**



Post Wayfair; Massachusetts

- TIR 18-8 issued September 17, 2018, permits retroactive application to October 1, 2017 if sales of \$500K AND 200 transactions.
- Massachusetts has already begun registering select remote sellers; with a rebuttable presumption available to them if they did not meet both of the threshold criteria.
- Recall the United States Supreme Court Rationale:
 - a) No Retroactivity
 - b) South Dakota was a streamlined state
 - c) Reasonable thresholds.

© 2018 Osha LLP

15



Post Wayfair; Commonly Asked Questions

Post Wayfair - Commonly Asked Questions

Q: Do the thresholds include wholesales or just sales to end users?

A: Unfortunately, the definitions as to what constitutes revenue for purposes of economic nexus thresholds vary by jurisdictions. Some jurisdictions, such as South Dakota, have authority which clearly reflect the \$100,000 threshold is inclusive of BOTH sales to end users and sales to wholesalers/resellers. We recommend upon reviewing the economic nexus thresholds, review what constitutes revenue for purposes of the economic nexus threshold.

© 2018 Osha LLP

17

Post Wayfair - Commonly Asked Questions - Continued

Q: What are the chances the five states without a sales and use tax (NOMAD; which includes New Hampshire, Oregon, Montana, Alaska, and Delaware), will enact a state sales and use tax?

A: While there has not been recent empirical studies, it is likely that within five (5) years at least one of the NOMAD states may enact a state and local sales and use tax to level the proverbial playing field. Most of the states without a sales tax are low population density, whereas many of the states without a personal income tax constitute high population centers (Texas, Tennessee, Florida, etc...).

© 2018 Cohn LLP

18

Post Wayfair - Commonly Asked Questions - Continued

Q: Are the thresholds for nexus measured by legal entity or is there some type of control group requirement?

A: While historically sales tax nexus rules were applied on a separate company basis, whether the threshold criteria will be applied on a consolidated basis is an area which the states are currently examining and will likely draft applicable regulations.

© 2018 Cohn LLP

19

Post Wayfair - Commonly Asked Questions - Continued

Q: The *Wayfair* decision precluded retroactive application of South Dakota law that was enacted in 2016. What about other jurisdictions with economic nexus laws on the books?

A: While the good news is that a significant majority of the jurisdictions in the approximate two months since the *Wayfair* decision have issued guidance and/or promulgated regulations precluding the retroactive application of *Wayfair*, there are still a few jurisdictions which have not announced a clear policy precluding retroactive application of *Wayfair*.

© 2018 Cohn LLP

20

Post Wayfair - Commonly Asked Questions - Continued

Q: Does the *Wayfair* decision also apply to purely overseas companies (remote foreign sellers) with no physical presence in the US?

A: The *Wayfair* decision applies to all remote sellers (both remote domestic sellers AND remote foreign sellers). Major difference is enforcement mechanisms.

© 2018 Osha LLP

21

Issues for Consideration



Issues for Consideration

Has the Company conducted a sales tax nexus study?

- Traditional Sales Tax Nexus Activities
 - I. Owning or leasing property in a jurisdiction
 - II. Conducting in person activities in a jurisdiction
 - III. Providing in person services within a jurisdiction (repairs, installation)
- Remote sellers should examine their potential exposure in those states that have enacted similar laws prior to the *Wayfair* decision and implement proactive courses of action (e.g., prospective registration and voluntary disclosure agreements).

© 2018 Osha LLP

22

Issues for Consideration

- Upon ascertaining sales tax nexus and calculating potential exposure by reviewing sales apportionment schedule:
 - Prospective sales tax registrations
 - Voluntary Disclosure Agreement (named or anonymous)
 - Generally pay tax and interest for the lookback period; Penalties abated
 - Tax, interest, and penalties for periods prior to the lookback period are "forgiven"
 - Prospective registration
 - Participation in a VDA is generally guaranteed unless: (a) taxpayer received a notice, or (b) taxpayer is currently filing a sales tax return
- Monitor changing state tax laws and revenue department guidance;
- We expect additional jurisdictions to update their economic nexus statutes
- Regardless of whether a taxpayer has the requisite sales tax nexus, collect the applicable exemption certificates

© 2018 Cohn LLP

24

Post *Wayfair*; State Income Tax Considerations



Post *Wayfair*; State Income Tax Considerations

- Potential legislative and judicial challenges to traditional corporate income tax nexus standards
 - Public Law 86-272 still applies, which is codified in 15 United States Code Sections 381-384 does not apply to sales tax. Public Law 86-272 only applies to corporate income tax and provides that a state may not impose a net income tax on businesses that limit their activity in a state to solicitation of orders for sales of tangible personal property.
- Potential migration from pure corporate income tax statutes to gross receipts taxing schemes (Ohio, Washington State)
- Although *Wayfair* addressed whether an out-of-state retailer had an obligation to collect and remit sales/use tax, the constitutional provisions analyzed by the court also apply when evaluating nexus for other types of state taxes (e.g., income tax, franchise tax, and gross receipts tax)

© 2018 Cohn LLP

25



Compliance Requirements and Challenges

- Determining where to file (nexus)
 - The Tax Foundation has stated that in 2014 there was approx. 10,000 sales tax jurisdictions.
- Determining taxability of products and services
 - Keeping up-to-date of all relevant law changes
- Adequate systems to maintain taxability and rates
 - Many companies do not have sophisticated system to handle approximately 10,000 sales tax rates
 - Many companies do not have the technology to manage product taxability
- Return Compliance
 - Monthly, quarterly, semi-annual and annual returns (due dates range from the 10th – 31st)
 - Obtaining the necessary information to prepare the returns (multiple data inputs)
 - Obtaining, reviewing, maintaining and updating exemption certificates
 - Ensuring receiving and managing notifications from all jurisdictions

© 2018 Grant LLP 28

Compliance Requirements and Challenges

- Audits
 - Audit periods generally are 3 to 4 years depending upon the jurisdictions statute of limitations
 - Obtaining documentation
 - May be difficult with system changes
- Knowing when new products, services, or entering new markets occur
 - The Tax Department is usually the last to know

© 2018 Grant LLP 29



Legislative Updates: Marketplace Facilitator Legislation

- A marketplace facilitator is defined as a marketplace that contracts with third party sellers to promote their sale of physical property, digital goods, and services through the marketplace. Common examples of marketplace facilitators are Amazon, eBay, Etsy, etc.
- Marketplace facilitator legislation is a set of laws that shifts the sales tax collection and remittance obligations from a third party seller to the marketplace facilitator.
- The marketplace facilitator will now be responsible to calculate, collect, and remit tax on sales sold by third party sellers for transactions destined to states where marketplace facilitator legislation is enacted.
- States with currently enacted marketplace facilitator legislation: Minnesota, New Jersey, Oklahoma, Rhode Island, Pennsylvania and Washington.
- Arizona has Marketplace facilitator legislation which applies to marketplace providers that otherwise have nexus (Tax Ruling September 20, 2016).
- States for which marketplace facilitators could fall under remote seller definition: Louisiana and Massachusetts.
- States with marketplace legislation coming into effect: Alabama (1/1/19); Connecticut (12/1/2018); Iowa (1/1/2019); Rhode Island (1/15/18) and South Dakota (3/1/19).

© 2018 Cohn LLP 21

**Legislative Updates – Marketplace Facilitator Legislation
Minnesota**

- Marketplace facilitator must register and begin collecting Minnesota sales tax on behalf of remote sellers using their marketplace no later than October 1, 2018.
- A Marketplace facilitator must collect and remit Minnesota sales tax on all taxable sales into Minnesota made by a remote seller through the marketplace unless any of the following are true:
 - The remote seller makes taxable retail sales into Minnesota through the marketplace of less than \$10,000 in a 12-month period ending on the most recently completed calendar quarter.
 - The remote seller elects to register and collect Minnesota sales tax directly and does not enter into an agreement with the marketplace facilitator for the marketplace to collect and remit Minnesota sales tax on behalf of the remote seller.
 - The marketplace facilitator does not maintain a place of business in Minnesota.
- A seller physically present in Minnesota should already be collecting and remitting Minnesota sales tax on all taxable sales into Minnesota including sales made by the seller through a marketplace.
- Minnesota sellers should continue to collect and remit unless the Minnesota seller enters into an agreement with the marketplace facilitator for the marketplace to collect and remit Minnesota sales tax on behalf of the Minnesota seller.

© 2018 Cohn LLP 22

**Legislative Updates – Marketplace Facilitator Legislation
New Jersey**

- Beginning November 1, 2018, P.L. 2018, c. 132 imposes Sales Tax registration, collection, and remittance requirements on marketplace facilitators.
- A marketplace facilitator is required to collect and remit Sales Tax on sales made through any physical or electronic marketplace owned, operated, or controlled by a marketplace facilitator, even if the marketplace seller is registered with New Jersey for the collection and remittance of Sales Tax. However, a marketplace facilitator and marketplace seller are permitted to enter into an agreement with each other regarding the collection and remittance of Sales Tax.
- Upon written application and for good cause shown, the Division may temporarily suspend or delay the registration, collection, and remittance obligations of a marketplace facilitator for a period not to exceed 180 days. See TB-83 (October 25, 2018) for more information on the requirements.
- Marketplace facilitators that are already registered to collect Sales Tax in New Jersey will need to establish a sub-account to report and remit the tax collected for marketplace sellers

© 2018 Cramer LLP

33

**Legislative Updates – Marketplace Facilitator Legislation
Oklahoma**

- On or before July 1, 2018, and on or before June 1 of each calendar year thereafter, beginning June 1, 2019, a remote seller, a marketplace facilitator or a referrer that had aggregate sales of tangible personal property within this state or delivered to locations within this state subject to worth at least \$10,000.00 during the immediately preceding twelve-calendar-month period shall file an election with the Tax Commission to collect and remit the tax imposed under Section 1354 or 1402 of Title 68 of the Oklahoma Statutes or to comply with the notice and reporting requirements.
- A remote seller, a marketplace facilitator or a referrer who does not submit an election (to collect or comply with the notice and reporting requirements) shall be deemed to have elected to comply with the notice and reporting requirements.
- The Commission shall assess a penalty in the amount \$20,000.00 or 20% of total sales in Oklahoma during the previous 12 months, whichever is less, against a remote seller, a marketplace facilitator or a referrer that makes an election to comply with the notice and reporting requirements, or is deemed to have made such election and fails to comply with the requirements. The penalty shall be assessed separately for each violation but may only be assessed once in a calendar year.

© 2018 Cramer LLP

34

**Legislative Updates – Marketplace Facilitator Legislation
Pennsylvania**

- If you are a marketplace facilitator, you must provide notice to the marketplace sellers using your forum that states whether you elected to collect and remit Pennsylvania sales tax on their behalf, and on what date, or instead elected to comply with Pennsylvania's notice and reporting requirements. The notice should be provided no later than the time of election.
- A marketplace facilitator that does not maintain a place of business in Pennsylvania and makes or facilitates taxable sales to Pennsylvania customers totaling \$10,000 or more in the previous calendar year must elect one of two options by March 1, 2018:
 - Option 1 - Register to collect and remit Pennsylvania sales tax.
 - Option 2 - Comply with Pennsylvania's notice and reporting requirements.
- An election made on or before March 1, 2018 will be in effect through June 30, 2019.
- The marketplace facilitator must complete REV-1830 to make the election.
- An election to comply with the notice and reporting requirements may be changed at any time to an election to collect and remit sales tax.
- Failure to file an election will be treated by the Department as an election to comply with the notice and reporting requirements.
- Both options are effective as of April 1, 2018.

© 2018 Cramer LLP

35

**Legislative Updates – Marketplace Facilitator Legislation
Pennsylvania**

- Pennsylvania reporting requirements:
 - Post a notice on its forum.
 - Provide a written notice on all invoices, order forms, sales receipts or similar documents, whether in paper or electronic form, to each purchaser at the time of each sale.
 - Provide an annual report to the purchaser.
 - Provide an annual report to the Pennsylvania Department of Revenue.
- Each failure to comply with the notice and reporting requirements can result in a penalty of \$20,000 per violation, per year, or 20 percent of total Pennsylvania sales during the previous 12 months, whichever is less.

© 2018 Cramer LLP

26

**Legislative Updates – Marketplace Facilitator Legislation
Washington**

- Marketplace facilitator must register and begin collecting sales tax on behalf of remote sellers using their marketplace no later than October 1, 2018.
- Marketplace facilitators making sales to Washington consumers (including sales made on behalf of marketplace sellers) are required to register and follow tax collection laws if you meet either of two thresholds.
 - Threshold one: exceeds \$100,000 in annual gross retail sales, or 200 or more annual transactions
 - Threshold two: \$10,000 - \$100,000 in annual gross retail sales
 - Seller may elect to register and collect the sales tax; or
 - Follow use tax notice and reporting requirements.
 - Once the \$100,000 retail sale or 200 or more transaction thresholds are exceeded, a sales tax registration/filing is required.
- When determining if a facilitator meets either threshold, the total retail sales for the facilitator include:
 - Their own retail sales; and
 - The retail sales of all their marketplace sellers.

© 2018 Cramer LLP

27

**Legislative Updates – Marketplace Facilitator Legislation
Washington**

- Marketplace facilitators should report sales/use tax collected on behalf of marketplace sellers using the secure online portal. The facilitator will report the tax collected for marketplace sellers under a different Unified Business Identification number than the one used to report their own sales.
- Report Washington sales of marketplace sellers under the retailing Business and Occupation (B&O) tax classification and claim a deduction for "Other" for these sales. The explanation for the "Other" deduction should be "Third-Party Sales." Note that marketplace facilitators do not owe retailing B&O tax on these sales.
- Marketplace facilitators generally earn commissions from marketplace sellers when facilitating a sale. If a marketplace facilitator has economic nexus (B&O) with Washington, its commission income is subject to B&O tax under the Service and Other Activities classification for facilitated sales that are delivered or sourced to Washington.

© 2018 Cramer LLP

28

Legislative Updates – Tennessee


- **Exemption for Veterans with Service-Connected Disabilities**
 - **Public Chapter 541** creates exemptions from sales tax, registration fee, and local motor vehicle privilege tax, for any motor vehicle sold to a veteran or service member who has a service-connected disability and who is eligible for a United States department of Veterans Affairs automobile grant under the Disabled Veterans' and Servicemen's Automobile Assistance Act of 1970. The law limits the sales and use tax exemption to the portion of the purchase price that is in excess of the amount of the grant received.
 - Effective Date: March 5, 2018
- **Industrial Machinery Exemption Clarification**
 - **Public Chapter 963** establishes that any entity qualifying for the sales and use tax exemption for spallation neutron source facilities is not eligible for a sales and use tax exemption with regard to any industrial machinery that is used in the operation of a qualified data center or used primarily for research and development. This limitation does not apply to a leadership computing facility that is funded by the United States government, or instrumentality thereof, not funded with any state funds, and located at a national laboratory.
 - Effective Date: May 15, 2018

© 2018 Crowe LLP 28


Legislative Updates – Georgia

- **New Nonprofit Organization Exemption Created (May 11, 2018)**
 - A temporary, refundable sales and use tax exemption is created for sales or uses of noncommercial written materials or mailings by §501(c)(3) organizations. To qualify, an organization must:
 - be located in Georgia; and
 - provide the materials or mailings to charity supporters for educational, charitable, religious, or fundraising purposes.
 - The exemption applies from July 1, 2018, until July 1, 2021. Qualifying organizations must pay sales and use tax on the materials or mailings and then file a tax refund claim. Tax refunds will not include interest.
- **Additional High-Technology Exemption Created (Jun. 1, 2018)**
 - Georgia legislation adds a temporary state sales and use tax exemption for high-technology data centers. The exemption applies to transactions occurring on or after July 1, 2018, and through December 31, 2028. It applies to qualifying sales and leases of high-technology data center equipment to be incorporated or used in a high-technology data center. The existing exemption for high-technology company purchases and leases of computer equipment exceeding \$15 million in a calendar year continues to apply.

© 2018 Crowe LLP 43



Questions and Thank You



Kimberly B. Still
 State and Local Tax Services
 +1 404 442 1633
 Kimberly.still@crowe.com

The information in this document is for informational purposes only and does not constitute an offer of any financial product or service. The information is provided for general informational purposes only and is not intended to be used as a basis for investment decisions. The information is provided for general informational purposes only and is not intended to be used as a basis for investment decisions. © 2018 Crowe LLP

Disclaimer

The information provided herein is educational in nature and is based on authorities that are subject to change. You should contact your tax adviser regarding application of the information provided to your specific facts and circumstances.

© 2018 CIMA LLP

42
