Sales Tax Collection After Wayfair:
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Did States Get What They Need?
Background

The 1992 Quill Decision

and

The Growth of E-Commerce
The Growth of eCommerce

U.S. **ECOMMERCE** VS. **TOTAL RETAIL SALES**

Source: Economic Research Division, Federal Reserve Bank of St. Louis
The Growth of e-Commerce

• Amazon Marketplace is now twice as large, and growing twice as fast, as Amazon’s own sales
• 2.5 million total sellers on the Marketplace worldwide
• 20,000 sellers with over $1 million in sales worldwide
• Walmart and others are working to expand their own marketplaces

Source: Marketplacepulse.com
Pennsylvania Compliance Initiatives
Pennsylvania Compliance Initiatives – Use Tax

- November 2005 to present – business use tax voluntary compliance initiative
- Ongoing transactional use tax program (including US Customs and audit referrals)
- Inclusion of consumer use tax reporting line on PA-40, the individual income tax return
Pennsylvania Compliance Initiative – Online Retailers

- December 1, 2011 – Sales Tax Bulletin 2011-01

- September 1, 2012 – Amazon begins to collect PA sales tax on its direct sales / Many remote sellers follow suit through 2017

- Thousands of online retailers contacted

- Many large online retailers registered to collect PA sales tax
Pennsylvania Compliance Initiative – Marketplace Sales

• October 30, 2017 – Act 43 of 2017 establishes Marketplaces Sales provisions

• Marketplace facilitators and online retailers with annual PA taxable sales over $10,000 had to *elect* to collect PA sales tax or comply with use tax notice and reporting requirements

• Marketplace Sales is not economic nexus
SUT - REMITTANCES FROM E-COMMERCE ENTITIES

SUT REMITTANCES ($M)

QUARTER

Wayfair - The Court noted:

• “Several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce” in South Dakota’s law
  • Safe harbor or threshold level of in-state sales activity, to protect small merchants
  • Prospective application
  • Member of the Streamline Sales and Use Tax Agreement (SSUTA), designed to “reduce administrative and compliance costs”
Wayfair: The Court noted (continued):

These features of the law prevented discrimination on businesses whose virtual presence in a state was limited.
Wayfair: The Pennsylvania Approach
The Pennsylvania Department of Revenue *Initial* solution (See Sales and Use Tax Bulletin 2019-01):

$100K gross sales in prior calendar year

7/1/2019 effective date for economic presence sellers to begin collecting and remitting PA sales tax

And simplification

- Already central collection of sales tax with one base and one rate
- Contract with Certified Service Providers (CSPs) to assist economic presence sellers
Wayfair: The Pennsylvania Approach
Act 13 of 2019
Wayfair: The Pennsylvania Approach  
Act 13 of 2019

• Effective July 1, 2019 Pennsylvania’s definition of “maintaining a place of business” is expanded to include economic presence

• Businesses with economic presence must register to collect and remit Pennsylvania sales tax

• Economic presence is defined as making annual gross sales to Pennsylvania customers of at least $100,000

• No transaction threshold
Wayfair: The Pennsylvania Approach
Act 13 of 2019

CALCULATING GROSS SALES

• Includes taxable and nontaxable sales made on all channels.

• Measured by Calendar year
  • Calendar year 2018 – July 1, 2019 through March 31, 2020
  • Calendar Year 2019 – April 1, 2020 through March 31, 2021 (Same for subsequent years)
The Pennsylvania Approach
Act 13 of 2019 and CSP Initiative

- The Act applies prospectively
- Leveraging the certification of Streamline Sales Tax Governing Board (SSTBG), procure services of Certified Service Providers (CSPs)
  - Provide a taxability matrix
  - Working with a CSP can relieve the seller of certain liabilities upon audit.
The PA CSP Composite Return

• Each CSP will file a single composite return and payment per month
• Structure is analogous to marketplace platforms filing one return for all marketplace sellers
• Each CSP will also upload to DOR a file showing detail by seller with dollar amounts included in the composite each month for analysis and tracking
• Removes sellers from state processes of registration and account maintenance
• Provides significant simplification for small remote sellers
Pennsylvania Certified Service Providers

Client Responsibilities

• Provide accurate information about products at the transactional level

• Provide an annual attestation that they have no physical presence in Pennsylvania. The DOR Attestation form is provided by CSP to the client.
Pennsylvania Certified Service Providers

• **AccurateTax** – [https://www.accuratetax.com](https://www.accuratetax.com)
• **Avalara** – [https://www.avalara.com](https://www.avalara.com)
• **Sovos** – [https://sovos.com](https://sovos.com)
• **TaxCloud** – [https://TaxCloud.com](https://TaxCloud.com)
Pennsylvania Certified Service Providers

Taxpayers *not eligible* to use a CSP:

- Physical presence in Pennsylvania
Pennsylvania Certified Service Providers

Taxpayers *not eligible* to use a CSP:

- Physical presence in Pennsylvania
- Compliance issues
Filing Direct– No CSP

Taxpayers with economic presence may choose to file directly with the department

- Must obtain a sales tax license
- Must charge, collect, remit PA sales tax and file returns
Filing Direct – No CSP

Taxpayers with economic presence may choose to file directly with the department:

- Must obtain a sales tax license
- Must charge, collect, remit PA sales tax and file returns
- Must determine taxability of items sold to PA customers
**Pennsylvania Act 13 of 2019**

**Wayfair Supreme Court Decision**
- Safe harbor or threshold level of in-state sales activity, to protect small merchants
- Prospective application
- Provides resource designed to “reduce administrative and compliance costs”

**Pennsylvania Economic Presence**
- $100,000 gross annual PA sales – no transaction threshold
- Begins July 1, 2019 – No look back period
- Pennsylvania has contracted with SSTGB approved Certified Service Providers to assist out of states businesses with sales tax administration at reduced costs
What about Act 43 of 2017?

• Taxpayers with economic presence no longer have an election to collect sales tax or comply with notice and reporting requirements. Taxpayers *must* collect sales tax if they make taxable sales and have economic presence.

• Taxpayers with no physical or economic presence in Pennsylvania have no sales tax obligations.
The National Sales Tax Landscape

This map shows the states that have enabled economic nexus or notice & report laws.

* AK, DE, MT, NH and OR have no sales tax

Updated July 12, 2019

Source: blog.TaxJar.com
What Remains?: Unreachable sales tax

• “Even After Wayfair, Billions in Sales Tax Will Remain Uncollected” by Liz Malm and Joe Crosby, April 2019

• Provides an estimate for sellers who are:
  • Below $1 million in total U.S. sales
  • Selling outside of any marketplace
  • In non-SSUTA states
  • In 2017
What Remains?: Unreachable sales tax (2)

- Estimate of $3.8 billion total unreachable sales tax under those assumptions
- PA estimate is $245 million in unreachable tax revenue
  - May be overstated, so TIFWIW
- Suggests that a substantial amount of unreachable sales tax remains
What Remains?: States continue to have strong reasons to work toward simplification

• To protect the gains we have made in the Wayfair case
• To make it feasible for additional small vendors to make a business decision to collect sales tax
• These small sellers are the new “voluntary” sellers post-Wayfair
What Remains?: Foreign Web Sites

• Present special enforcement challenges and issues
• May have assets in US banks, inventory storage, etc. that can be attached
• But to the extent that foreign sellers reach the US market through a U.S. marketplace, collection may not be a problem
Summary and Wrap-up

• After agitating for change for 25 years post-Quill, states are now in the best position ever for narrowing the tax gap significantly.

• There is both the “push” from new jurisprudence, and the “pull” of competition driving sellers toward marketplaces who can handle tax collection duties.

• Non-SSUTA states can leverage the CSPs to satisfy the Court’s concern about excess burden without adopting the uniform definitions.

• Even after these gains, there is still a lot of unreachable sales tax.

• States should continue to work to simplify sales tax compliance to protect the gains already made, and make it easier for sellers to agree to collect.