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SUTHERLAND SALT SHAKER

Shaking things up in state and local tax.

Simon Says! Indiana Must Force Amazon to Collect Sales Tax

In an unusual twist in the ongoing debate over sales tax collection by e-commerce retailers, Simon Property Group, L.P. (Simon), the largest operator of U.S. shopping malls, filed a lawsuit on November 3, 2011, seeking a writ of mandate aimed directly at Amazon.com to force the Indiana Department of Revenue (Department) to require Amazon to collect and remit Indiana sales tax. The complaint alleges that the Department acted in an "illegal and unconstitutional" manner for failing to "comply with their statutory duties" to require Amazon.com to collect Indiana sales tax. *State of Indiana ex. Rel. Simon Property Group, L.P. v. Indiana Dep't of Revenue and John Eckart, Comm'r of the Indiana Dep't of Revenue*, 49D13 11 11 PL 042652 (Ind. Super. Ct. Marion County Nov. 3, 2011). The complaint further states that the Department's actions "amount to an illegal and unconstitutional subsidy to Amazon." Thus, Simon was seeking to compel the Department to require remote e-commerce retailers to collect sales tax even though they are protected from sales tax collection and remittance obligations under the Commerce Clause of the United States Constitution.

Indiana law provides that "[a]n action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer, or person to compel the performance of any: (1) act that the law specifically requires; or (2) duty resulting from any office, trust, or station." Ind. Code § 34-27-3-1. Although in many states such a lawsuit will survive a standing challenge only if the plaintiff alleges special injury distinct from any public harm, the Indiana Supreme Court has recognized the legitimacy of such actions for the purpose of enforcing a public right rather than any special private rights. *See State ex. rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003). However, the court has also held that such a mandate can survive only if the duty of the challenged officer is not discretionary—the Department is required to force Amazon.com to collect. *State ex rel. Woodford v. Marion Super. Ct.*, 655 N.E.2d 63 (Ind. 1995).

Simon alleged in the complaint that Amazon Indiana, an Amazon subsidiary, operates distribution centers in Indiana that ships orders from Amazon.com to Indiana residents, and as a result Amazon.com is "engaged in business" under Indiana law. To establish both the specific harm to Simon and its brick-and-mortar lessees, as well as a public harm to the population at large, Simon referenced an academic study that found that ndiana "will experience a total of $195.3 million in lost sales and use tax revenue in 2012 from electronic remote sales." That lost revenue represents, according to the complaint, $2.79 billion in remote sales. Simon further asserted a public harm to the Indiana economy in the form of lost jobs and declining real estate values.

Since Simon filed the complaint, Amazon.com entered into an agreement with Indiana to begin collecting sales and use tax no later than January 1, 2014. As a result, Simon announced that it would dismiss its complaint against Indiana, but emphasized the need for federal legislation to resolve the issue nationwide.

SUTHERLAND

In This Issue

SALT Pet(s) of the Month 2

New York, New York 4

California Screaming 4

Policy Wonk 7

The SALT Shaker is now a compilation of recent posts from Sutherland SALT Online.

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Seventh Circuit Not Amused by Chicago's Amusement Tax

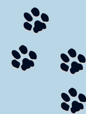
In an interesting procedural case, and important decision for online intermediaries, the Seventh Circuit Court of Appeals held that the City of Chicago may not require Internet intermediaries to collect and remit the City's amusement tax on the difference between the original ticket price and resale price of tickets sold online. *City of Chicago, Illinois v. StubHub!, Inc.*, Dkt. No. 09-3432 (7th Cir. Nov. 23, 2011); *City of Chicago, Illinois v. eBay, Inc.*, Dkt. No. 10-1144 (7th Cir. Nov. 23, 2011).

Beginning in 1991, Illinois authorized ticket brokers to resell their tickets at a premium price, provided the broker registered with the State and collected local taxes. The City of Chicago took advantage of this opportunity to tax the incremental price of resold tickets until Illinois amended its ticket scalping laws in 2005. Following the 2005 amendments, an "Internet auction listing service" was relieved of the mandatory collection of local taxes, provided it met certain registration requirements and published a written notice on its website "inform[ing] the ticket reseller of the ticket reseller's potential legal obligation to pay any applicable local amusement tax." 720 ILCS 375/1.5(c).

In 2006, the City of Chicago amended its amusement tax ordinance to require "resellers" and "reseller's agents" to collect and remit its amusement tax. The City's amended definition was broad enough to capture "Internet auction listing services" and obligate them to collect and remit the City's amusement tax. Shortly thereafter, the City of Chicago filed suit against StubHub! alleging that it was liable for collecting the City's amusement tax. StubHub! removed the action to federal district court based on diversity jurisdiction. Because the City—not the taxpayer—brought the suit, the Tax Injunction Act did not bar federal court jurisdiction. The district court dismissed the case, stating that the City lacked the authority to impose the tax under the Illinois home rule.

On appeal to the Seventh Circuit, the court consolidated Chicago's parallel suits against StubHub! and eBay after both district court judges rejected the contention the two intermediaries were obligated to collect the amusement tax. Recognizing that resolution of the disputes hinged on unanswered questions of state law, the court certified questions to the Illinois Supreme Court to determine whether municipalities may require electronic

continued on page 3



SALT PET(S) OF THE MONTH

Calvin and Maggie

Meet Calvin and Maggie, the playful new kittens of Sutherland Client & Practice Development Manager Katie O'Brien and her boyfriend, Scott. It has been just five days since the four-month-old pair was adopted from the Atlanta Humane Society, but they are already Sutherland SALT's biggest fans: while Mom and Dad are away at work, the kittens' favorite napping spot is on Katie's fuzzy Sutherland SALT blanket.

Calvin is quite the cuddly cat, preferring to nap every moment he can in Scott or Katie's lap. Maggie also enjoys her naps, but she truly loves darting around, determined to capture the ever-elusive red dot of the laser pointer.

Katie and Scott could not be more in love with their new "kids" but hope the coming months bring fewer 4:00 a.m. wakeups by the furry pair purring loudly and batting Mom and Dad's faces, letting them know it is time to play!

SALT Pet of the Month: It's Your Turn!!

In response to many requests, the Sutherland SALT practice invites you to submit your pet (or pets) as candidates for SALT Pet of the Month. Please send us a short description of why your pet is worthy of such an honor, along with a picture or two. Submissions should be directed to Lia Dorsey at lia.dorsey@sutherland.com.

continued from page 2

intermediaries to collect and remit amusement taxes on resold tickets. The Illinois Supreme Court responded in the negative, stating that Illinois law does not allow Chicago to collect its tax from the auction sites. *Chicago v. StubHub!, Inc.*, 2011 IL 111127 (Oct. 6, 2011). Interestingly, the court noted that Chicago was free to define terms within its municipal code so as to include Internet auction listing services within its definition of "reseller's agents." But the Illinois Supreme Court declared that the City overstepped its home rule authority by attempting to impose an obligation that the state had clearly relieved under the statute in 2005. Consistent with the Illinois Supreme Court's answer, the Seventh Circuit held that the City was not allowed to collect its tax from the auction sites.

The decision serves as an important reminder to localities that their own ordinances may not contradict state policy goals.

New Illinois Tax Incentive Bill Ill-Annoys Many Out-of-State Taxpayers

Illinois enacted legislation on December 16, 2011, that includes several new tax provisions, some of which benefit only Illinois-based companies. SB397 gives two Illinois taxpayers—CME Group and Sears Holdings—a tax incentive to stay in the state after Illinois's recent significant tax rate increases. SB397 also extends and broadens the Illinois research and development tax credit for five years, extends the Illinois Economic Development for a Growing Economy (EDGE) job creation program, and restores the corporate income tax operating loss deduction.

One of the most contentious aspects of SB397 is the revised sourcing provision for federally regulated exchanges. Federally regulated exchanges include securities and commodities exchanges and clearing agencies. The Illinois legislature crafted an elective regime that allows exchanges to source receipts using an alternate methodology. This provision includes two unique, potentially problematic aspects. First, the provision imposes a fixed percentage to source electronic trading receipts. The fixed percentage for tax years ending on or after December 31, 2013, is 27.54%. This fixed percentage appears to be arbitrarily determined, and is at a level that will likely benefit only exchanges based in Illinois. Most out-of-state exchanges likely have an Illinois apportionment factor much lower than 27.54%, while most in-state exchanges likely have an Illinois apportionment factor much higher than 27.54%. Second, the provision effectively eliminates the throw-out rule that applies to services. Some may question whether eliminating the often problematic throw-out rule only for electing exchanges—which will generally only be in-state exchanges—raises discrimination concerns.

On the other hand, most taxpayers are happy to hear that SB397 finally creates an independent tax tribunal. Beginning July 1, 2013, the Illinois Independent Tax Tribunal Board will assume responsibility for protests of all taxes administered by the Department of Revenue.

"Other Sales in Florida": COP Sourcing in Regulation, Market in Application

A recent Florida Department of Revenue Technical Assistance Advisement (TAA) applies costs-of-performance (COP) sourcing for corporate income tax purposes in a manner that is more akin to market sourcing. Tech. Asst. Adv. 11C1-008 (Sept. 15, 2011).

The TAA applied to receipts from the Taxpayer's two predominant revenue streams: receipts from subscription programming; and receipts from advertising sold to distributors. The Taxpayer provided content directly to distributors and had no direct contact with its customers' customers (i.e., retail subscribers/customers). The Department of Revenue stated that the income-producing activity is the Taxpayer's delivery of programming content to distributors and that such delivery constitutes performance. Thus, the Department found that subscription revenue would be sourced to Florida when the distributor is located in Florida. The Taxpayer's receipts from subscription services provided to out-of-state distributors is not sourced to Florida, even if that distributor provided the content to Florida residents. Interestingly, there is no mention of the location of the Taxpayer's activities or costs associated with producing the programming content, which is typically the focus of a COP analysis. The TAA further states that the Taxpayer cannot use the special industry regulation applicable to broadcasters because the Taxpayer is not in direct contact with individual subscribers.

As for the Taxpayer's advertising revenue, the Department ruled that it should be sourced to the location of the advertiser. The TAA states that "although activities related to the production of income . . . occur outside of Florida (such as the gathering . . . and processing of all necessary information to develop and produce the advertisements), those activities cannot rightly be called income producing activity."

This TAA demonstrates the significant non-uniformity associated with the application of costs-of-performance sourcing.

NEW YORK, NEW YORK

The Empire State Says In-State Fulfillment Services Do Not Spoil 86-272 Protection

The New York State Department of Taxation and Finance issued an advisory opinion concluding that the use of third-party fulfillment services located in the state does not cause a taxpayer to lose its Public Law 86-272 protection where the taxpayer's only other activity in the state is sales representatives soliciting orders. TSB-A-11(10)C (Nov. 1, 2011).

The taxpayer sells corporate gifts and awards, and maintains manufacturing facilities and inventory warehouse facilities outside New York state. The taxpayer also sells gifts acquired from third-party vendors, some of which are located in New York. The taxpayer sells its products through sales representatives throughout the country. When the taxpayer sells a gift produced by a third-party vendor, the vendor ships the gift to the recipient directly. The taxpayer petitioned the state to determine whether its business activities in New York were covered by P.L. 86-272 so that it would not be subject to New York corporate franchise tax.

The Department stated that whether the taxpayer was subject to the corporate franchise tax depended on whether it was doing business in New York. New York regulations implement P.L. 86-272, under which a foreign corporation is exempt from the Article 9-A corporate franchise tax if the only activity of its employees in the state is the solicitation of orders of tangible personal property, and the orders are sent out of state for approval and shipped or delivered from a location outside the state.

The shipment of some of the goods directly from New York vendors to the taxpayer's customers in New York was arguably outside the protections of P.L. 86-272 as shipments from within New York. However, the Department explained that New York tax law specifically provides that the use of "fulfillment services" within New York does not constitute doing business in New York. Because the use of the third-party vendors in New York to ship items to customers was considered a fulfillment service and exempt from tax, the Department concluded that the use of the services would not disqualify the taxpayer from P.L. 86-272 protection.

CALIFORNIA SCREAMING

Here's Your California Sales Tax "Deal of the Day"

The California State Board of Equalization (BOE) recently provided guidance regarding the application of sales and use tax to purchases of tangible property from retailers using certificates such as Groupon or LivingSocial coupons. *Special Notice L-297, California State Board of Equalization* (Nov. 2011). In particular, the BOE addressed transactions in which retailers contract with Internet-based third parties to issue to retail customers "deal-of-the-day instruments" (DDI) that are redeemable to purchase tangible property at a discount from those retailers.

The BOE advised in a special notice that the sale of a DDI is not a taxable transaction because the DDI is treated as evidence of an intangible right to receive tangible personal property at a later date. However, when a customer subsequently purchases tangible property from the retailer and pays in whole or part with a third party certificate, the sales tax applies to the amount the customer paid for the DDI plus any other consideration paid to the retailer at the time of purchasing the tangible property.

By applying sales tax only to the sum of the consideration paid for the DDI and the tangible property, the BOE has, in fact, opted to treat these certificates as reducing the tangible property's purchase price. In other words, the coupons are deemed to be the equivalent of "cash discounts" issued by the retailers themselves. California's position is significantly different from other states where the DDI is not treated as a reduction of the property's sale price, and the coupon's price discount is disregarded for sales tax purposes. *See, e.g., Massachusetts's Working Draft Directive 11-XX: Application of Sales Tax to Sales and Redemption of Third Party Coupons* (Sept. 16, 2011) (providing that sales and use tax is applied on the coupon's entire face value plus any additional consideration paid to the retailer).

From *Finnigan* to DISAs, California Franchise Tax Board Decides to Begin Formal Rulemaking

On December 1, 2011, the Franchise Tax Board (FTB) decided to begin a formal regulatory process on numerous proposed regulations¸ including Proposed Regulation 25106.5, implementing the *Finnigan* Rule, codified in Cal. Rev. & Tax. Code § 25135(c); and Proposed Regulation 25106.5-1, modifying the rules governing Deferred Intercompany Stock Accounts (DISAs). The FTB staff's request to begin a formal rulemaking process on these proposed regulations comes after numerous interested parties meetings in which stakeholders provided feedback to the FTB regarding the scope and language of necessary regulatory guidance.

The interested parties process surrounding Proposed Regulation 25106.5 (*Finnigan* Rule) did not generate debate. However, Proposed Regulation 25106.5-1 attracted debate regarding the

continued on page 5

continued from page 4

extent to which California's DISA rules should conform to the federal Excess Loss Account (ELA) regime. The federal ELA provisions allow gain from an intercompany distribution in excess of basis to be deferred leading to the creation of an ELA. The distributee may make a subsequent capital contribution to the distributor to eliminate the ELA.

Similarly, Proposed Regulation 25106.5-1 allows a subsequent capital contribution to cure a California DISA. However, the FTB has declined to agree that a liquidation can cure a DISA to the same extent that it can cure an ELA under the federal consolidated return rules. Hopefully, these issues and others will be resolved in the formal regulatory process that is expected to begin soon.

Rules Swallow the TTA Exemption: California State Board of Equalization Issues Internal Guidance on *Nortel*

On November 7, 2011, the California State Board of Equalization's (SBE) Tax Policy Division issued an internal memo (Memo) to its Sales and Use Tax Department employees regarding the application of the California Court of Appeal's decision in *Nortel Networks, Inc. v. State Bd. of Equalization,* 191 Cal. App. 4th 1259, 1278 (2011). In *Nortel*, the court addressed the breadth of the California Technology Transfer Agreement (TTA) statutes, which exempt from sales tax intellectual property transferred with tangible personal property (TPP) pursuant to a TTA. Cal. Tax & Rev. Code §§ 6011, 6012. The California Court of Appeal held that a TTA could involve either a transfer of a patent or of a copyright or both. The court also made clear that the use of a patented process qualifies as a TTA even if the user did not sell a tangible product. Specifically, the court found that "[a] licensing agreement is exempt from sales tax if it is a TTA. An agreement is a TTA if (1) the holder of a patent or copyright assigns or licenses to another person 'the right to make and sell a product' that is subject to the patent or copyright interest, or (2) the holder of a patent assigns or licenses 'a process' that is subject to the patent." *Nortel* at 1273. Moreover, the court held that the licensing agreements were exempt from California sales tax even though the agreements did not expressly reference a patent or copyright. *Id.* at 1276, 1278.

After *Nortel*, the SBE amended its Regulation 1507 to delete a sentence that disallowed a TTA exemption for prewritten computer programs. Apart from the regulatory change, the November 7 memo provides the most detailed guidance to date regarding the application of *Nortel* to software transactions and the ability to establish a right to a refund under the TTA statutes. To determine whether a TTA exemption applies to a software transaction, the SBE suggests that SBE staff first determine whether the sale of the non-custom software on tangible storage media involve a TTA. The Memo states that a TTA is a written agreement that either explicitly or implicitly provides the purchaser with the right to "copy software onto a hard drive, run the software on a computer or other special purpose digital machine, and/or make archive copies of the software." Memo at 3. In addition, the SBE explains that the retailer must be able to provide documentation that it assigned or licensed a patent or copyright interest to the purchaser (establish that it is the holder of the transferred patent or copyright interest). *Id.* The requirement that the TTA be in writing diverges from the statutory language, which requires merely that the TTA be an agreement, without specifying that the agreement be written.

Once the SBE concludes that the transaction is related to a TTA, it must determine the value of the TPP transferred to calculate the amount of sales tax owed on the sale or lease of the TPP. Thus, the SBE must analyze whether the TTA separately states a reasonable price (approximating fair market value of software in tangible form on the storage media) for the TPP. If so, sales tax is applied to the separately stated price. If the TTA does not separately state a reasonable price for the TPP, then the price at which the TPP has been sold or leased to third parties provides the amount to which sales tax is applied. This analysis presumes the tangible software is sold to third parties without any patent or copyright interests. If the SBE cannot establish the value of the TPP by looking at a separately stated price in the TTA or the price at which the TPP was sold or leased to third parties, the value of the TPP is deemed to be equal to 200 percent of the cost of materials and labor used to produce the TPP. *Id.* at 4. In an incredible and unsupported turn of events, the SBE opines that the cost of materials and labor "includes software development costs (mostly subcontract or employee labor costs), including the costs of designing, developing, and testing the software, but excluding any costs directly incurred in obtaining copyrights or patents on the software (such as filing fees and attorneys' fees.)" *Id.* at 5. This position seems to simply attempt to undo the TTA exemption by taking the position that the value of the taxable TPP includes the cost of the software that should be exempt!

The SBE's guidance regarding the value of TPP transferred pursuant to a TTA is inconsistent with the TTA statutes, which exclude from the sales or purchase price the amount charged for intangible property and which base sales tax exclusively upon the value of the TPP transferred. Cal. Tax & Rev. Code §§ 6011, 6012. Electronically delivered software is not taxable as tangible personal property under 18 Cal. Code Regs. 1502(f)(1)(d). Rather, tax applies only to prewritten computer programs transferred on storage media or coding sheets to the extent they are not subject to exemption under the TTA statutes. Thus, TPP subject to valuation should be limited to the storage media transferred, not the software contained on the storage media. To include all software development costs except filing fees and attorney's fees incurred to obtain the patent or copyright interest in the value of TPP subject to tax would improperly subject intangible property to sales tax and the taxable exception would swallow the exemption rule.

The SBE staff is conducting a study to determine whether using an elective percentage of the TTA's total sales price would be feasible for calculating the value of the TPP in lieu of the 200 percent calculation. *Id.* Despite the ongoing study, the SBE has directed districts to process audits, petitions, and claims for refunds without further delay. *Id.*

California Franchise Tax Board Decides Fate of Proposed Market Sourcing Regulation

On December 1, 2011, the California Franchise Tax Board (FTB) approved Proposed Regulation 25136-2, which implements a market rule for sourcing receipts from sales of services and intangibles for those taxpayers electing a single sales factor apportionment formula. The Proposed Regulation now moves to the Office of Administrative Law to be finalized. The FTB's decision follows a nine-month interested parties process and a regulatory process that began in June 2011.

Proposed Regulation 25136-2 applies a series of cascading rules, establishing separate rules for receipts from: (1) sales of services to individual customers; (2) sales of services to businesses; (3) complete sales of intangibles; and (4) the licensing, leasing, rental, or other use of intangibles.

These rules begin with a presumption that, if rebutted, requires the taxpayer to move to the next rule in the cascade. For example, receipts from sales of services to individuals and businesses are sourced according to the location where the benefit of the service is received. For individuals, the location of the benefit is presumed to be the customer's address; and for businesses, the presumption is established based on the taxpayer's contract with the customer or on books and records. The first tier presumption provides a safe harbor for taxpayers sourcing receipts from sales of services to individuals. However, the presumption may be rebutted by the taxpayer or the FTB for sales of services to businesses. If the presumption is rebutted, the next tier requires a reasonable approximation of the location of the benefit.

Receipts from sales involving a complete transfer of intangible property are assigned to the state to the extent the intangible is used in the state. A rebuttable presumption is created based on the location of use identified in the contract between the taxpayer and the purchaser, or the taxpayer's books and records. This rebuttable presumption can be overcome by either the FTB or the taxpayer. As with services, the next tier rule involves reasonably approximating the location of use of the intangible.

Receipts from licensing, leasing, rental or other use of non-marketing or manufacturing intangibles—patents, copyrights, or trade secrets used in a manufacturing process—also must be sourced to the location where the intangible is used. The taxpayer must determine this location by reviewing its contract with the licensee or its books and records. The taxpayer or the FTB can overcome this presumption by showing that this method does not determine the place of use.

The Proposed Regulation acknowledges (in the context of marketing intangibles) that determining the location of ultimate use may be challenging with respect to wholesale sales made by the licensee. The decision to look through to the location of the ultimate customer—rather than the taxpayer's customer (i.e., the licensee)—is likely to be difficult even when such sales are made at retail, given that the taxpayer may not have detailed information regarding the location of the licensee's sales. Thus, the feasibility of applying these provisions remains to be seen.

Promoter Finds Shelter in California Court: Court Rejects FTB's Retroactive Imposition of Tax Shelter Promoter Penalty

In a reminder that there are limits on the retroactive application of tax laws, a California Superior Court rejected the Franchise Tax Board's (FTB) attempt to impose retroactive penalties on a tax shelter promoter. *Quellos Fin. Advisors, LLC v. Franchise Tax Bd.*, Case No. CGC-09-487540 (San Francisco Super. Ct., Tentative Statement of Decision, Oct. 31, 2011).

Quellos was promoting the allegedly abusive tax shelter in 2001. California law tied the amount of the applicable penalty to that in I.R.C. § 6700, which established a maximum penalty of $1,000. Cal. Rev. & Tax Cd. § 19177. In 2003, California amended section 19177 to substantially increase the promoter penalty from $1,000 to 50% of the income derived by the promoter from the tax shelter promotion activity. The FTB assessed the 50% promoter penalty against Quellos in November 2009 for its promotion activities alleged to have occurred in 2001. Quellos argued that the pre-2003 law imposed a maximum penalty of $1,000 and the 2003 amendment could not be applied retroactively to Quellos's 2001 activities.

The Superior Court ruled in favor of Quellos and rejected the FTB's position that the 2003 amendment to section 19177 could be applied retroactively. The court observed the general rule that as a matter of statutory interpretation, legislation must be applied prospectively unless there is a clear expression of legislative intent to apply it retroactively. The amendment did not have an effective date provision specific to it alone, but the amending Act's effective date provided that the Act "shall apply with respect to any penalty assessed on or after January 1, 2004, on any return for which the statute of limitations on assessment has not expired. All other provisions of this Act shall apply on and after January 1, 2004." The court held that the first sentence did not apply to section 19177 because, under federal law, the promoter penalty is not a penalty that is assessed "on a return" but rather is imposed on the activities of the promoter, regardless of whether a return was filed. The court therefore concluded that the 2003 amendment applied prospectively "on and after January 1, 2004,"

continued on page 7

continued from page 6

and that the alleged promotion activities must have occurred on or after that date to fall within the higher penalty.

The court was able to resolve the case on statutory interpretation grounds and, therefore, did not have occasion to address the taxpayer's constitutional due process claims. Interestingly, another recent case involving an attempt to retroactively deny New York Enterprise Zone tax credits did reach the constitutional claims and ruled that the retroactive denial of credits in that case constituted a violation of the taxpayer's due process rights. *James Square Assocs. LP v. Mullen*, No. 11-00675, 2011 N.Y. Slip Op. 08423 (N.Y. App. Div. Nov. 18, 2011). These cases serve as important reminders that taxpayers are entitled to know the consequences of their actions at the time they occur, and subsequent law changes should not change those consequences retroactively. The FTB is expected to appeal the decision.

POLICY WONK

More Vexing Nexus Expansion

Despite several pending federal bills that would address the remote seller nexus issue (S. 1452, H.R. 2701, H.R. 3179, S. 1832), states have picked up where they left off in 2011 with state-specific attacks on the nexus standard. The past two weeks have seen a veritable flurry of activity, and states have almost appeared to be racing each other to get these bills introduced. Hawaii (H.B. 1694), Indiana (H.B. 1119, S. 240), and Florida (H. 1085, S. 1514, H. 861, S. 1352) proposed click-through and affiliate nexus bills. Affiliate nexus bills were introduced in New Jersey (S. 905) and Virginia (S.B. 957). Click-through nexus bills were introduced in Minnesota (H.F. 1849) and Maryland (S.B. 152). Further, the Georgia Governor told newspapers that he may not wait for Congress to act. By the time you read this, another two or three bills probably will have been introduced. State-level nexus bills continue to raise constitutional concerns and demonstrate why a federal solution would create more certainty for taxpayers while providing a national approach to the nexus question.

Click-through nexus

The click-through provisions introduced in the past two weeks are very similar to the click-through bills passed in New York, North Carolina, and Illinois, among other states. The bills would all create the presumption of a registration and collection requirement for out-of-state retailers that have persons or residents in a state refer customers to the out-of-state retailer via an Internet link or otherwise, with a threshold of sales into the state usually of $10,000. The presumptions are rebuttable by the taxpayer.

Affiliate nexus

The affiliate nexus provisions that have been introduced are more varied than the click-through provisions. The Virginia bill applies specifically to out-of-state retailers that have affiliates operating a distribution center that facilitates the delivery of tangible personal property sold by the out-of-state retailer to Virginia customers. Others, such as the Indiana, Hawaii, and Florida bills, are broader. Some contain provisions that would impose a registration and collection requirement if an out-of-state retailer has an affiliate in a state that sells similar products under a similar business name. Other provisions would impose a registration and collection requirement if an in-state affiliated entity performs services connected to tangible person property sold by the out-of-state retailer. The New Jersey bill expands the existing affiliate nexus provision to cover more activities performed by an in-state affiliate, including use of an in-state distribution center to deliver products to the out-of-state retailer's customers.

Of particular note, two companion Florida bills (S. 1514, H. 1085) contain a provision that would require a majority vote in both legislative houses to approve any agreement between a taxpayer and the Florida executive branch or executive agency where an agreement is reached that an out-of-state retailer is "not a dealer required to collect sales and use tax in this state despite the presence of a warehouse, distributional center, or fulfillment center in this state" that is owned or operated by an in-state affiliate.

Notice provisions

One of the bills, Florida S 1352 contained a notification provision that would require out-of-state retailers to notify customers that they have a potential use tax responsibility. None of the bills contained a reporting requirement similar to the Colorado reporting requirements.

Conclusion

Unless Congress addresses the nexus question, it is likely that 2012 will see states continue their targeted attacks on nexus. This piecemeal approach will make determining whether nexus exists difficult for retailers and could result in a high volume of litigation to address the efficacy of these provisions. Whether this strategy will ultimately encourage Congress to pass federal legislation remains to be seen.

Come See Us

February 16, 2012
Strafford Webinar
Pilar Mata on State Corporate Income Tax Audits: Preparing the Case: Anticipating Critical Planning and Documentation Demands for State Examinations

February 21, 2012
TEI Nebraska Chapter Meeting
Omaha, NE
Jonathan Feldman on Cloud Computing and Remote Seller Tax Issues

February 21, 2012
TEI Dallas Chapter State and Local Tax Meeting
Dallas, TX
Jeff Friedman and **Steve Kranz** on State and Local M&A Issues

February 21-22, 2012
TEI IRS Audits & Appeals Seminar
U.S. Grant Hotel – San Diego, CA
Marc Simonetti and **Pilar Mata** on State Tax Consequences of Federal Tax Controversies

February 23, 2012
TEI Carolinas Chapter Meeting
Embassy Suites – Greensboro, NC
Jonathan Feldman, Scott Wright, Madison Barnett and **Maria Todorova** on Hot State Audit Topics

February 28, 2012
TEI Florida SALT Meeting
NextEra Energy, Inc. – Juno Beach, FL
Jeff Friedman and **Andrew Appleby** on State Tax Litigation Update
Michele Borens and **Marc Simonetti** on 2012 Legislation Update and Outlook
Marc Simonetti and **Andrew Appleby** on Top 10 Guidelines for Negotiating a Good State Tax Settlement
Michele Borens and **Jeff Friedman** on Defending Against or Applying Alternative Apportionment

March 1, 2012
Strafford Webinar
Charlie Kearns on Sales and Use Tax on Digital Products and Services: Managing Multi-State Compliance Challenges for Vendors and Customers

March 2, 2012
TEI Atlanta Chapter Meeting
Home Depot, Inc. - Atlanta, GA
Jonathan Feldman and **Eric Tresh** on National Update on Sales and Use Taxes and on Top 10 Tips for Settling State Audits: When to Waiver or Walk

March 5, 2012
COST Sales Tax Conference and Audit Session
Four Seasons - Austin, TX
Michele Borens on Ethics and Professional Responsibilities for Transactional Tax Professionals
Diann Smith on Abandoned and Unclaimed Property

March 11-14, 2012
UPPO Annual Conference
Hyatt Regency Grand Cypress – Orlando, FL
Marlys Bergstrom on Unclaimed Property Court

March 24-26, 2012
The Tax Council Spring Conference
The Breakers - Palm Beach, FL
Eric Tresh will present

March 25-28, 2012
TEI 62nd Midyear Conference
Grand Hyatt – Washington, DC
Jeff Friedman on Hey You! Get Off My Cloud!
Steve Kranz on Transfer Pricing: Are the States Taking the Gloves Off?

Recently Seen and Heard

January 12, 2012
TechAmerica Winter SGA Meeting
Autodesk – San Francisco, CA
Steve Kranz on Digital Goods and Services Taxes and the Age of Cloud Computing

January 22-27, 2012
COST SALT Basics School
Georgia Tech Hotel and Conference Center – Atlanta, GA
Eric Tresh on Nexus
Charlie Kearns on Streamlined Sales Tax – Changing the Landscape
Jonathan Feldman led a breakout session on SALT Basics
Madison Barnett led breakout sessions on Jurisdiction to Tax and on Pass-Through or Disregarded Entities

January 24, 2012
Wireless Tax Group Conference
Kiawah Island, SC
Doug Mo and **Zack Atkins** on Litigation Update

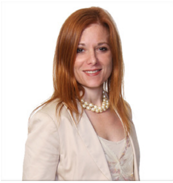
February 1, 2012
TEI New Orleans Chapter Meeting
Linda Boggs Center, University of New Orleans – New Orleans, LA
Michele Borens and **Tax Partner Robb Chase** on Head in the Cloud: Applying Permanent Establishment, Nexus and Treaty Principles to Electronic Commerce Transactions

February 1, 2012
The National Multistate Tax Symposium
Disney's Grand Floridian Resort & Spa – Orlando, FL
Jeff Friedman on Pending Legislative Developments in State Taxation
Marc Simonetti on Deep Dive on Combined Reporting

February 8, 2012
TEI Westchester Fairfield State Bootcamp Meeting
Giovanni's Water's Edge – Darien, CT
Marc Simonetti and **Andrew Appleby** on Unitary Combined Reporting – The Not So Unitary Application of the Unitary Business Principle

February 9, 2012
American Payroll Association Atlanta Chapter Meeting
Ravinia Club and Spa – Atlanta, GA
Marlys Bergstrom on Unclaimed Wages

The Sutherland SALT Team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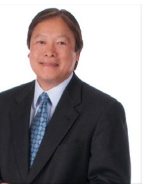
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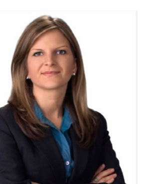
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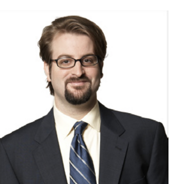
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