

Update on Pending Federal Legislation
Interim Taxation Committee
July 30, 2014

Marketplace Fairness Act: S. 743

Summary

- Allows states to require remote sellers without physical presence within the state to collect state and local sales and use taxes
 - Point of taxation is where good is delivered to customer
 - Currently, tax is due on goods delivered, but under *Quill* case in 1992, seller not required to collect tax unless the seller has a physical presence within the state where goods are delivered
 - Physical presence examples – store, warehouse, inventory, sales staff, delivery vehicles, agents, employees.
- Creates two paths to provide collection authority for states
 - Streamlined Sales Tax States – meet all the necessary requirements for collection authority
 - All other states
 - Must meet certain tax simplification standards (which are the basic requirements to be a member SST state). The most common are:
 - Single entity that administers both state and local taxes
 - Same tax base for state and local taxes
 - One uniform return to report all sales and taxes collected
 - One rate per state or local jurisdiction, except food which may be taxed at a different rate
 - One audit for a state and its local jurisdictions
 - Must provide retailers software that calculates tax and prepares returns
 - SST states do this through the Certified Service Providers
 - SST states test the CSP systems, certify they are correct
 - Under both paths there is a small seller exception of \$1 million of total remote sales in all states combined

- Remote sale means the retailer is not currently required to collect tax.

Status

- Introduced April 16, 2013 by Senator Enzi (R – WY); Senator Heitkamp was a cosponsor
- Passed Senate May 6, 2013
- Referred to House Judiciary Committee, chaired by Rep. Goodlatte (R - VA)
- House Judiciary Committee has taken no action and is drafting modifications to address concerns raised by House members
 - Want states to pay retailers' cost to integrate tax software into the retailers' point of sale systems.
 - Concerned that retailers will be subject to audit by all states; want to limit burden of potential audits
 - Some House members see MFA as a "tax increase" but the tax is already due and under current law requires purchaser of goods to report purchase and pay tax to the state

Permanent Internet Tax Freedom Act: HR 3086

Summary

- Current law provides for a temporary prohibition for most state and local governments for imposing tax on Internet access charges.
- Seven states that were already imposing and collecting tax on internet access in 1998 were allowed to continue taxing access charges
 - Referred to as Grandfather clause
 - North Dakota is "Grandfathered". The 6 other states are HI, NM, OH, SD, TX, WI
- If HR 3086 is approved, the ban on taxation of Internet access will be made permanent and the "Grandfather clause" will be removed – no states will be allowed to tax access charges.
- Study by Center on Budget and Policy Priorities estimates North Dakota collected \$14 million in 2012.
 - Would result in about a \$1.2 million loss for cities and counties through current state aid distribution formula
 - Tax Department has not made its own estimate – tax on Internet access is embedded with other taxable sales and cannot be determined from the return information we receive.

Status

- Original Internet Tax Freedom Act passed in 1998
- Extended in 2001, 2004, 2007
- Current extension expires 11/1/2014.
 - If Congress does not act, all states will have ability to impose tax on access charges.
- Introduced September 12, 2013 by Representative Goodlatte (R – VA)
- Passed House July 15, 2014 and sent to Senate

Marketplace and Internet Tax Fairness Act: S 2609

Summary

- Includes the provisions from Marketplace Fairness Act, with minor tweaks.
 - No significant changes for SST member states.
- Extends the existing Internet Tax Freedom Act for 10 years
 - Also extends existing “Grandfather clause” that would allow the seven states to continue imposing sales tax on Internet access charges.

Status

- Introduced July 15, 2014 by Senator Enzi (R – WY); cosponsored by Senator Heitkamp
- No action taken yet

Business Activity Tax Simplification Act of 2013 (BATSA): HR 2992

Summary

- BATSA would establish a federal standard for determining when a state can tax a company earning income within its borders. BATSA would curtail the in-state business activity that a state can tax, primarily in two ways:
 - It significantly narrows state taxing jurisdiction by requiring that an entity must have one or more of certain specifically enumerated types of physical presence in a state before that state could impose a business activity tax on the entity; and
 - It expands the reach and coverage of Public Law 86-272, a 1959 law intended to provide restrictions on the ability of states to levy net income taxes on certain multistate businesses whose only activity in the state is solicitation of orders for tangible personal property.

- This version would interfere with the ability of states to calculate income derived from a state where the income is attributable to members of a unitary business group. Nexus would have to be established for each legal entity, not on a collective or consolidated basis.
- The combination of the changes would establish a new framework in federal law that reverses current law. The new federal framework would allow large, multi-state businesses to engage in tax structuring and planning that would enable them to avoid a significant part, if not all, of their state tax liabilities.
- A BATSA-type bill has been introduced 6 sessions in a row. This one is identical to the last version in 2011. There has been discussion of the potential for it to get attached to the Marketplace Fairness Act (or some other desirable tax bill) as a way to buy support to get that passed. However, most organizations that oppose BATSA have indicated their opposition is so strong that attaching it to MFA would far outweigh the benefits of the MFA, so they would have to oppose such a bill. The National Governor's Association, as well as the MTC and FTA, are on record opposing BATSA. The states view BATSA as an infringement on state's rights, as well as creating several loopholes that could be easily used by multistate businesses to legally minimize taxes paid to states overall.

ND-specific issues:

- ND already currently follows the proposed standard for income apportionment, so this change would not impact ND.
- Applies primarily to income tax but nexus protection would be expanded to apply to other types of taxes on businesses. This provision would not impact ND. It would have applied to FIT had it not been repealed.

Status

- Introduced August 2, 2013 by Rep. Sensenbrenner (WI-R) and referred to House Judiciary Committee, and referred again to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law.
- There are 12 cosponsors on the bill (including 2 Democrats). Rep. Goodlatte is one of the cosponsors.
- The subcommittee held a hearing on February 26, 2014.
- The lobbyist for the MTC reported to the states in May that he viewed the hearing as being favorable toward the bill, although noted the bill would still be an uphill battle for passage, and

for any chance at all probably would need to get attached to some other bill. He thought it could get a markup in the House this summer, but that hasn't happened and doesn't appear likely.

Mobile Workforce State Income Tax Simplification Act of 2013: HR 1129, S 1645

Summary

- Prohibits the wages earned by an employee who performs duties in more than one state from being subject to income tax in any state other than:
 - The state of the employee's residence, and
 - The state within which the employee is present and performing employment duties for more than 30 days during the calendar year.
- Exempts employers from withholding of tax and information reporting requirements for employees not subject to income tax under this Act.
- The exemption under the Act does not apply to professional athletes, professional entertainers, and public figures who are persons of prominence who perform services for wages or other remuneration on a per-event basis.

ND-specific issues:

- In 2011, North enacted its own "mobile workforce" exemption for nonresident individuals, which is codified at N.D.C.C. § 57-38-59.3. While similar in nature and purpose, North Dakota's statute contains some differences, which would be preempted by the enactment of the federal legislation. In particular, North Dakota's statute provides for a 20 day period and requires that the nonresident individual have no other income from North Dakota sources.

Status

- HR 1129 introduced March 13, 2013 by Rep. Howard Coble (NC-R); 35 cosponsors. Latest action taken: Hearings held April 29, 2014 by Subcommittee on Regulatory Reform, Commercial and Antitrust Law.
- S 1645 introduced November 5, 2013 by Sen. Sherrod Brown (OH-D); 15 cosponsors. Latest action taken: Referred to Senate Committee on Finance.