

POST-WAYFAIR
GROSS RECEIPTS TAX/COMPENSATING USE TAX
ADMINISTRATION ISSUES



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**New Mexico Legislature--Revenue Stabilization and
Tax Policy Committee
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INTRO - SALES SOURCING

- The question is what tax rate (including local option rates) applies.
- States vary – most use some kind of destination sourcing – looking to the location of the customer.
- New Mexico uses origin sourcing – which is a product of its imposition of the tax on the seller.
- New Mexico could use destination sourcing.
- Other events have brought this issue to the forefront
- New Mexico may want to consider what other states have done.
- Destination sourcing of sales of services, leases, and intangibles can be complicated – but is possible.
- Bottom line - states have choices – as long as they don't tax sales coming into the state more.

SOUTH DAKOTA V. WAYFAIR DECISION (5-4) ON 6/21/18

Under SB 106's "economic nexus" provisions (\$100,000 sales or 200 transactions per year), "substantial nexus" exists for remote sellers Wayfair, Overstock.com, Newegg; and physical presence is not necessary.

Overruled *Quill* and *Bellas Hess*, which said physical presence was necessary.

Case remanded for determination if SB 106 is constitutional under *Complete Auto* test.

Test: Do the tax provisions discriminate against and impose an "undue burden" on remote sellers?

WAYFAIR “BLESSED”

SOUTH DAKOTA SB 106 FEATURES

- “Safe harbor” for small sellers
 - \$200,000 sales per year, or
 - 200 transactions per year
- No retroactive liability
- South Dakota is a member state in the Streamlined Sales and Use Tax Agreement (SSUTA)

FEATURES OF STREAMLINED SALES & USE TAX AGREEMENT (SSUTA) NOTED IN *WAYFAIR*

- State-level administration of state & local taxes
- Uniform definitions of products and services
- Simplified tax rate structures
- Access to software paid for by the state
- Liability protection for sellers relying on state software

SSUTA – DESTINATION SOURCING

- Required by Section 309 of the SSUTA
- Intrastate sales of tangible personal property and digital goods may be origin-sourced under Section 310.1 (not including sales of services or lease/rental of tangible personal property or digital goods, which must be destination-sourced).
- Ohio and Utah, SSUTA member states, have relied on Section 310.1.

ASSOCIATED INDUSTRIES V. LOHMAN, 511 U.S. 641 (1994)

- Missouri's statewide "additional use tax" (1.5%) on goods purchased outside the State and stored, used, or consumed within the State was purportedly designed to "compensate" for the taxes imposed by local jurisdictions within the State on in-state sales of goods.
- Local sales tax rates varied widely, and in many jurisdictions the "additional use tax" rate exceeded the local sales tax rate (ranging from 0-3.5%).
- Held: Unconstitutional discrimination against interstate commerce in local jurisdictions with local sales tax rates below the statewide "additional use tax" rate.

ADVANTAGES OF DESTINATION SOURCING WITH LOCAL USE TAX

- State and local rate is based on location where purchaser receives the product, so both in-state seller and out-of-state seller apply the same rate, eliminating any rate advantages.
- Local use tax would be a major new revenue source for local governments.
- With a local use tax in effect, local taxing jurisdiction of the market shares in the revenue on shipped/delivered sales.

DISADVANTAGES OF DESTINATION SOURCING

- Seller must be aware of the local rate in effect at the location where the purchaser receives the product and be able calculate the tax based on that location.
- Returns for out-of-state sellers must break out sales by local taxing jurisdiction.
- Small businesses and those that ship or do a lot of deliveries (furniture stores, lumberyards, newspapers, etc.) will complain about cost and inconvenience.
- Some local use tax revenue will be shifted from jurisdictions where sellers are located to the market jurisdictions.

NEW MEXICO LAW

- State, municipal, and county gross receipts taxes are imposed on seller (unlike most, but not all, state sales taxes)
- Only state compensating use tax—no local compensating use tax
- State level administration of local gross receipts taxes
- Intrastate and interstate origin sourcing for local gross receipts tax

KANSAS-DESTINATION SOURCING AND SSUTA MEMBERSHIP

- State and local compensating use tax in effect
- Member of SSUTA since 2005
- Adopted local compensating use tax and converted from origin to destination sourcing for intrastate transactions as part of legislation to conform to uniformity and simplification requirements of SSUTA—2003 HB 2005
- Phased-in enforcement of destination sourcing between July 1, 2003 and January 1, 2005—2004 House Subst. for SB 147

ALABAMA SIMPLIFIED SELLERS USE TAX REMITTANCE PROGRAM

- Reg 810-6-2-90.02
- Remote seller collects and remits flat 8% combined state and local use tax rate
- Receives 2% discount as compensation
- Purchaser can claim a refund from the Department for the difference between a lower local sales tax rate and the local portion of the flat combined rate
- Statutory formula for sharing the revenue among local taxing jurisdictions (which administer their own local sales taxes, unless they have agreed to have state administer)

MARKETPLACE FACILITATOR AS COLLECTOR/REPORTER LAWS

- Washington (collect eff. 1/1/18)
- Minnesota (collect eff. 7/1/19 or constitutional, if sooner)
- **Connecticut (SB 417 collect/referrer report if sales/yr \$250,000 + 200 trans eff. 12/1/18)**
- Pennsylvania (collect or report)
- Rhode Island (collect or report if sales/yr \$100,000/200 trans)
- **Iowa (SF 2417 collect/referrer report if sales/yr \$100,000/200 trans eff. 1/1/19)**
- Oklahoma (HB 1019XX collect if sales/yr \$10,000 or report eff. 7/1/18)
- Alabama (HB 470 collect if sales/yr \$250,000 or report eff. 1/1/19)
- New Jersey (A. 4261 collect if sales/yr \$100,000/200 trans eff. 10/1/18)
- South Carolina (Amazon litigation pending; draft ruling collect if sales/yr >\$250,000 effective upon earlier of physical presence or 10/1/18)
- South Dakota (SB 2 collect if sales/yr \$100,000/200 trans eff. 3/1/19)

DESTINATION SOURCING OF SERVICES, LEASES, & INTANGIBLES

- Services:
 - New Mexico rule for in-state versus out-of-state rule:
 - Initial use of the product of the service for its intended purpose. (Note – this does not determine the rate but only whether the service is in-state, and taxable, or out-of-state, and deductible.)
- Leases and Licenses (Intangibles):
 - New Mexico uses a business location rule for determining the rate on leases and licenses (intangibles).
- MTC has adopted destination sourcing for sales factor purposes for services, leases, and intangibles.
 - The regulations are available here, starting on page 52:
http://www.mtc.gov/getattachment/Uniformity/Adopted-Uniformity-Recommendations/FINAL-APPROVED-2018-Proposed-Amendments-to-General-Allocation-and-Appportionment-Regulat-_.pdf.aspx?lang=en-US

RESOURCES

- www.mtc.gov go to “Uniformity” tab, then “Current & Recent Uniformity Projects,” then “Wayfair Implementation and Marketplace Facilitator Work Group”
- www.streamlinedsalestax.org
- Alabama DOR contact: Joe Garrett, Deputy Commissioner, Joe.Garrett@alabama.revenue.gov

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