

## *US House Judiciary Committee hearing on internet sales tax*

March 14, 2014

### *In brief*

On March 12, 2014, a panel of interested members of the tax community presented testimony and answered questions before the Judiciary Committee relating to state sales taxation of internet transactions. The panelists, some in favor of the Marketplace Fairness Act (MFA) and some opposed, proposed alternative solutions for collecting tax from remote sellers. See our summary of the MFA [here](#).

### *In detail*

House Judiciary Chairman Bob Goodlatte (R-VA) began the hearing on “exploring alternative solutions on the internet tax issue” by agreeing that internet retailers enjoy structural advantages in the current marketplace. During the three and a half hour session, the chairman invited six panelists to offer testimony regarding the internet sales tax issue and to suggest potential solutions. Committee members then had the opportunity to question the panelists.

#### ***Federal action on remote sales***

Stephen Kranz, partner at McDermott Will & Emery, began testimony stating that the rise of the internet has drastically changed the face of commerce. Though legislation seeking to overturn the *Quill* physical presence requirement has been introduced in every

session of Congress since 2001, he was particularly encouraged by the Senate’s recent passage of the Marketplace Fairness Act and the current hearing in the US House. Moving forward, Mr. Kranz asserted:

Congress has two choices regarding how it will react to the problems of collecting sales tax on remote sales: Congress can either: 1) exercise its authority under the Commerce Clause to provide a framework under which states can enforce collection by remote sellers, or 2) Congress can do nothing. There is no question that states will continue to try forcing remote sellers to collect their sales taxes regardless of Congress’ action or inaction. The question is whether Congress will provide the necessary framework to ensure that state collection efforts will be uniform, clear, predictable and fair or, in the alternative, Congress will remain silent and

allow state collection efforts to be confusing, unpredictable, burdensome, and potentially discriminatory.

According to Mr. Kranz, 17 states have enacted legislation to address the internet sales tax issue, including click-through legislation, use tax reporting legislation, and unilateral “*Quill* is dead” legislation. If the federal government does not act, states will continue the “onslaught attack on remote commerce.” He stated that a federal framework should be built around existing state tax policy decisions and a radical departure from existing sales tax regimes is not needed.

#### ***Prohibiting shipment of goods to states where a retailer does not collect sales and use tax***

William Moschella, a shareholder with the law firm Brownstein Hyatt Farber

Schreck LLP, spoke on behalf of Simon Property Group, the largest owner/operator of shopping malls in the United States. Simon Property fully supports the MFA as passed by the Senate, but proposed another option would be to enact a federal law, pursuant to Congress' Commerce Clause jurisdiction, prohibiting the shipment of goods that violate sales tax laws of the state to which the goods are shipped. Citing the 1913 Webb-Kenyon Act, Mr. Moschella equated this approach to previous federal efforts concerning the regulation and taxation of intoxicating liquors. This proposal received little response from the House Committee.

### ***Consumer private reporting system***

James Sutton Jr., with Florida's Moffa, Gainor, & Sutton PA, opposed the MFA and alternatively proposed a 'consumer private reporting system' (CPR). Mr. Sutton stated that the MFA would be devastating to businesses and would threaten to cripple our interstate commerce economy through the additional complications for audits, collections, investigations, and criminal prosecutions. Instead, CPR legislation would be a procedural remedy enabling states to enforce their existing use tax laws. CPR would require remote sellers to provide 1099-style sales report information to the states and to purchasers so self-reporting of use taxes could be better regulated and enforced. Mr. Sutton believes CPR could ensure the free flow of interstate commerce while still protecting the purchaser's privacy. Privacy concerns, however, were later noted as a potential hazard of the CPR system.

### ***Simplification necessary to grant states remote seller collection authority***

Joe Crosby, a principal at MultiState Associates Inc., testified that Congress must define an interstate agreement structured solely for remote sales, but that allows states to retain full autonomy over intrastate sales. Mr. Crosby stated the Streamlined Sales Tax Agreement (SSTA) was not widely accepted because it only benefits the sellers and not the states. While he believes the SSTA is a laudable goal, it has proved far too ambitious for many states in the absence of a Congressional guarantee that the effort will be rewarded. When asked whether the current MFA software solution was feasible, he stated the software integrates with most current systems, could file all returns, and provides immunity for audit purposes. Mr. Crosby also commented that the desire for a uniform tax base among all the states and a single tax rate per state was diminished because current software can handle state discrepancies.

### ***Origin sourcing***

Andrew Moylan, outreach director and senior fellow at the R Street Institute, proposed an origin sourcing model for remote sales in which tax would be sourced to the location of the seller rather than the location of the customer. He noted this system is already effectively in place for brick and mortar businesses today. In response to this proposal, other panelists suggested origin-sourcing would create a race to the bottom, where businesses would rush to 'locate' in non-sales tax states. Mr. Moylan responded by stating that there were ways to prevent such gaming, and that businesses weigh many more factors than sales tax in determining their location. Another concern, issued by Mr. Kranz, was that an origin-based tax will place the

burden of tax on the producer, rather than the consumer. Mr. Moylan defended his proposal by stating that origin sourcing would preserve the physical presence standard and ultimately ease the collection burdens for retailers.

### ***Voluntary multistate compact imposing 'home rule revenue return'***

Former US Representative Chris Cox, now counsel at NetChoice, and partner at Bingham McCutchen LLP, proposed a multistate compact titled 'Home Rule & Revenue Return' to allow every business to report taxes from where they are physically located. Unlike origin sourcing, this proposal would distribute taxes received from out-of-state purchasers to their home states. Mr. Cox stated that the MFA, as passed by the Senate, fails across the board to achieve Chairman Goodlatte's seven 'Basic Principles on Remote Sales Taxes.' He also had concerns with the significant business costs of integrating new tax software. One critique, offered by Mr. Crosby, was that the proposal is largely based on the Interstate Fuels Tax Agreement, which works for fuels but would not be an appropriate solution for sales taxes, where the imposition and collection burden is on a much greater scale.

### ***Takeaway***

The hearing was another step forward on the long road to federal sales tax legislation. The panelists provided some interesting alternative proposals to ponder, but there was no clear winner. The venue also created an opportunity for the House Committee members to entertain various viewpoints, ask questions, and voice their own thoughts or concerns. While some ideas appeared to create more concern than others (e.g., origin-sourcing and privacy concerns with reporting) most in attendance agreed

that some kind of action is required. A future hearing was suggested to address concerns about the MFA specifically.

### ***Let's talk***

For a deeper discussion of how this issue might affect your business, please contact:

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