Kilpatrick

Key Takeaways from the Chicago Tax Club Fall Seminar

Kilpatrick partners Sam Breslow, David Hughes, and Jeff Reed recently spoke during three separate sessions at the prestigious 70th annual Chicago Tax Club Fall Seminar.

1

Sam Breslow presented on the **"Evolving Economic Nexus and its Challenges"** which addressed the evolving landscape of economic nexus across the country, including how cities and other localities are now trying to stretch their borders. Sam also included a discussion on Illinois' Leveling the Playing Field, recent changes to the law and an update on pending litigation challenging it.

Two key takeaways from Sam's session, include:

- **More Harm than Good.** To "level the playing field" between Illinois-based retailers and remote retailers, effective January 1, 2021, Illinois adopted structural changes to the Illinois sourcing laws to require "remote retailers" to remit state and local Retailers' Occupation Tax ("ROT") based on the destination of the sale. Here's the rub – because Illinois is inherently an origin-based sourcing regime, this law did more harm than good, creating an overly complicated patchwork for determining the appropriate state and local rate for remote sellers. For example, because Illinois has over 1,000 taxing jurisdictions, remote retailers are potentially required to file ST-2 returns in hundreds of jurisdictions every month, yet in-state retailers enjoy the benefit of origin sourcing, meaning they are only required to charge the state and local rate from where the goods are shipped. Also, the Illinois law created a loophole for out-of-state retailers with a physical presence but no selling activities in the state, such as inventory, as they are only required to pay a state use tax of 6.25%, but no local rate. Rather than fix the clear constitutional violations caused by the Leveling the Playing Field Act, the legislature has only fixed the loophole for out-of-state sellers, as beginning January 1, 2025, all out-of-state sellers without selling activities in Illinois will now be required to collect and remit ROT based on the destination of the customer. The Illinois Department of Revenue is beginning to audit and assess ROT on out-of-state sellers, which is a clear discrimination on interstate commerce.

- **Lagging Behind in Creating Clear Guidance.** Although the United States Supreme Court's decision in *South Dakota v. Wayfair* led to bright-line economic nexus thresholds for state-level sales taxes, most home rule municipalities have lagged behind in creating clear guidance or have applied their guidance inconsistently. For example, in January 2021, via an Informational Bulletin the City of Chicago adopted a bright-line economic nexus safe harbor of $100,000 in revenue from Chicago customers. However, the City has not consistently applied the safe harbor. Although the Bulletin clearly indicates that it applies prospectively beginning July 2021, the Chicago Department of Finance has assessed local taxes on remote sellers prior to this date. The Colorado home rule municipalities have been even more aggressive in their enforcement of economic nexus for local sales tax, as the majority have adopted the Model Ordinance, meaning they impose nexus based on whether a remote seller has $100,000 in retail sales at the state level, regardless of whether the same threshold is met in the city. With the help of private audit firms, the Colorado municipalities have been aggressively auditing remote sellers, regardless of the tremendous burdens of compliance.

2

David Hughes moderated a session on **"AI for Tax Part 1: Legal, Ethical and Contractual Considerations"** and outlined how artificial intelligence is becoming more common in the workplace and warned of the serious considerations that need to be evaluated before fully embracing this new technology.

A key takeaway from David's session, includes:

- **Artificial Intelligence can be Powerful but Risky.** Artificial intelligence (AI) can be a powerful tool for tax professionals…but it comes with certain risks and limitations. AI, for example, can develop certain biases based on the data used to train it, leading to unfair or discriminatory outcomes. AI also often "hallucinates" and generates incorrect, irrelevant, or fabricated information, leading to costly errors in tax and legal analysis. In addition, using AI presents risks of unauthorized access or disclosure of client-sensitive data. For these reasons, it is highly advisable that every company and firm adopt an AI policy to ensure responsible and ethical application of AI technologies.

3

Jeff Reed presented on **"Let's get Practical about Indirect Tax Compliance!"**. Jeff discussed Indirect Tax's best practices for compliance automation, audit defense, integrating acquisitions and their systems, and necessary document retention.

Two key takeaways from Jeff's session, include:

- **Importance of Sales Tax Exemption Certificates.** A sale may be exempt from sales tax because the purchaser is not subject to sales tax or because a specific exemption applies. To support the sale being exempt, sellers should obtain exemption certificates from purchasers where applicable. Some states offer a single exemption certificate with different boxes that should be checked depending on the exemption being claimed, while others offer a variety of different exemption forms depending on the exemption being claimed (e.g., different exemption forms for purchases by exempt organizations, resales, purchases of manufacturing equipment, etc.). Where there are recurring transactions between parties, it is generally permissible to obtain a blanket exemption certificate from a purchaser rather than a transaction-specific exemption certificate. Legally, a sales tax exemption certificate creates a presumption that a sale is non-taxable provided that it is acquired in good faith. As a best practice, where applicable an exemption certificate should be obtained from the purchaser when the purchaser is onboarded as a customer.

- **Bulk Asset Sales and Tax Clearance Certificates.** It sometimes surprises parties to learn that there is successor liability for sales tax, not just for purchases of entity interests, but also for bulk purchases of a target's assets. To prevent purchasers from inheriting sales tax liabilities on asset purchases, most states offer a mechanism where the parties can approach the relevant state tax department, alert it to the bulk sale of assets, and obtain a document giving the target a "bill of clean health" that prevents the purchaser from succeeding to sales/use tax liabilities of the target. The document may be called a "tax clearance certificate," a "letter of good standing" or may have a different title depending on the state. If a request is made and the target has any existing sales/use tax liabilities they must be paid before the tax clearance certificate is issued. There are differences between the states in terms of which party should request the tax clearance certificate, how long it takes to obtain the document, and the level of review that should be expected from the state tax department in response to the tax clearance certificate request.

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