

“Main Street Fairness Act” Would Be Ineffective Without Membership in Streamlined Sales Tax Agreement

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On July 29th, the proposed “Main Street Fairness Act” (MSFA) was introduced in the United States Senate (S. 1452) and House of Representatives (H.R. 2701). Subject to a “small seller” exception, the MSFA would allow qualifying states to require “remote sellers” (essentially internet-based and mail order sellers) to collect sales and use tax on “remote sales.” The potential impact of this legislation in Pennsylvania, however, is complicated not only by uncertainties relating to passage by Congress, but also by the uncertainty of whether and when Pennsylvania would agree to join the Streamlined Sales Tax Agreement, which would be a precondition for remote collection authority under the MSFA.

Many “bricks and mortar” retailers in Pennsylvania support actions that would require remote sellers to collect tax. As a practical matter, many sales to PA customers by internet-based and mail order sellers escape state and local sales taxes in Pennsylvania. This gives remote sellers an effective price advantage over local retailers who not only collect sales and use taxes, but pay other local taxes and provide local employment. Of course, a purchaser from a remote seller is legally required to remit use tax directly to the Commonwealth on any untaxed purchases which would be subject to sales tax if purchased from an in-state vendor. Other than business taxpayers who are regularly audited, however, many taxpayers are either ignorant of their use tax obligation or simply ignore it.

In the United States Supreme Court’s 1992 decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, the Court ruled that a state cannot require a vendor to collect sales tax on sales to customers in that state unless the vendor has a physical presence in the state. This physical presence may consist of an office or other facility, visits by out-of-state based employees, or in-state activities on the company’s behalf by an agent or other representative of the company. However, unlike prior cases, this decision made clear that the United States Congress, under its Commerce Clause powers, could establish a different tax collection standard. The MSFA would do just that.

However, whether the MSFA would have significant potential impact on Pennsylvania’s ability to enforce collection by remote sellers lacking current nexus is uncertain because it is far from clear that the General Assembly is ready to join the Streamlined Sales Tax Agreement, which would be required before MSFA would give Pennsylvania remote collection authority.

In February, members of the PA House Appropriations and Finance Committees heard testimony from a former Iowa legislator, currently representing the Main Street Fairness Coalition. He advocated for Pennsylvania to join the Streamlined Sales Tax Agreement and

cited a study estimating that Pennsylvania loses more than \$700 million annually in uncollected tax on remote sales.

In May, the PA Senate Finance Committee heard testimony from several persons, including a representative of the PA Department of Revenue. The Department's representative indicated that a use tax reporting line will be added to 2011 Personal Income Tax returns, to encourage reporting by individuals who make purchases from remote sellers (although only minimal compliance is expected). He reported that the Department already collects more than \$370 million in use tax annually – nearly all from businesses. The Department sees little immediate benefit to joining the Streamlined Sales Tax Agreement, projecting lost revenues from adoption of the Agreement's definitions that would offset other revenue gains. The Department's testimony indicated that no real benefit would be realized until federal legislation is adopted to enable states to force remote sellers to collect tax. This, of course, raises the old "chicken and the egg" quandary.

In other Senate Testimony, a Carnegie Mellon University professor said that a study he authored indicates an annual loss of \$254-410 million to Pennsylvania from uncollected taxes on remote sales. Another study provided to the Committee – prepared by three professors at the University of Tennessee in 2009 – estimated Pennsylvania's 2012 state and local tax loss on e-commerce sales at \$345.9 million.

On the other side of the coin, the Senate also heard testimony from e-commerce vendors. The Net Choice Coalition argued that changes to the collection rules are not necessary because Pennsylvania is already receiving much of the tax due on e-commerce sales through: (a) business use tax filings; and (b) collections by online retailers that have a physical presence in the state. The Coalition also argued against participation by Pennsylvania in the Streamlined Sales Tax Agreement, arguing that the Agreement does not provide sufficient simplification. If Pennsylvania and other additional states joined the Streamlined Sales Tax Agreement and Congress passed MSFA, smaller Pennsylvania-based e-tailers could be harmed by added compliance burdens.

At this point, there is considerable doubt that Pennsylvania's General Assembly will move with any haste to join the Streamlined Sales Tax Agreement. Adding the political posturing and other factors affecting legislation in the United States Congress, one suspects that it may be quite some time before Pennsylvania will be able to close the online sales tax collection gap.

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