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In this article, the author discusses the challenges surrounding the collection of sales tax assessments from offshore online vendors.

The U.S. Supreme Court case *South Dakota v. Wayfair*, 585 U.S. __ (2018), decided on June 21, 2018, radically altered the sales and use tax landscape for internet retailers by upholding a South Dakota law requiring vendors making $100,000 or 200 sales into the state to collect and remit sales tax. Before that decision, physical presence was required before a state could impose a duty to collect and remit sales tax on sales delivered into the state.

Many U.S.-based online retailers have already registered to collect and remit sales tax as various states roll out policies and issue guidance following *Wayfair*. For these e-commerce vendors, the issue and the economics are clear: Rather than risk taking a hit to their bottom line for failure to collect and remit the sales tax, they've decided to collect the tax from their customers.

However, some vendors organized outside the United States have raised questions about whether their activities establish a substantial nexus in a state and how states would be able to collect sales and use tax assessments issued against foreign entities. There is also confusion surrounding tax treaties between the United States and other countries that may require an entity to possess a permanent establishment before being subject to U.S. income tax. However, these treaties do not restrict states from imposing a sales tax collection obligation if a vendor has a physical presence less extensive than a PE.

The Court in *Wayfair* addressed the complexities of defining "physical presence" and mentioned states that "defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents' web browsers." It is likely that states will embrace the most expansive view of substantial nexus going forward.

As to the ability to collect tax, there are substantial issues involved in determining whether a foreign government will enforce U.S. tax laws or judgments. The U.S. State Department provides guidance on foreign jurisdictions' enforcement of judgments:

> There is no bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments. Although there are many reasons for the absence of such agreements, a principal stumbling block appears to be the perception of many foreign states that U.S. money judgments are excessive according to their notions of liability. Moreover, foreign countries have objected to the extraterritorial jurisdiction asserted by courts in the United States.

While attempting collection activities against entities organized outside the United States may take time and require states to carry out several steps and spend additional resources, it is unlikely these vendors will escape state tax collectors' wide net.

State sales tax auditors and investigators scrutinize the internet for online vendors and will look at articles in newspapers and elsewhere to identify companies making online sales that should be collecting and remitting sales tax. Also, through the auditing of other companies or individuals, an online retailer could come to auditors' attention.

Once a state tax department determines a tax can be assessed, if the vendor does not contest, the assessment will turn into a judgement that could become a lien on property. A judgement from one state can be enforced in another under the full faith and credit clause in Article IV, section 1 of the Constitution. This means that any state that enters a judgment for taxes owed and then files that judgment in another state may pursue collection if they find assets in that other state. This is significant for three reasons.

First, many vendors — although organized in jurisdictions outside the United States — have U.S. property in the form of fulfillment or distribution centers. These properties could be subject to a state levy to collect tax delinquencies.

Second, credit card companies and other payment processors generally require a federal employer identification number (FEIN) and a depository bank to set up a merchant account to facilitate credit card payments. Collecting a tax delinquency from a bank account is relatively simple for tax authorities once they identify a taxpayer by FEIN.

Finally, and maybe most importantly, IRC section 6050W requires payment processors to file a Form 1099-K informing the IRS of payments made to vendors when the amount paid exceeds $20,000 and the vendor has engaged in more than 200 transactions. The IRS routinely shares information with the states, and once the state tax department gets access to the 1099-K, it could assess tax on amounts due to the vendor from the payment processor.

Foreign online vendors need to be wary of ignoring the fast-changing developments in this area. It would be wise for those making internet sales to review their operations, consult with their tax advisers, and carefully consider their options and the consequences of their choices. After all, some ostriches are perfectly fine sticking their head in the sand; others get run over. ■