How Retailers Can Navigate a Post-Wayfair World

The Wayfair decision hurled a veritable bomb into the retail environment by allowing states to mandate that online and remote retailers collect, remit and report sales tax on taxable sales made within the state. Whereas physical presence had been a clear, defining standard for nexus, this decision cleared legal space for states to vastly broaden retailers' exposure to sales tax issues.

It's not just physical

For retailers, it is not necessary to have a brick-and-mortar store within a state in order to create a physical presence for nexus. Even prior to Wayfair, the standard for physical presence as it pertains to retailers included short-term activities like performing installations or repairs, attending trade shows, storing inventory and simply using a business vehicle to make deliveries within the state. If third-party agents rather than company employees are the ones actually performing the service or activity, that was potentially still enough to establish a physical presence in regard to sales tax.

Remote seller nexus provisions in state legislation have also affected retailers' sales tax requirements, with many in existence long before Wayfair entered the scene. States had enacted a number of different nexus laws prior to Wayfair including:

- Affiliate nexus
- Click-through nexus
- Marketplace nexus
- Notice and reporting requirements

Other states have been quick to react and adopt laws that impact retailers' nexus status since the Supreme Court handed down its 2018 Wayfair ruling, and retailers should expect others to follow. In addition, state laws regarding nexus change frequently, so constant monitoring of nexus standards is critically important for sellers to remain in compliance.

Size matters

Under Wayfair, physical presence remains a definitive qualifier that obligates retailers to collect sales tax. However, nexus can now arise from purely transactional factors unrelated to physical presence as well. Economic nexus typically rests on one of two measures, or both in combination.

Most states define economic nexus in terms of the dollar amount of sales in the state or the number of individual transactions retailers make. Though the factors that control economic nexus may appear somewhat consistent, dramatic variation appears in the fine print of state laws. The number of transactions and/or amount of sales revenue required to establish nexus differs widely between states, as do guidelines for counting gross versus taxable sales figures.

Remote selling continues to offer great opportunity for retailers of every size, but Wayfair has made a sales tax situation that was already nearly inscrutable more complicated. To avoid tax consequences that can damage your company's continued success and profitability, count on the experienced State and Local Tax team at Mauldin & Jenkins for knowledgeable support in a post-Wayfair world.

Here again, states continually update and revise legal definitions of nexus. Savvy retailers must remain alert for changes and allot adequate resources for staff to monitor evolving guidelines. For many retailers, an investment in specialized software or outside professionals to assist in this process will prove to be a cost-efficient strategy in the long run.

Determining nexus is just the tip

Sorting out where nexus exists is a start, but the real danger lurks below the surface: Which sales are taxable? Finding the answer to this question has long been the bane of retailers nationwide, and Wayfair only further complicates their challenge.

States classify products as either taxable or nontaxable without any consistency among them. Categories of items that are clearly taxed in one state may be considered completely tax-free in another, with little rhyme or reason to the maze of specific exceptions to taxability laws.

Tracking individual state taxability policies is key not only to setting retailers' sales tax obligations, but also in determining whether or not you have nexus. Untaxed transactions count toward total volume of sales (both revenue and number of transactions) in some states while others omit them when addressing the thresholds that establish nexus.

Where nexus is present, retailers may still escape the obligation to collect and remit sales tax if all sales in the state are nontaxable. Note though that the obligation to register and report may exist even if all sales are nontaxable and therefore no tax must be collected.

Retailers are strongly advised to seek professional guidance and devote sufficient resources to accomplish the difficult task of determining taxability for all products throughout the U.S.

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