Sales Tax and the Remote Seller

(STRS2)

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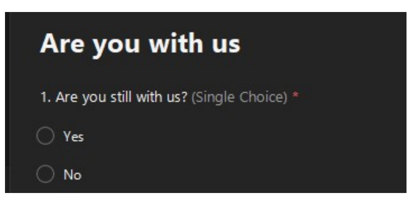
Tips for a Successful Experience

- **Technical Difficulty?** Try refreshing your page, reconnecting to the class, or rebooting (chat the moderator if you do this, so they can keep track of your presence). Also, logging in under your company's VPN may cause technical difficulty. Turn off your pop up blocker! Tech Support Team 866.265.1561 Option 1 then Option 2
- **Earning CPE:** Throughout the presentation a presence manager will pop up to check your attendance. Answer the questions with the appropriate response to record your attendance. Credit is earned by acknowledging 75% of these pop-ups per hour.



- **Chats:** You may be asked to reply to the moderator in the chat box to confirm attendance. Please be aware of any chats.
- **Questions:** Use the Chat box to ask any questions you may have about today's webcast. Someone is available to assist with your technology related concerns. The instructor will address your content related questions during the presentation or follow up after.
- **Once you are logged in please do not log out even during breaks.**

Learning Objectives

- Understand the importance of sales tax compliance
- Describe the impact of the Wayfair Case on remote sellers
- Describe changes made in the Physical Presence nexus standard after the Wayfair Case
- Describe the steps necessary to achieve proper sales tax compliance with the various state and local jurisdictions

Sales & Use Taxes – Overview
Enactment of sales taxes
Overview of changes

Sales & Use Taxes – Overview

- Sales Taxes enacted in 45 states between the 1930's and 1960's
- 5 states – Alaska, Oregon, Montana, Delaware and New Hampshire do not impose a general sales tax
- Calculated as a percentage of taxable sales of products or services (some exemptions apply)
- Imposed at the state and or local level. Some states have a state sales tax only. In addition to state level, local sales taxes are collected in 39 states

Sales & Use Taxes – Overview

- Among the highest local taxes in excess of 4% are:
  - Alabama (Combined rate 9.24%)
  - Colorado (Combined rate 7.77%)
  - Louisiana (Combined rate 9.55%)
  - Missouri (Combined rate 8.29%)
  - New York (Combined rate 8.52%)
  - Oklahoma (Combined rate 8.97%)
- KEY POINT: While it is the consumer's responsibility to pay the tax, it is the seller's responsibility to collect and remit sales taxes to the state and/or local jurisdiction where applicable
- TECHNICAL POINT: Most states have rule that IF the seller fails to collect and remit the sales tax, a "use" tax is imposed on the ultimate consumer. However, this course will focus on sales taxes and the seller's responsibilities.

Sales & Use Taxes – Past to Present

- Significant changes have been taking place in the sales tax landscape over the past decade, brought about principally by the significant increase in E-Commerce
- Prior to the internet – most transactions were local , some were mail order through existing or new business ventures
- Beginning in the mid to late 1990's many "Online sellers" began offering goods to customers through their computers

Sales & Use Taxes – Past to Present

- With ownership of personal computers and proliferation of the internet, goods could be ordered from anywhere from home and shipped anywhere, regardless of the physical location of the buyer or seller.
- Many of these sellers were new retail ventures and auction sites; Existing "brick and mortar" sellers also sold online, but due to their long standing multi-state store presence, did not initially offer online shopping
- Commerce Implication – now you have thousands of out of state businesses selling customers around the country with any physical presence in the state where the product is sold…
- Enter a new classification of retailer: The "REMOTE SELLER" – discussed in later slides

Sales & Use Taxes – Current Climate and Issues

- According to the US Government GAO in June 2022, about one third of state tax collections come from sales taxes
- This percentage will likely grow as thousands more remote businesses are created or are required to comply with new Economic Nexus standards brought about by the South Dakota v. Wayfair case. (Discussed in subsequent slides)
- National Taxpayers Union Foundation (NTUF) – estimates that as of November , 2022, nearly 50,000 remote businesses are not compliant with Wayfair
- Possibly future Federal or State legislation as political leaders weigh the impacts of "Wayfair" and continued changes in technology
- These and other businesses must weigh the probability of additional tax liability and penalties from non compliance (Discussed in subsequent slides)

Wayfair Decision and the Change in Sales Tax Landscape

Economic Nexus

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Wayfair Decision and the Changes That Followed - Remote Sellers

Leading up to Wayfair:

- A Remote Seller is generally a business that does not have a physical presence in a state but who sells products or services for delivery into that state
- Where Nexus is based on physical presence , Out of State sellers were not required to collect and remit sales tax
- Decades long battles in the courts over the standards of Nexus led up to the Supreme Court's decision in the Wayfair Case
- The landscape of sales tax nexus and resulting impact Remote Sellers changed dramatically

Wayfair Decision and the Changes That Followed

<u>The Seismic shift:</u>

South Dakota vs Wayfair – Supreme Court Decision (June 2018)

- Represents the evolution of Nexus through decades of pivotal court cases
- Prior to Wayfair's endorsement of an "economic presence" standard, states found creative, if sometimes questionable ways, to expand the definition of physical presence
- Click-through or cookie nexus, or notice and reporting requirements for remote sellers – such measures were telling of the landmark decision overturning the time honored (although weakening) " physical presence" standard relating to the collection of sales tax by business

Wayfair Decision and the Changes That Followed

Brief evolution of Nexus through the Constitution, law, and pivotal court cases follow ….

- National Bellas Hess (Bellas) v. Illinois Department of Revenue, 386 U.S. 753 (1967)
  - Supreme Court held the Commerce Clause prohibits a State from imposing tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or by mail
- National Bellas Hess created a physical presence test that lasted up to Wayfair:
  - Any physical presence in a state – Had to collect the sales/use tax from buyers

Wayfair Decision and the Changes That Followed

- Quill Corporation v. North Dakota, 504 U.S. 298 (1992), May 26, 1992
  - Quill maintained the physical presence standard, but it's clear from the court's opinion, the physical presence requirement was weakening
- ND passed a law they knew was contrary to Quill, set for any challenge to go straight to the South Dakota Supreme Court:
  - Trial court held it violated Quill (expected result)
  - SD Supreme Court ruled it violated Quill and they couldn't go against SCOTUS (also expected)
- This set up a SCOTUS appeal…..and Wayfair

Wayfair Decision and the Changes That Followed

State of South Dakota v. Wayfair, Oral arguments heard April 17, 2018 Decision rendered June 21, 2018

- Marks the death of the physical presence Nexus standard
- The Court concluded that, “that the physical presence rule of Quill is unsound and incorrect.
- Further, the majority stated Quill was an unsound and incorrect interpretation of the Commerce Clause

Post Wayfair - Economic Nexus Standard

- Every state with a state sales tax presently has economic nexus requirements for remote out-of-state sellers following the 2018 South Dakota v. Wayfair decision
- Requires sellers to collect sales tax in states where the seller's sales exceed the state's monetary or transactional threshold, thereby creating a “Safe Harbor” likely to benefit small business taxpayers

Economic Nexus – Remote Seller Threshold Terms

It's important when considering the reporting threshold to understand the components of the base for testing the threshold and what components apply to the particular state:

- Some states use total gross sales, but others use retail sales as a basis for determining whether numeric thresholds have been reached.
- Six states: Arkansas, Florida, Missouri, New Mexico, North Dakota, and Oklahoma, include only taxable sales in their threshold calculations, excluding all tax-exempt sales. In contrast, other states include some or all tax-exempt sales in their threshold calculations.

Economic Nexus – Remote Seller Threshold Terms

- Importantly, the types of sales states exempt from sales taxes vary considerably state-to-state, and possibly in local jurisdictions.
- States vary on taxation of or inclusion of services
- Some states also impose taxes on the sale of certain digital products.

Economic Nexus – Remote Seller Threshold Terms

- In some states, marketplace sales made via a marketplace facilitator are excluded from the threshold calculation for remote sellers, while in others marketplace sales are included in the calculation.
- States thresholds are calculated on different measurement periods. Some based on sales made during the prior or current calendar year. In other states, measurement periods may differ. Examples include the prior 12 months, the prior four sales tax quarters, and the 12-month period ending on the last day of the most recently completed calendar quarter
- For detailed information on Remote Seller Threshold: https://www.streamlinedsalestax.org/for-businesses/remote-seller-faqs/remote-seller-state-guidance

Businesses Impacted by Economic Nexus

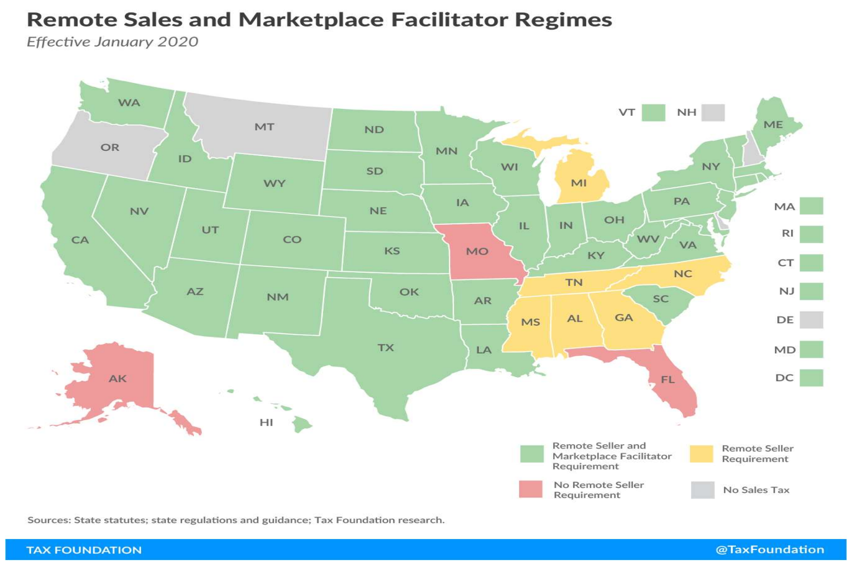
Businesses Impacted by Economic Nexus

In addition to Remote Sellers who are required to register directly with the state to collect sales tax, other specific sales tax related rules have been implemented in the post Wayfair era:

- Market Place Facilitators - required to collect and remit sales tax on sales facilitated on behalf of Marketplace Sellers if they exceed certain thresholds.
  - A Marketplace Facilitator/Provider is generally a business or person who owns, operates or otherwise controls a physical or electronic marketplace and facilitates the sale of a third-party Seller's products. (like Amazon, Ebay, etc.)
  - The Marketplace Facilitator/Provider either directly or indirectly through contracts, or other arrangements with third parties, collects the tax payment from the purchaser and transmits the payment to the Seller

Businesses Impacted by Economic Nexus

- Marketplace Sellers - require a Marketplace Facilitator/Provider to remit tax on sales on their behalf. A Marketplace Seller may also be required to register and file returns for sales and use tax purposes in that state if they otherwise have nexus
  - Sells products through a physical or electronic market place operated by a Marketplace Facilitator/Provider (Example: small business storefront)
  - A Marketplace Seller may also be a remote seller and required to register if the minimum threshold is met.
- Taxpayers should review every state for the specific sales tax rules relating to these category of sellers.



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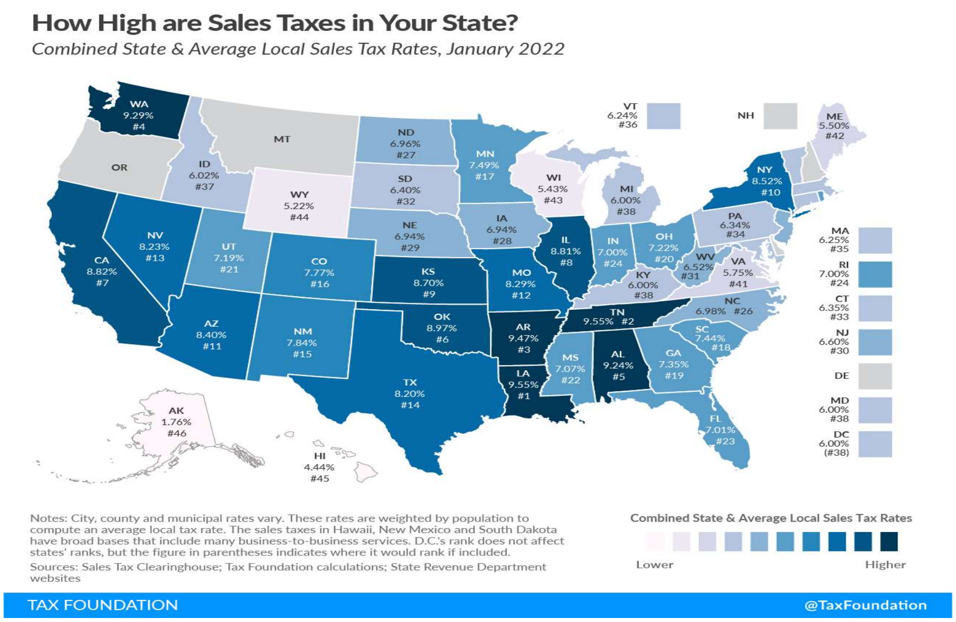
Management of the Sales Tax Function Good Management and Comprehensive Process is the Key



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Key Steps to Managing Sales Tax Compliance and Planning

- Determine where you have business has nexus and must collect and remit sales tax
- Register with state or states to collect and remit sales tax
- Track and manage exempt sales where applicable
- Calculate the correct sales tax amount and remit sales tax to the tax authorities

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Key Steps to Managing Sales Tax Compliance and Planning

- It is critical to understand different business activities within a company to determine where you may have an obligation and remit sales tax.
- If the business does not have any physical presence, then as a remote seller, marketplace seller or facilitator, endure that the economic nexus thresholds are carefully evaluated to determine the specific elements of the threshold (see slides 17 to 19)
- It is important to periodically review (at least annually) for changes in legislation that may affect state and local tax jurisdictions.

Key Steps to Managing Sales Tax Compliance and Planning

- Registering in the appropriate tax jurisdictions. Process, forms, and requirements to register aren't the same for all state or local tax jurisdictions
- In most jurisdictions, you must register before legally collecting sales tax within each separately administered tax jurisdiction,
- Consider: Streamlined Sales and Use Tax Agreement (SSUTA) (https://www.streamlinedsalestax.org) created in 1999 to simplify and make more uniform the sales and use tax collection and administration for retailers and states.
- Member states: Full Members 23; TN – Associate members; 26 Non members

Key Steps to Managing Sales Tax Compliance and Planning

SSUTA Full Members*

Arkansas	Ohio
Georgia	Oklahoma
Indiana	Rhode Island
Iowa	South Dakota
Kansas	Utah
Kentucky	Vermont
Michigan	Washington
Minnesota	West Virginia
Nebraska	Wisconsin
Nevada	Wyoming
New Jersey	
North Carolina	
North Dakota	

*Per SSUTA's website

- A Full Member State is in compliance with the Streamlined Sales and Use Tax Agreement (SSUTA) and its laws, rules, regulations, and policies to bring them into compliance are in effect
- Sellers registering through the Streamlined Sales Tax Registration System (SSTRS) may register in all Full Member states or the Member states they select.

Key Steps to Managing Sales Tax Compliance and Planning

- A business may be exempt from collecting and paying sales tax on a transaction
- Determined by type of business, the item, or its intended use
- Most states don't require nonprofits and government agencies to pay sales tax.
- Certain products (depending on the state) or items intended for resale are generally exempt from sales tax.

Key Steps to Managing Sales Tax Compliance and Planning

- Products vs. Services:
- When considering exemptions, it is important to review price allocations between products and services
- Certain services are more likely to be subject to sales tax
- Services unlikely to be subject to sales tax include medical and legal

Key Steps to Managing Sales Tax Compliance and Planning

- Certificates of Exemption are required from buyer for their state.
- Seller must collect and manage an exemption certificate to validate and confirm why sales tax wasn't collected
- Failure to produce up-to-date documentation if requested or required if audited may subject taxpayer to penalties
- Managed process must be in place to collect, track, and validate exemption certificates from your buyers.
- Missing or expired exemption certificates is one of the top reasons businesses are assessed penalties during an audit.

Key Steps to Managing Sales Tax Compliance and Planning

- Correct state sales or local sales tax if applicable must be applied to each transaction
- Rates can found at states' websites ; Ensure that local tax rate is applied if applicable
- If available, use free software provided by the state.

Key Steps to Managing Sales Tax Compliance and Planning

- Consider using third party sales tax software to streamline compliance
- Contact several sales tax vendors for a demonstration of their software
- Consider how you businesses POS systems interact with their software
- Get a live demonstration of the software and verify the results

Evaluate Contingent Liabilities if Applicable

- A major concern after the Wayfair case is whether it would be applied retroactively with the potential for several years of open tax years and significant liabilities?
- The Court stated in its opinion that " … [South Dakota's] Act ensures that no obligation to remit the sales tax may be applied retroactively"
- 38 states signed on indicating that they would not enforce any change in nexus standards retroactively
- Although not absolutely certain, it would appear that the decision will only be applied prospectively

Evaluate Contingent Liabilities if Applicable

- Any significant exposure, taxpayers should evaluate and follow the guidance under ASC-450 Contingencies
- Overview of General Rules under ASC -450
  - If a loss is "probable" - recognize in the financial statements
  - If a loss is "reasonably possible" - disclose in the financial statement notes
  - If the possibility of a loss is "remote" - disclosure in financial statement notes is not required

Reminders

- **Post event evaluation:** Please complete the course evaluation that will be viewable once the session ends. We welcome your feedback!

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