Amazon.com's sales tax collections will increase significantly this quarter

David M. Kall | Tuesday, February 28, 2017

It was recently announced that Oklahoma and Arkansas will begin collecting sales taxes on Amazon.com purchases as of March 1, 2017. That will leave Hawaii, Idaho, Maine, and New Mexico as the only remaining states that impose sales taxes, but do not tax purchases from the internet giant. Additionally, Alaska, Delaware, Montana, New Hampshire, and Oregon do not collect sales tax statewide, including purchases from Amazon.

In *And Then There Were Six: Amazon Expands Its Sales Tax Collection*, the Institute on Taxation and Economic Policy's (ITEP) Tax Justice Blog pointed out this "dramatic reversal," observing that "as recently as 2011[,] Amazon was only collecting sales tax in five states." Now, with the addition of Oklahoma, "the number of states in which Amazon.com collects sales tax will have leapt from 29 to 40 in just two months." Adding in Arkansas brings that count to 41 states.

ITEP theorizes that many of the internet giant's tax collection practices came about when it opened distribution centers throughout the country. This physical presence establishes "nexus" requiring the imposition of sales taxes when the seller has a sufficient connection with the state. Given the decline in state tax revenues generally over the last several years, some states have expanded their laws or enforcement practices to assert nexus over Amazon.com purchases that might not otherwise have been taxed. Additionally, states like Illinois and Pennsylvania have drawn Amazon.com's physical presence in with significant tax incentive offerings.

In a November 2016 policy brief addressing sales tax collections on internet purchases, ITEP opined that "[f]rom a tax fairness perspective, Internet-based sales should be treated in the same manner as other retail transactions," for the following reasons:

1. **Failing to collect tax on e-commerce transactions is unfair to "brick and mortar" retailers.** While retailers who sell their wares in a "brick and mortar" setting are required to assist in the enforcement of existing sales tax laws, internet retailers are dodging that responsibility and instead offering their customers an opportunity to evade sales tax liability. The result is a built-in price advantage for internet-based retailers at the expense of companies with actual stores in the communities in which they do business.
2. **Failing to collect tax on e-commerce transactions is unfair to law-abiding taxpayers.** While all sales are legally subject to sales taxes, most online shoppers fail to pay the taxes they owe because they are either unwilling to do so, or unaware that the responsibility to do so even exists. Individuals who shop in traditional retail outlets, as well as online shoppers who dutifully pay their sales taxes, are stuck paying proportionally more of the sales tax than would otherwise be the case. This arrangement is particularly unfortunate for low-income taxpayers and seniors who are less likely to have reliable access to the internet and/or a means of making online payments.
3. **The revenue loss associated with failing to collect tax on e-commerce transactions is large and likely to grow.** State and local governments are losing billions of dollars in sales tax revenue each year because taxes are going uncollected on many purchases made over the internet. At the turn of the century, e-commerce made up less than 1 percent of retail sales. Today that figure is 8 percent, and rising.

Still, there remains a sizeable portion of consumers who do not shop on Amazon.com. A late December article in *The Wall Street Journal* suggested that not everyone wants to shop there and that, in fact, about 22 million households abstained in 2016.

Even so, states are doing what they can to enforce tax laws on internet purchases, which has prompted a fair amount of litigation. For example, we have been following a South Dakota case that started when the state sued Newegg Inc., Overstock.com Inc., Systemax Inc. and Wayfair LL, seeking court approval for its new law requiring internet retailers to collect and remit state sales/use tax. That law, SB 106, broadened the tax base to impose a remittance obligation on out-of-state retailers that incur either $100,000 of in-state sales, or generate 200 or more separate electronic or delivery transactions.

South Dakota is one of the states in which Amazon.com began collecting sales taxes just this year, as of February 1, 2017. Noting that "Amazon's collection of tax will be a significant step in ensuring tax fairness," the Department of Revenue's Winter 2017 newsletter attributed this success to SB 106's passage.

Colorado took a different approach, by imposing notice and reporting obligations on internet retailers whose sales are not subject to state sales tax collections. Noteworthy is that the law does not require retailers to actually collect taxes. One stakeholder, the Direct Marketing Association, sued Colorado on the grounds that the law is unconstitutionally discriminatory, and has an unconstitutionally burdensome effect on interstate commerce. In that case, *Direct Marketing Association v. Brohl*, the Tenth Circuit Court of Appeals upheld the notice and reporting requirements under a dormant Commerce Clause challenge. The U.S. Supreme Court declined to review the case in December, as we described. As a result, the notice and reporting obligations remain intact.

Bloomberg acknowledged that, also as of February 1, 2017, Amazon.com started collecting and remitting sales taxes in Mississippi and Missouri. Though the president of the Missouri Retailers Association, David Overfelt, thinks this is "great news," he wants Congress to enact legislation that would simplify, clarify, and standardize a remotes sales tax law. This would help with tax collections for online retailers that are not as cooperative as Amazon.

Bloomberg recognized that "at least 36 bills have been introduced in 18 states in 2017 related to sales tax on transactions by remote sellers," many of which follow Colorado's lead. However, in Missouri, this strategy may backfire; Overfelt declared that the lawmakers do not have "much stomach for giving the Department of Revenue authority to go in to audit individual taxpayers…And most people in Missouri wouldn't be happy about that kind of personal information being shared with the department."

Federally, lawmakers have proposed several different schemes in the past that define a state's authority to tax out-of-state sellers, but Congress has not taken decisive action on any of them:

- Marketplace Fairness Act (S. 698)
- Remote Transactions Parity Act (H.R. 2775)
- No Regulation Without Representation Act (H.R. 5893)
- Online Sales Simplification Act (discussion draft)

According to Overfelt, and presumably many others, "[w]e'd rather see the Congress take on and settle this issue once and for all."

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