

South Carolina: Amazon owes \$12.5 million for third party sales



David M. Kall | Friday, August 25, 2017

In mid-June, the South Carolina Department of Revenue notified Amazon Services, LLC, an affiliate of Amazon.com, Inc., that it owes the state \$9.5 million in unpaid sales and use taxes for its sales through third party vendors. After adding in penalties and interest, the total amount comes to nearly \$12.5 million. [Amazon Services](#) operates Fulfillment by Amazon (FBA), which offers third party sellers a place to store their products, in Amazon's fulfillment centers, and picks, packs, ships, and provides customer service for these products.

Other affiliates relevant to the department's [Determination](#), which [Bloomberg](#) posted on-line, are Amazon.com, LLC, which offers property for sale on Amazon.com; Amazon Fulfillment Services, which contracts with Amazon Services and owns and operates fulfillment centers by way of subsidiaries located around the country; and Amazon Payments, LLC, which is the payment processing entity that the taxpayer, Amazon Services, LLC, uses.

South Carolina imposes a 6 percent sales and use tax on the sale of goods and some services, and counties may impose an additional one percent local sales tax with voter approval. Tangible personal property purchased at retail for storage, use, or other consumption in the state is subject to a use tax on its "storage, use, or other consumption."

The entity responsible for collecting and remitting these taxes, by state law, is the retailer seller "who maintains a place of business" in South Carolina. Included in the definition of such a retailer is one that has

an office, distribution center, warehouse, or an agent operating under the retailer's authority, regardless of whether the business or agent is located in the state permanently or temporarily, and also regardless of whether the retailer or subsidiary is licensed to do business in the state.

On this and additional authority and evidence, the department concluded that Amazon Services, the taxpayer, is in the business of selling tangible personal property at retail and thus subject to the collection and remittance obligations.

The determination points to a number of facts supporting its conclusions, including these:

- The taxpayer, Amazon Services, LLC, hosts its own website, from which customers can select a variety of items.
- It controls to whom and to where the property is sent, and effects the actual transfer of these items to its customers.
- It accepts payment and holds a portion of them for later disbursement to a third party.
- It exercises control over transaction details, like customer service and returns.

Although Amazon Services does not dispute that taxable personal property is sold on its website, to users in South Carolina, it does dispute the department's conclusion that *it* is the entity that sells those goods.

The department addressed the arguments contained in Amazon Services' protest letter as follows:

1. **Due process:** Amazon Services argued that it "did not direct purposeful contact with the state" when it acted as a service provider to merchants "situated in states other than South Carolina." The Department countered that Amazon Services is not a "service provider," and moreover, by definition, it is "deemed a seller" by statute. Thus, when the taxpayer "sold property to South Carolina customers, it directed purposeful contact with South Carolina." This gives Amazon Services sufficient nexus with the state to satisfy due process.
2. **Fair notice:** Amazon Services contended that South Carolina failed to give it "adequate warning" that it could be subject to the state's taxing jurisdiction. South Carolina pointed again to the fact that Amazon Services' activities qualify it as a seller, not a service provider, thus giving it fair warning that it is subject to South Carolina's taxing jurisdiction.
3. **Internet Tax Freedom Act (Act):** Amazon Services declared that the Department's assessment violates the Act because it "taxes sales that would not be taxed if they were accomplished through traditional commerce." The Department found this to be "without merit," assessing Amazon Services' characterization of itself as a mall, that is not responsible for collecting taxes from stores within the mall, as inaccurate. Instead, Amazon Services "is actually like a consignment store that is responsible for collecting sales and use tax" because, "like a consignee, [it] receives payment from the customer and passes the third party/consignor's portion on to the third party." The department used similar reasoning, along with the fact that Amazon Services' transactions are not unique to the internet, to rebut Amazon Services' other act-related arguments.

For these reasons, the department concluded that Amazon Services "is a person in the business of selling tangible personal property at retail."

The Bloomberg report indicated that there could be broad implications from attempts to collect taxes from Amazon's FBA program. It noted that Minnesota, Rhode Island, and Washington are three states that have pursued taxing third-party sales. In addition, this year, "Minnesota and Washington became the first states to enact laws requiring marketplace providers to collect tax on third-party marketplace transactions. Many practitioners predict they will trigger legal challenges." So far though, South Carolina is the only state using existing laws to impose collection and remittance obligations.

As for the potential for a favorable outcome for the Palmetto State, Bloomberg quoted an expert who opined that "[i]t's 'too early to tell' whether the [Department] is likely to be successful as there are many factors at play... This is forging a different and new path out there."

Earlier this month, we [described](#) the Multistate Tax Commission National Nexus Program, an amnesty program under which FBA sellers could register, between Aug. 17, 2017 and Oct. 17, 2017, for future tax collections, while avoiding back taxes, interest and penalties. [Twenty-four states](#) are participating as of this writing, but South Carolina is not one of them.



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