



Tax



Regulation



Responsibility

Tax Insight: Sales and Use Tax, online transactions

Tax Insight

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Given the actual fiscal situation on many states, these are looking for new and innovative ways to collect more revenues. Due to this, taxation of internet sales is at the center of the attention and gaining relevance.

Background

The way business was done back in 1992 has changed enormously when compared now a days. The amount of transactions made electronically has increased exponentially creating a significant amount of SUT revenue that has been lost due to sales made by remote sellers.

At the time the U.S. Supreme Court arrived to the verdict in *Quill v. North Dakota*¹ the majority of the sales were made at “point of sale” rather than online or through another alternative. Time has passed and new cases have arisen, for example *DMA v. Brohl*². Even though the U.S. Supreme Court denied the DMA certiorari request, Justice Kennedy made a very bold and important statement “The instant case does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate

case for this Court to re-examine *Quill and Bella Hess*³”, recognizing that the system has flaws and needs to enact new legislation.

There are numerous states that have challenged the decision in *Quill v. North Dakota*. For example, the state of Colorado enacted legislation to impose certain notifications and reporting documentation requirements for non-collecting retailers/remote sellers. The notifications, that were challenged in *DMA v. Brohl*, and reporting required by the Colorado Department of Revenue are:

- issuing a notification letter to the purchaser indicating that their purchases may be subject to use tax.
- issuing a summary showing the annual purchases made by resident purchasers that bought more than \$500 in goods. The summary includes the date of the transaction, categories, and amount of purchases, as well a reminder of their obligations to pay use tax on those purchases.

- file an annual customer information report with the Colorado Department of Revenue listing purchasers’ names, addresses, and total amount spent.

Other states like Wyoming, South Dakota, Arkansas, Oklahoma and Rhode Island have promulgated similar legislation for this type of notifications and reporting requirements. Favorably, the U.S. Court of Appeals for the Tenth Circuit upheld the constitutionality of Colorado’s notice and reporting requirements since these do not violate the Commerce Clause as they do not discriminate against or unduly burden interstate commerce. Furthermore, *Quill v. North Dakota* only impacted the collection and remittance of SUT instead of its reporting and notification, which is what these state legislations are addressing.

On the other hand, Alabama and Tennessee entered into a more aggressive action, in comparison with *Quill v. North Dakota*’s decision, by requiring through regulation that remote sellers need to collect and remit the SUT irrespective of their physical presence situation in the state. The constitutionality of these regulations is questionable, but that is to be determined in the near future.

¹ *Quill Corp. V. North Dakota* (91-0194), 504 U.S. 298 (1992)

² *Direct Marketing Association v Brohl*, 135 S. Ct., 1124 (2015)(Kennedy, J.)

³ *National Bella Hess, Inc. v Department of Revenues Illinois*, 386 U.S. 753 (1967)

Nonetheless, the current state of law in these states strengthen the urgent need of the states for the U.S. Supreme Court to address the *Quill v. North Dakota's* decision.

Puerto Rico's proposal

Meanwhile in Puerto Rico, due to the current economic situation, the government is looking for better tax collections in relation to consumption taxes. The Puerto Rico Treasury Department ("PRTD") has identified that a huge portion of the SUT has been evaded as a result of online purchases. On this regard, the Puerto Rico government joined the states' trend discussed above and is proposing legislation that will require notification and reporting filings similar to the ones discussed above. Consequently, House of Representatives Bill 849 ("HR 849") has been proposed to emulate Colorado's requirements of notification and reporting. The PRTD estimates that with the approval of HR 849, the government will collect additional revenues of an average of \$100 to \$125 million per year.

It is not guaranteed that HR 849 will be approved. What is guaranteed is that a trend has been marked and changes in the collection, payment, reporting and notifications of SUT are needed in order to capture the SUT that has not been collected as a result of online sales. With the states requesting a revision of Quill's decision, it is time to temper these determinations to the new era and its technological advantages, commercial behavior and fiscal necessities.

Contacts



María de los Angeles Rivera
Partner Head of Tax and
IBC Director
T 1 787 754 1915
E maria.rivera@pr.gt.com



Javier Oyola
Tax Manager
T 1 787 754 1915
E javier.oyola@pr.gt.com