

IMRA SUPPORTS A LEVEL PLAYING FIELD FOR SALES TAX COLLECTION

SUMMARY

In August 1999, the Board of Directors of the International Mass Retail Association (“IMRA”) approved IMRA’s position on requiring all retailers to collect sales taxes on remote sales. IMRA supports a level playing field for sales tax collection by all retailers—including remote retailers—so that economically equivalent transactions bring identical tax consequences.

IMRA is the world’s leading alliance of retailers and their product and service suppliers. IMRA represents many of the best-known and most successful retailers in the world, who operate thousands of stores worldwide. IMRA equally values among its members hundreds of the world’s top-tier product and service suppliers.

The decision whether remote sellers should be required to collect sales/use taxes rests with the Congress. The U.S. Supreme Court’s 1992 decision in *Quill Corporation v. North Dakota* held that the Commerce Clause of the Constitution prohibits states from requiring sales/use tax collection by out-of-state sellers without a physical connection (or “nexus”) to the state. The Court emphasized that Congress, because it is authorized to regulate interstate commerce, has the power to require out-of-state sellers to collect the taxes. Consequently, brick-and-mortar retailers are at a competitive disadvantage because they must collect sales taxes in their stores and even on their Internet-based sales (if they have a store or other facility in the state/locality of the buyer), while their remote-selling competitors need not collect the taxes.

This disparity is unfair and leads to some retailers trying to manipulate the system in order to remain competitive. Some retailers have concluded that they need not collect sales/use taxes on remote sales made through separate subsidiaries, except in jurisdictions where the subsidiary has nexus. While this may eliminate sales tax collection requirements in states where the subsidiary has no physical presence, this strategy is not risk-free. Such structural and operational issues are, of course, business decisions that each company must make for itself.

IMRA believes that a more reasonable approach would be to treat all retail sales of tangible personal property in the same manner, whether made in a store or via a store’s Internet site, by a non-store Internet seller or by some other type of remote seller.

To achieve a level playing field, IMRA believes that extensive simplification and other reforms are necessary to reduce the burden of collecting sales taxes. To offset collection costs, IMRA suggests that sellers be allowed to keep a percentage of the taxes collected. Finally, IMRA believes it that expanding the duty to collect and remit sales/use taxes should not alter existing nexus requirements for business income taxes, franchise taxes or other business activity taxes.

THE STATUS QUO PUTS TRADITIONAL RETAILERS

AT A COMPETITIVE DISADVANTAGE

At present, many Internet retailers do not collect sales/use taxes for sales made to purchasers located in states where the retailers do not have a physical presence. This puts brick-and-mortar retailers at a competitive disadvantage in the states with sales/use taxes because they must collect sales taxes, while Internet retailers located outside the state do not have to collect the tax that applies on the identical sale (the “use” tax). Clearly, retailers that do not have to collect the tax enjoy an advantage over those that must.

Many of the best-known mass retailers view the Internet as a growth opportunity for sales and are actively promoting their Internet sites. Seeking to reduce the competitive disadvantage, some of these stores have set up separate Internet subsidiaries that need not collect and remit sales/use taxes, except on purchases made by customers where the subsidiary has nexus. Even these retailers, however, take little comfort from the uncertainty of their tax liability and the possibility of expensive, protracted challenges by state tax agencies.

Other popular mass retailers have elected to keep their Internet business as part of their main company structure and therefore must collect and remit applicable sales/use taxes wherever the company has a physical location. These retailers have taken this route for many reasons: they fulfill orders out of stores; they want customers to be able to return items to their physical stores and do not want to assume the risk that this could create nexus; or they want to set up Internet kiosks in their stores, again without assuming any risk that this creates nexus.

IMRA has members that are collecting sales taxes on-line and members that are not. Even so, they all support a level playing field where all retailers would be required to collect and remit sales/use taxes. IMRA strongly believes that certainty and fairness about sales/use tax collection is rational and sound tax policy.

A LEVEL PLAYING FIELD IS SOUND TAX POLICY

IMRA believes a level playing field, not preferential treatment for one type of seller, is sound tax policy. The most efficient means of collecting sales/use taxes is to require all retailers to perform the collection duty. The fact that an out-of-state business does not directly benefit from the services of the state is a misleading argument because sales/use taxes fall on consumers, not retailers. Finally, sales/use taxes should continue to be “destination-based.”

Some advocate keeping the Internet a “tax-free zone,” arguing that requiring Internet retailers to collect sales/use taxes would hinder the development of an infant industry. But providing special treatment to one sector of the economy to the detriment of other competing sectors does not make for rational economic or tax policy. Government should not distort the market by trying to pick winners and losers—propping up one segment of the retail industry at the expense of its competitors—but should instead provide uniform treatment to all.

Although Internet and other remote sellers are not obligated to collect a sales tax on a transaction in states where the seller does not have a store, consumers are obligated to pay an equivalent “use” tax to their home taxing jurisdiction (if they live in a sales tax state) when the retailer does not collect the sales tax. Many consumers are unaware of, or often ignore, this requirement. On the other hand, consumers who purchase an item at a local retailer must pay sales tax. The low rate of compliance with the use tax suggests that the only efficient means of taxing sales of tangible personal property is to require the seller to collect and remit the tax.

Furthermore, while IMRA suggests that the duty of collecting and remitting the taxes should fall on all retailers equally, it is important to note that sales/use taxes are imposed on the purchaser, not the retailer. It should not make a difference for tax collection purposes whether the goods are purchased over the Internet or from a local store—in either situation, the buyer receives a benefit from and should pay their fair share for public services (like roads, police and fire).

Charles McLure, a former Treasury official in the Reagan Administration, explained to the Advisory Commission on Electronic Commerce that it would be unreasonable not to ask all retailers to collect sales taxes. “The argument that remote vendors should not be required to collect the tax because they do not benefit from public services provided by the states of destination of their sales misses the point. Failing to apply sales or use tax to such sales is analogous to not levying motor fuel taxes on gasoline produced by out-of-state refineries—a policy few would find sensible.”¹

Because sales/use taxes are imposed on the purchaser, taxes collected on remote sales should be “destination-based,” with sellers collecting sales/use taxes based on the “ship-to” address.²

While state sales taxes are not perfectly destination-based, the system is the best approximation that can be made for a destination-based tax (using the purchase location as a rough estimate of where the consumption will take place) without asking for intrusive information on in-store sales. Sales of tangible personal property made over the Internet always require “ship-to” information, so no additional information would be required. A destination-based system makes for rational tax policy because the purchase and use of goods is a good barometer for measuring use of services provided by state and local governments. In this way, destination-based sales taxes act as compensation for benefits derived from public services.³

Origin-based taxation—taxation by the state where the product originates—would make for bad tax policy. It would defeat the goal of consistency (which goes hand-in-hand with fairness) by

¹ Charles McLure, *Achieving Neutrality between Electronic and Non-Electronic Commerce (A Presentation to the Advisory Commission on electronic Commerce, Williamsburg, Virginia)* (June 22, 1999).

² Because IMRA’s position only addresses the sale of tangible personal property, the question of how to source sales of digital products that can be downloaded from the Internet is not addressed.

³ Charles McLure, *Achieving Neutrality between Electronic and Non-Electronic Commerce (A Presentation to the Advisory Commission on electronic Commerce, Williamsburg, Virginia)* (June 22, 1999).

taxing electronic commerce differently from traditional commerce and it would simply encourage on-line retailers to locate in states that do not impose a sales tax. The result would hardly be an improvement over the present situation.

SIMPLIFICATION OF SALES/USE TAXES IS ESSENTIAL

IMRA firmly believes that states and localities should be required to dramatically simplify and harmonize their sales/use tax systems before remote sellers are required to collect these taxes. While some of IMRA's members are currently collecting taxes on their Internet sales, we recognize that it might not be economically viable to require all remote sellers to collect and remit sales/use taxes to thousands of different taxing jurisdictions nationwide.

One of the most important simplification concepts would require states and localities that choose to impose a sales tax to simplify their tax rate structure. While some suggest that nothing less than requiring a single, uniform sales/use tax rate per state will do, others including Amazon.com have suggested that moving to one rate per zip code would be sufficient simplification.

IMRA also believes that uniformity and consistency among the states on definitions for goods and services subject to tax is a key element of sales tax simplification. Other possible areas of simplification include: a single filing per state; simplified tax returns, remittance requirements and filing procedures; simplified treatment of purchases by businesses and exempt organizations; and uniform procedures for registration, audit, bad debt deduction, direct pay, refunds, and assessments and appeals.

ALL SELLERS SHOULD RECEIVE A COLLECTION ALLOWANCE

To offset costs associated with collecting sales/use taxes on remote purchases, IMRA believes that sellers should be allowed to keep a percentage of the taxes collected. Important in determining the percentage would be accurate information on the actual costs that collection would impose on businesses.

A LEVEL PLAYING FIELD FOR SALES/USE TAX COLLECTION SHOULD NOT CHANGE OTHER NEXUS RULES

Finally, Congress should provide concrete assurances that it will preserve existing nexus standards for other business taxes, such as income or franchise taxes.

Income and other business taxes are paid by a business for the various services provided by the state in which it is located. Sales taxes, on the other hand, are paid by customers and are merely collected by the retailer.

For more information, please contact IMRA's Counsel for Tax and Finance, Lisa Wolski.