5 KEY TAKEAWAYS

State and Local Tax Team Lunch & Learn

Kilpatrick's David Hughes and Samantha Breslow recently presented during the State and Local Tax Team (SALT) Lunch & Learn Webinar with Hoffman, Stewart & Schmidt, P.C. Key Takeaways from their presentation include:

1

Sales Tax Economic Nexus Rules: Every state with a sales tax uses "economic nexus" rule to determine whether an out-of-state seller is required to collect tax on taxable sales of goods in the state. Out-of-state sellers that exceed certain thresholds are required to collect tax. When these rules were first adopted, the thresholds were measured by both dollars and transactions. More recently, states have started to eliminate the transactions threshold in favor of only a dollar-based threshold, largely because the transactions threshold (typically 200 transactions in a state per year) often subjects many smaller retailers to what can be burdensome compliance requirements.

2

Public Law 86-272 and Internet Activities: Enacted in 1959, Public Law 86-272 is a federal law that prohibits states from imposing a net income tax on sellers of tangible property whose only connection with a state are salespeople who solicit orders that are accepted and fulfilled outside the state. The Multistate Tax Commission, a quasi-governmental agency that seeks to promote uniform tax rules for states, recently issued its revised interpretation of P.L. 86-272. Under this revised interpretation, any seller with an interactive website – such as a website that provides online repair or technical assistance to customers – loses its P.L. 86-272 protection because such activity exceeds the solicitation of orders. This is an expansive reading of the federal law that has not been endorsed by any state or federal court.

3

State Income Tax Issues in M&A: Many sellers assume that if they sell the stock of a company, they will only be subject to income tax in their state of residency. Some states, especially Massachusetts and New York, disagree. Both states use an "investee apportionment" rule whereby a non-resident seller is subject to income tax in Massachusetts or New York if the company they sell operated in the state. Tax applies even if the non-resident seller was a passive investor with no role in management. This could become a real trap for the unwary as it would not be surprising if other states followed the lead of Massachusetts and New York.

4

State Transaction Tax Issues in M&A: In general, sales tax and other transaction taxes are rarely an issue when a business is sold either because of the sale for resale exclusion (inventory) or the "occasional" sale rule, which would apply to capital assets, furniture and fixtures and other non-inventory items. There are, however, two notable exceptions. First, titled assets such as vehicles could be subject to tax, though the tax typically falls on the buyer rather than the seller. Second, many states have "controlling interest" rules whereby the sale of the stock/equity of a company that owns real estate (and very little else) is subject to a real estate transfer tax even though the deed to the property is never transferred.

5

Mobile Employees and a Taxpayer's Footprint: Since Covid, more and more employees are working remotely, often in a state that is different than their employer's home state. While the employee might enjoy the benefits of remote work, it can create tax headaches for employers, especially nexus and withholding issues. Employers must develop a system for tracking employee locations and knowing when they are obligated to start withholding. Employers should also be careful about registering for withholding in a state without doing an extensive nexus study to determine if the company has exposure for unpaid tax liabilities in that state.

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