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Kansas Surprises by Removing Nexus Thresholds and Seeks to Create Rebirth of “Slightest Presence” Nexus

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The Kansas Department of Revenue recently released Notice 19-04 (the Notice) which provides that all remote sellers making sales into the state are required to register for and begin collecting and remitting sales and use tax effective October 1, 2019, raising significant Constitutional concerns. Notably, the Notice cites *no transaction or dollar thresholds* for determining remote seller nexus with Kansas. The only predicate for nexus is that the remote seller makes a sale of tangible personal property or services to a customer located in the state.

The Department was clear that it relied on existing law, specifically K.S.A. 79-3702(h)(1)(F), to support the nexus position taken in the Notice, similar to New York who also relied on previously existing law to enforce economic next standards. K.S.A. 79-3702(h)(1)(F) defines “retailer doing business in this state” to include “any retailer who has any other contact with this state that would allow this state to require the retailer to collect and remit tax under the provisions of the constitution and laws of the United States.” The Department stated in the Notice that it will begin to enforce this statutory requirement as of October 1, 2019 and will not enforce the requirement prior to that date.

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Although the Notice references marketplace facilitators, it does not expressly require that they register with the Department for sales and use tax purposes. The Notice defines what is considered a marketplace facilitator and states that “marketplace facilitator[s] should contact the Department concerning entering into a voluntary compliance agreement.”

Interestingly, the Kansas Legislature twice tried to pass remote seller nexus legislation in 2019 which included \$100,000 transaction thresholds. Both bills were passed in the legislature but ultimately vetoed by Governor Laura Kelly. It is possible that remote sellers will challenge this Notice and the enforcement of the Department’s interpretation of Kansas law, however, no one has come forward yet to do so.

It is clear that the Department interprets *South Dakota v. Wayfair* to permit assertions of sales and use tax nexus based solely on a single economic connection – or transaction – between a remote seller and the recipient of tangible personal property or services in Kansas. The basis for such an assertion is questionable. The Notice makes no mention of the South Dakota law at issue in *Wayfair* that outlined clear transaction and dollar thresholds for determining sales and use tax nexus.

As discussed in “Removing Transaction Thresholds – Where Does Wayfair Go From Here?” some states – including California, Colorado, North Dakota and South Carolina – have begun to shift away from a dual threshold approach that was ratified in *Wayfair* to a singular dollar threshold, often \$100,000. This move to singular dollar nexus thresholds raised concerns of a “race to the bottom” where taxing jurisdictions would continually lower the amount of the dollar threshold. The end result, the critics claimed, was a direct affront to small businesses. Given the position taken by Kansas in the Notice, these concerns are quickly being realized.

The jurisprudence of the Supreme Court is clear that a taxpayer must have “substantial nexus” with a taxing jurisdiction in order to be subject to its sales and use tax laws. Prior to *Wayfair*, “substantial nexus” for sales and use tax purposes was synonymous with physical presence. As explained in the Court’s *Quill Corp. v. North Dakota* decision, absent a physical presence in a taxing jurisdiction, a remote seller was not subject to the jurisdiction’s sales and use tax laws. *Wayfair* expressly overruled the physical presence requirement articulated in *Quill* in favor of an economic presence. Yet, there remains one residual aspect of *Quill* that survived *Wayfair* that provides much-needed guidance on the application of the Court’s “substantial nexus” requirement, i.e., what is a required ‘minimum contact’ with the jurisdiction.

Over four decades ago, California argued that sales and use tax nexus could be supported by the “slightest presence” of the taxpayer in the jurisdiction. In *National Geographic Society v. California Board of Equalization*, the Supreme Court, although upholding California’s assertion of sales and use tax nexus in the case, expressly disagreed with the notion of “slightest presence” nexus. In response to the argument that “a few floppy diskettes” located in North Dakota constituted a sufficient physical presence to support sales and use tax nexus, the *Quill* Court stated that in *National Geographic* it had “expressly rejected a ‘slightest presence’ standard of constitutional nexus.”

In a post-*Wayfair* world, it appears that “slightest presence” nexus is now construed as “slightest *economic* presence” nexus. This construal is supported by the concerns expressed by the Court in *Wayfair* and again indicate the Court’s opposition to such a standard. To this point, the Court defended its holding in *Wayfair* by noting that there were sufficient safeguards in place to protect small businesses from the undue compliance burden of economic nexus laws. According to the Court, protections were afforded to small businesses

through the dual transaction and dollar nexus thresholds in the South Dakota law.

In the Notice, the Department directly challenges “slightest presence” nexus for sales and use tax purposes. In so doing, Kansas has all but obliterated any protection for small businesses. Now, all business owners making sales into Kansas, regardless of the annual number of sales or the dollar value of such sales are deemed to have sales and use tax nexus with the state. Through the lens of *National Geographic*, *Quill*, and *Wayfair*, effective October 1, 2019, a remote seller will have Kansas sales and use tax nexus based on the “slightest economic presence” with the state.

By failing to incorporate any nexus thresholds, Kansas has seemingly won the “race to the bottom.” It remains to be seen, however, whether the position taken in the Notice can survive constitutional scrutiny under a “slightest economic presence” nexus challenge. As states and other taxing jurisdictions continue to pass, revise, and reinterpret their nexus rules, it is possible that the protections for small businesses will continue to be dismantled piece by piece unless they are challenged and the courts step in to stop it.

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