

Best Practices for Managing Sales Tax in Turbulent Times

June 24, 2020



Housekeeping

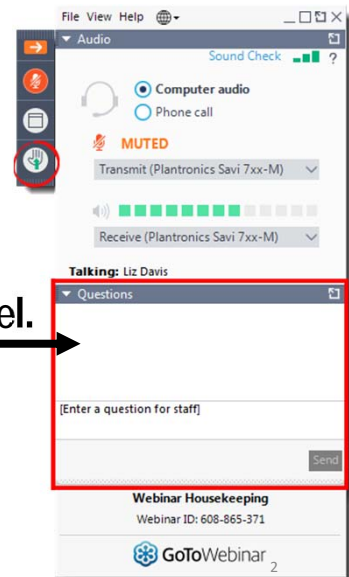


Today's web seminar is being recorded.

Submit your questions via the Questions Panel.



Questions will be answered throughout the presentation.



Speakers



David W. Machemer
Partner
Horwood Marcus & Berk



C. Eric Fader, CPA, JD
Managing Director
Sales and Use Tax Central Region Leader
BDO USA, LLP

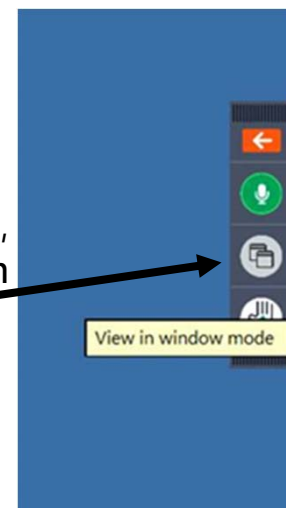


Linda O'Donohue, Esq.
Tax Manager
Wells Fargo Equipment Finance

Polling

If viewing the webinar in FULL SCREEN MODE, you will need to convert your screen to VIEW IN WINDOW MODE for the polling.

On your attendee control panel, the 3rd button will convert your screen



Polling Question #1

How many years of sales tax experience do you have?

- a) 0-3
- b) 4-10
- c) 10-15
- d) 15+

Topics and Learning Objectives

(1) Addressing immediate concerns with lease re-writes

- Sales tax implications of lease re-writes and modifications due to financially distressed lessees

(2) Strategic planning with marketplace facilitator laws

- What are the pros and cons to legal entity simplification
- What is the impact, if any, of states' recent marketplace facilitator legislation

(3) Audit Resolution best practices (keep your cash!)

- As governments are faced with budget shortfalls and reduced resources, what tactics will they turn to for revenue generation?
- Best practices for audit defense, both before and after they knock on your door!

Lease Re-writes and Modifications

Polling Question #2

How is your company handling lease modification requests?

- a) Deferral of Time
- b) Lease Amendment Time or Dollars
- c) Both A & B
- d) Neither
- e) Not applicable

Lease Re-writes and Modifications

- What are the sales tax consequences when a lessee requests a change in terms of the lease (reduction in payment, extension in years, etc.)?
- Accounting standards and business decision to likely drive the decision on whether Lessor can adjust the terms
- Non-Issues (generally):
 - Stream states
- Issues:
 - Upfront States: Ohio, New Jersey, California, Illinois, Maine
 - Titled Equipment: DMV/Title states may be an issue (approximately 20 states)
 - Can lessors obtain a refund in upfront states?

Strategic Planning with Marketplace Facilitator Laws

Legal Entity & Transaction Review: Marketplace Facilitator Laws – the impact on Leasing Companies

- Is now a good time for legal entity & transaction review?
- If so, what are the pros and cons of legal entity simplification?
- What considerations should be given to legal entity simplification?
- What is the impact, if any, of states' recent marketplace facilitator legislation?
- Strategic planning with marketplace facilitator laws
 - What is the impact, if any, of states' recent legislation

Polling Question #3

Has Wayfair and the Marketplace Facilitator laws impacted your sales/use tax practices?

- a) Yes, our use tax self-assessed and remitted has decreased because more suppliers charge tax
- b) Yes, we act as a facilitator on certain sale transactions
- c) Yes to both
- d) No impact

Legal Entity Simplification

What is it?: The review and evaluation of legal entities with the goal of liquidating, merging, or otherwise eliminating certain entities.

- **Pros**
 - Costs savings and increased efficiencies
 - Organizing based on asset type
 - Titling trust for titled equipment
- **Cons**
 - Costs
 - Compliance
 - Re-titling assets
 - Filing final returns which may trigger audit
 - Mitigates ability to “hide” from audit activity

Marketplace Facilitator Laws

- In broad terms, Marketplace facilitators/providers operate or control a marketplace and facilitate transactions by engaging, directly or indirectly, in communicating the offer and acceptance between a purchaser and a seller.
 - Definitions vary by state
- **Litigation**
 - *Normand v. Wal-Mart.com USA LLC*, No. 2019-C-00263 (La. S.Ct. Jan. 29, 2020)
 - *Amazon Services, LLC v. S.C. Dep't of Revenue*, Trial Case 17-ALJ-17-0238-CC (on appeal before the S.C. Court of Appeals)

Marketplace Nexus

- Certain states have begun to impose tax collection or reporting obligations on online marketplace operators (“marketplace providers” or “marketplace facilitators”)
 - Requirements generally apply to companies that help, in varying degrees, to facilitate sales by advertising, fulfillment, or payment processing
 - Specific definitions vary by state
- States proceeding under various approaches/theories
 - Marketplace as agent, retailer, co-vendor, consignee, or joint and several liability or “interests of efficient tax administration”

Marketplace Provider Obligations

- States are increasingly imposing a collection obligation on electronic (and physical) marketplaces
- Special challenges
 - Return presentation for sellers and marketplaces
 - Handling the customer service end – dealing with returns, refunds, and exchanges if marketplace sells and retailer performs customer service
 - Determination of exempt status and exemption certificates
 - Can the obligation be contracted between the parties?

Issues – Marketplace Providers

- Exemption Certificates → state rules on accepting, validating, and retaining exemption certificates vary
 - Marketplace providers must rely on marketplace sellers to provide complete and accurate information about their products
 - Marketplace providers should analyze how e-commerce customers can present exemption certificates
 - MTC workgroup: consensus that marketplace facilitators should be responsible for obtaining and streamlining exemption certificates

Marketplace Facilitator/Provider Laws

As of June 2020, the only states that impose a general sales/use tax that have not enacted marketplace facilitator laws are:

1. Florida (Proposed, SB 126 & HB 159)
2. Kansas (Proposed in 2019, not passed)
3. Mississippi (Proposed, HB 379)
4. Missouri (Proposed, SB 529 & SB 648)

Audit Resolution Best Practices (keep your cash!)

Polling Question #4

What are you seeing from the Jurisdiction right now?

- a. Status quo activity
- b. Auditors are increasing audit activity
- c. My auditor lacks capability to work remotely
- d. I haven't heard from the auditors or the State since the start of Covid

Three Guarantees: Death, Taxes.....and Audits

- **Audits**
 - Steps to Take Before They Come Knocking...because they will be knocking
 - Develop a Game Plan Upon Receipt of Audit Notice
 - Stalled Audits
 - Resolving Audits
 - Settlement/Closing Agreements
- **Post Assessment**
 - Notice of Assessment
 - Initial Considerations
 - Forum

Steps to Take Before They Come Knocking

- Consistent positions that are legally and factually sound
- Develop internal controls to ensure consistent positions are taken
- Memorialize internal research (memorandums, matrices) and monitor state tax developments
- Avoid compliance and refund positions that can trigger an audit
- Know your system limitations and be proactive!
 - Illinois ST-556 Example

Audit Notice Received: Develop a Game Plan

Issues:

- Identify all potential issues
- Identify the Scope of the Audit
 - Issues, Period, Tax Types
- Identify any "Trade-Off" issues
- Evaluate where the issues may be resolved:
 - Audit
 - Refund claim
 - Informal Conference
 - Hearings/Litigation

Develop a Game Plan

• Memorialize the facts:

- Gather documents
- Identify knowledgeable internal personnel
- Determine if external support is needed:
 - Legal analysis
 - Expert advice
- Document the position for the files
 - Document everything provided to the auditor; Don't rely on audit file!
- Preserve Privileges
 - Attorney Client
 - Work Product

Progressing Through an Audit

- **Avoid inadvertent admissions**
 - Discussions with the auditor
 - Informal settlement discussions
 - Discussions with Department personnel
 - Does auditor have authority to compromise?
 - When to escalate matter?
- **Statute of limitations:**
 - Two Way Street? (Assessment and Refunds?)
 - State waivers

Settlement

- An opportunity to settle is almost always available, especially in this environment;
- Cash is King...but that works both ways.
- Settlement may be beneficial to avoid undetected risks or reduce litigation risk on detected issues if an assessment is ultimately issued
- Generally, the earlier in the process the better;
- Engage in discussions even if it is only to gauge the strength of the state's case; and
- May be beneficial if issues are small and settlement will free up resources

Settlement (Cont.)

- In settling an audit, companies should consider:
 - The strength of their tax return positions & documentation;
 - If an assessment has not been issued, an understanding of the issues and amounts that may be assessed;
 - If an assessment has been issued;
 - Understand your controversy options;
 - Know who to negotiate with;
 - When and how to hint at settlement (without proposing it first);
 - Consider impact on other states (and audits);
 - Consider global state settlement; and
 - How to request and draft a closing agreement.

Closing Agreements

- Always ensure that any settlement has been memorialized in a closing agreement
- Settlement/Closing agreement may address:
 - Issues settled;
 - Methodology used;
 - Impact on future periods and audits;
 - Impact on net operating losses and credits;
 - Impact on other members of affiliated group (if separate reporting state);
 - State information sharing; and
 - If a settlement proposal is not accepted, company must ensure that it cannot be used by the adversarial party in litigation.

Polling Question #5

What is your prediction of how states will solve the budget deficit?

- a. Increased audit activity
- b. Base Expansion
- c. Both A & B
- d. Neither

Post- Audit Negotiation & Appeals

- **Proposed assessment. Anticipate:**
 - Auditor's need for lead time for supervisor review.
 - Additional questions due to supervisor review.
 - Possible penalty abatement/reduction if taxpayer agrees to assessment.
- **Formal notice of tax liability:**
 - Confirm protest rights & timing
 - Start date: when issued or received?
 - Protest date: 60 days? Mailbox rule? Signed by attorney, officer/director?

Post-Audit Negotiation & Appeals (Cont.)

- **Review:**
 - Review tax amount -> compare to audit report
 - Interest/penalties -> reasonable cause?
 - Advise management, counsel, tax advisors
- **Decide on next steps:**
 - Pay (some/all)? Refund claim? Seek equitable relief?
 - Unpaid amount -> timely protest

Post-Audit Negotiation & Appeals (Cont.)

- **Dispute resolution (options vary by state):**
 - Informal conference
 - Administrative hearing
 - Tax Tribunal
 - Circuit Court
- **Considerations:**
 - "Fair" hearing? Who is the hearing officer?
 - "Pay to play"
 - Running of interest
 - Continuing issue?
 - Other taxpayers have the same issue?

2020 Amnesty Plans?

- **Tax Amnesty:** Legislation which permits the taxpayer to pay (some) or the entire portion of tax due, in exchange for a full or partial waiver of interest and penalties.
 - Limited to identified periods
 - Often available to taxpayers engaged in controversy or litigation
- **States with 202 Amnesty Plans:**
 - Ohio (HB 609)
 - Nevada rumblings?



Upcoming Web Seminars

- July 8 Bold Conversations to Effect Positive Change
- July 15 Introduction to Unconscious Bias
- July 22 CECL
- August 5 Tech Roundtable, CTO Discussion
- August 12 FASB Update
- August 26 Ethics

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Thank You for Attending!