Stuck in the Middle Again: Latest Developments in Online Marketplace Litigation

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Agenda

Marketplace Collection – How Did We Get Here?

Recent Marketplace Disputes
Marketplace Collection – How Did We Get Here?
Background on Sales Tax Collection

— Generally for state and local tax purposes, the seller of the goods or services is responsible for collecting and remitting sales tax.

— Collection of sales tax by someone other than the seller is not a new issue.

— In certain circumstances, states have required parties that are not the buyer or the seller to collect sales tax:
  - Auctioneers
  - Tradeshow operators
  - Brokers
  - Agents
  - Sales representatives
  - Consignors
Background on Sales Tax Collection

These entities have been designated by states to be responsible for sales tax collection because:

- They may have control over the transaction;
  - Agents
- The actual seller may not be identified;
  - Consignment arrangements
  - Auctions
- They may handle or receive the funds;
  - Brokers
- They may process the payment; or
- It is administratively more efficient for the state.
  - Tradeshow operators
Ecommerce Platform Collection

As electronic commerce marketplaces became more popular, states began looking for opportunities to shift the tax collection obligation to new types of entities.

States historically have focused on:

- Online hotel intermediaries (OTC);
- Marketplaces (e.g., Ebay);
- Transportation platforms (e.g., ride share/transportation network companies);
- Financial entities; and
- Common carriers.
Ecommerce Platform Collection

States have attempted to shift the tax collection obligation to these entities through:

- Asserting these entities are the seller/vendor/retailer
  - OTCs
- Asserting these entities are agents for the sellers
- Enacting/proposing legislation to require such entities to collect tax
  - OTCs
  - Short-term rental platforms
  - Transportation platforms
  - Credit and debit card processors
  - Marketplaces
Ecommerce Platform Collection – OTCs

– OTCs were one of the first electronic commerce industries that was targeted.

– State taxing authorities asserted that hotel taxes are unpaid or underpaid as a result of online bookings.

– There have been numerous cases in states with states reaching differing conclusions on whether online travel websites have a tax collection obligation for their bookings.

– Some short-term rental platforms (e.g., Airbnb) have avoided the fray by simply negotiating collection agreements with the states under existing laws.
Payment Processors – “Real Time” Proposals

- In 2017, 2018, and 2020, Massachusetts considered implementation of a real-time sales tax collection system by payment processors, but ultimately it was decided after public comment that significant systems and technology changes would be required and this would take significant time and investment.

  - The State Tax Research Institute (COST) estimated in 2017 that implementation would have costs businesses $1.2B in one-time costs and $28M in annual costs, not including costs to Issuing Banks for systems integration.

- Similar proposals considered, but rejected, in Arizona, Connecticut, Nebraska, and Puerto Rico.

- What is the benefit?
Payment Processors – “Real” Time Proposals

— In 2019, Missouri considered legislation that would have required all remote internet sellers subject to Missouri sales tax to use a payment processor to collect and remit tax.

  • But, where a seller directly extended credit to its customers or accepts direct payment from customers, the bill provides that the seller would be treated as a “payment processor” for the purposes of the proposed sales tax collection obligation.

— In 2019, New York considered legislation that would have required certain issuers of credit cards and debit cards to participate in the collection and remittance of sales and use taxes through an escrow account mechanism.
Recent Marketplace Disputes
Louisiana (Jefferson Parish) – Marketplace Win!


- Louisiana Supreme Court issued its decision in favor of Walmart.com overturning the court of appeals and trial court decisions

- The Walmart.com marketplace was not *the* “dealer” in third-party sales made through the platform.
  - “There is no indication the legislature intended to tax intermediaries that are only tangentially involved in sales transaction, such as a marketplace facilitator relative to sales by third-party retailers.”
  - “The fact that an intermediary transmits the funds to sellers does not relieve the sellers of their tax-collection obligation or cause the intermediary to assume the sellers’ legal obligation to collect taxes. A contrary interpretation of [the term ‘dealer’], in light of Louisiana’s general tax scheme, would authorize the imposition of liability for sales tax on any intermediary that aids or enables sellers to reach new customers although not selling anything (i.e., payment processors, credit card companies, financial institutions, common carriers, advertisers, and broadcasters). Such an interpretation produces an absurd result …”
South Carolina – Amazon Marketplace Challenge

Amazon Services LLC v. S.C. Dep’t of Revenue, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019)

— The South Carolina Administrative Law Court concluded that Amazon was required to collect and remit sales and use tax on third-party seller sales made on the Amazon marketplace.

— The ALC held that Amazon retained extensive control over every aspect of the transactions, including being the only contact for the purchaser, and prohibiting the third-party merchants from accepting payments for the products.

— South Carolina enacted a marketplace collection law in April 2019.

— The case is on appeal to the South Carolina Court of Appeals.
Arkansas – Uber Eats Challenges Prepared Food Tax


- The City of Little Rock Advertising and Promotion Commission filed a complaint against Uber Eats for failure to collect the 2% Prepared Food Tax on restaurant gross receipts.
  - The tax applies to restaurants and other similar establishments that sell food.
  - The tax was recently expanded to platforms that facilitate the sale of food.

- Uber Eats filed a motion to dismiss, claiming that imposition of the tax on the marketplace results in double-taxation and that the DFA has held that platforms such as Uber Eats are operating as couriers and therefore not responsible for collecting the tax.

- The Arkansas Circuit Court granted Uber Eats’ Motion to Dismiss, finding that the Little Rock Advertising and Promotion Commission failed to state facts showing that it is entitled to relief.
Hawaii – Car Rentals Qualify for Reduced GET Rate

In the Matter of the Tax Appeal of Priceline.com Inc. v. Haw. Dir. of Tax’n., No. SCAP-17-0000367 (Haw. March 4, 2019)

— The Hawaii Supreme Court found that online travel platform companies (OTCs) must pay the state’s general excise tax (GET) on car rental transactions completed through their websites.

— However, the court found that the car rental transactions are tourism-related services that qualify for the reduced GET rate that is calculated only on the portion of proceeds retained by the OTCs, i.e., the margin/service fee.

• The OTCs used the “merchant model” where a customer makes a single payment to an OTC for all purchased services at the time of the reservation. The payment generally includes two components: (1) the base price for services set by contract between OTCs and service providers (remitted to the service provider); and (2) a facilitation service fee (retained by the OTC).
Arizona – OTCs Are Hotel Operators


- The Arizona Supreme Court found that online travel companies (OTCs) are “brokers” engaged in the business of operating hotels.

- Thus, the OTCs’ proceeds—their services fees and markups—are taxable gross income subject to municipal privilege taxes.

- The dissent warns that “[t]he opinion today changes the status quo and requires these agents [OTCs], credit card companies, and others to secure licenses and pay municipal taxes for the privilege of ‘operating hotels[.]’”
The New York Department of Taxation and Finance determined that an online marketplace operator that facilitates taxable software sales is a “vendor” liable to collect sales tax.

The Department relied on a rarely-used portion of the definition of “vendor,” which states that “when in the opinion of the commissioner it is necessary for the efficient administration of [the sales tax law] to treat any salesman, representative, peddler or canvasser as the agent of the vendor . . . the commissioner may, in his discretion, treat such agent as the vendor jointly responsible . . . for the collection and payment of the tax.”
Future Litigation?

- Contractual disputes between the marketplace facilitator and marketplace seller?

- Disputes over hold harmless provisions?

- Class action risks from over collection?
  - Some marketplace collection litigation limits class action lawsuits against marketplaces
  - Some states do not allow class action lawsuits for taxes

- Other non-tax liability for marketplaces?
  - Consumer protection issues
  - Product liability
  - *Apple Inc. v. Pepper*, 139 S.Ct. 1514 (2019) (consumers could sue Apple alleging that the company has an illegal monopoly that produces higher prices).