Sales and Use Tax Note

Whether and how to collect taxes on items sold over the Internet remains controversial as states look for new revenue, small brick and mortar businesses battle to compete against e-sellers, and businesses of all sizes and types sell more on the Internet. Issues include determining who is responsible for collecting such a tax and the nexus of businesses that sell on the Internet.

Arkansas Act 1001 of 2011 transfers responsibility for collecting sales and use taxes to sellers engaging in the business of selling tangible personal property and services in certain circumstances. For example, the Act directs that "if there is not an affiliated person with respect to a seller in the state, the seller is presumed to be engaged in the business of selling tangible personal property or taxable services for use in the state if the seller enters into an agreement with one or more residents of the state under which the residents, for a commission or other consideration, directly or indirectly refer potential purchasers, whether by a link on an Internet website or otherwise, to the seller," and if the the cumulative gross receipts from sales by the seller to purchasers in the state who are referred to the seller by all residents exceed $10,000 during the preceding twelve months.

California AB 155, which became law in 2011, changed provisions of state law which imposed a sales tax on retailers measured by the gross receipts from the sale of tangible personal property sold at retail in the state, and a use tax on the storage, use, or other consumption in the state of tangible personal property purchased from a retailer for storage, use, or other consumption in the state, measured by sales price. Before AB 155, state law required every retailer engaged in business in the state, as defined, and making sales of tangible personal property for storage, use, or other consumption in the state to collect the tax from the purchaser.

Before AB 155, state law defined a "retailer engaged in business" in the state:

- to mean a retailer that had substantial nexus with the state and a retailer upon whom federal law permits the state to impose a use tax collection duty;
- including, among others, a retailer entering into an agreement or agreements under which a person or people in the state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise, provided that two specified conditions are met, including the condition that
- the retailer, within the preceding 12 months, has total cumulative sales of tangible personal property to purchasers in the state in excess of $500,000; and
- a retailer that is a member of a commonly controlled group, as defined under the state Corporation Tax Law, and a member of a combined reporting group, as defined, that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer.

California AB 155 revised the definition of a "retailer engaged in business" in the state to temporarily eliminate the above-mentioned inclusions in that definition, but also specified that the operation of these inclusions would resume upon a specified date if either a certain federal law authorizing states to require sellers to collect tax is enacted and the state declines to implement that law, or the federal government fails to enact a law providing that authority. California AB 155, for purposes of the condition with respect to total cumulative sales, also increases the threshold amount of total cumulative sales of tangible personal property to purchasers in the state to $1,000,000 or more.