

Our American States | An NCSL Podcast



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy.

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Welcome to Our American States, a podcast of meaningful conversations that tell the story of America’s State legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host, Gene Rose.

Let’s step into a time travelling machine for a few moments, and go back to the year 1992. The Internet, as we know it now, was in its infancy. Many people on the Internet were using America Online, and in the early 1990s, a company called CompuServe started competing for customers. Online sales were minimal in 1992. In fact, Amazon would not be founded until 1994.

We go back to 1992 because a court ruling that year said a state cannot require businesses to collect sales tax unless that business had a physical presence in that state. Let’s fast forward 25 years to today, where that court decision is still the law of the land, despite many brick-and-mortar retailers saying this is an unfair decision.

In this edition of Our American States, we’re going to find out what the chances are of that 1992 decision to be overturned, and what actions states have taken over this course of time, and what actions are expected of Congress.

In this episode, we’ll talk to South Dakota Senator Deb Peters, who also is President-Elect for the National Conference of State Legislatures, and find out from her how states are positioning themselves on this issue, and to learn more about a court case that likely could be headed to the Supreme Court.

We'll also talk to NCSL analyst, Max Behlke, who will fill us in on the details of the issue and give us an inside look on how Congress is being lobbied. We'll talk with Senator Peters right after this break.

Break

Gene: Joining us today is Senator Deb Peters from South Dakota. So let's give our listeners a little history lesson here. This is... you started with a case heard by the U.S. Supreme Court in 1992, Quill vs. North Dakota. Walk us through what that ruling said and tell us why it caused NCSL and the states to address its consequences.

Deb: Sure. Well, the Quill vs. North Dakota case back in 1992 basically stated that states did not have the authority to collect sales tax from businesses doing business outside of their geographic area. You have to have a physical presence within that state. And the reason why they ruled that way is because at that point in 1992, it was a bookkeeping nightmare. It was an undue burden on the business in order to collect and remit in all of the states that they were shipping to.

And in that court case it also said: We think Congress needs to address this issue because of the commerce clause. Now, nothing has happened since 1992 in Congress. So why did NCSL get involved? They started the Streamline Sales Tax Governing Board after that 1992 case. Now the Streamline Sales Tax Governing Board actually didn't even come into play until the early 2000s. The Governing Board then took it upon themselves to compact or create an agreement amongst states – now there are 24/25 different states in the compact – that have simplified their sales tax laws and streamlined them, so a definition of water in 24/25 states is the same definition of water.

So, let's say a retailer selling water doesn't have to decide in these 25 states what the different definitions are. What it does do is says the states can either tax it or not tax it based on that definition of the 24 states [sic]. So the Governing Board has gone through and streamlined sales tax. NCSL on top of that also started the State and Local Tax Taskforce, which also works with all of the states, not just the 24 compact states, in order to come up with strategies on how to get Congress to actually act. And we actively lobby Congress to push through a federal solution on sales tax that will work for all 50 states.

Gene: Okay. And what do you say to the critics who say that this kind of activity is just to try to put another tax on consumers?

Deb: Sure. The states that have a sales tax law on the books also have a use tax law on the books. Most states put their sales tax laws on the books in the 1930s. In that case they not only put sales tax laws in, but they put use tax laws in, and what that is, is that is a tax if you do not pay tax in your state, so you're consuming a good or service in your state that is not taxed because it was purchased outside of your state and brought in, then you have to remit the use tax.

So, it is not a new tax to require online retailers and remit tax, as it's already law in every state that has a sales tax law, but you must collect and remit your use tax if you do not pay a sales tax on the purchase. So it's nothing new.

Gene: You're just trying to get fairness on this issue?

Deb: Exactly. What we're trying to accomplish... the ultimate goal is point-of-sale fairness. So it doesn't matter where you buy the good or what you do with it, it's treated the same. So, for instance, if you're in South Dakota – now we tax it if it moved because we do not have a corporate income tax or a state income... no corporate or personal income tax. We rely almost 80% of our state budget on a consumption tax.

You can argue whether that's right or wrong; however, besides that, because our budget is 80%, we have a very broad-based sales tax that covers almost everything. So because of the broad base, we have a low rate and we tax everything. So we also need the use tax to be collected and remitted. And there's no really good, efficient way to do that other than a federal solution to ensure that all states are treated equally.

Gene: So, as you point out, there's a lot of activity on the state level and definitely some hope that Congress will take action. So where are we at today in terms of trying to address this problem from a legislative perspective?

Deb: Sure. Well, NCSL has been lobbying for over a decade in Congress, trying to come up with a federal solution, and to no avail. Nothing has actually moved. The closest we got was in 2013 when the Senate actually passed a Marketplace Fairness Act solution. However, the House failed to act.

So what states have done is taken it into their own hands. For example, South Dakota, we passed Senate Bill 106 last year. Senate Bill 106 is a direct challenge to the Quill vs. North Dakota court case and what we are trying to do is fast-track the issue to the U.S. Supreme Court. Just last week our Sixth Circuit Court here in South Dakota said it does not have the jurisdiction to hear the case and has moved it to the South Dakota Supreme Court.

The reason we chose South Dakota to do this type of an action is we do not have an appellate court. So we go to the South Dakota Supreme Court quicker than any other states. And once we get a ruling from the South Dakota Supreme Court, we can move it right to the U.S. Supreme Court.

Gene: And so tell us a little bit about this case that is going through the courts. What are the parameters of it?

Deb: The parameters are basically authorizing states the ability, because of technological changes, that nexus is different today than it was in 1992. If you recall in 1992, we had the Commodore 64 and technology wasn't where it is today. Commerce has also changed since 1992. Most folks went down to the local retail store. The Internet was very, very young. And a lot of folks didn't do any purchasing online.

Fast forward till today. Now retail is growing at over 6% a month over month. We are hitting retail records and e-commerce is the only sector of retail that's growing today. The growth in stores is not where it used to be.

So what we're trying to do with Senate Bill 106 is say: If you're selling in the State of South Dakota, whether you have nexus or not, you must collect and remit sales tax for the State of

South Dakota. What that does is that directly challenges the Quill vs. North Dakota 1992 U.S. Supreme Court case, and in doing that, what we're doing is fast-tracking it.

We don't have to have a court case, or we don't have to have a judgment against business; you know, you don't have to go through the audit system; you don't have to go through all of the steps that other states are going to have to go to in order to get a court case to challenge it. What this does is it automatically, when the day of the bill went into effect, which is 15 days after the Governor signed the bill, which is a random day, we took after four retailers right away and took four retailers right to court, and said: You must, because the state law says you must, collect and remit sales tax.

So what that did is it put it automatically right into the court system without a full audit. We knew four players within the State of South Dakota were doing business actively and hit the pre-arranged amounts and dates and bill of Senate Bill 106, and we went right to court within 10 days of that bill going into effect.

Gene: Across the country you've got support on this issue from Republicans and Democrats?

Deb: That is correct. It's interesting... the people that are having the most issues up in Congress are the Republicans. But this is a bipartisan issue from all of the states. It doesn't matter if you're a blue state or a red state. States are having issues with revenue. Instead of raising taxes to balance budgets, what states are trying to do is collect taxes that are already legally due and owing and, in order to do that, we need a solution on the sales and use tax.

I'm hoping that we don't have the patchwork effect of each state doing their own thing, which is what it looks like is going to happen. But if Congress could ultimately act and fix the solution and come up with a federal solution that works for all commerce within the country, we would have a solution that works for 50 states and it would solve budget issues for states to come up with a simplified, streamlined effort for collecting and remitting sales tax already legally owed and due.

Gene: We've covered a lot of ground here. Is there anything else about this issue that you think is important for other state legislators across the country to know about?

Deb: You know, this is a quickly and rapidly changing area as court cases are being heard all over the country, and I would just encourage other states to continue contacting their congressional members to push for a federal solution so we don't end up with a patchwork solution that's bad for retail business.

The ultimate goal is to just put enough pressure on the federal government to come up with a solution that works for all, and ultimately be beneficial to our online retailers as well.

Gene: We've been talking with Senator Deb Peters from South Dakota. We appreciate your time today.

Deb: Thank you very much.

Gene: Coming up we hear from NCSL analyst, Max Behlke, and get his perspective on activity in the nation's capital on this issue.

Break

Gene: Okay, joining us now is Max Behlke, Director of Budget and Tax Policy at the state/federal office at NCSL. Max, welcome to the program.

Max: Good morning Gene. Thank you for having me.

Gene: So let's get specific on what activity has been happening on the state level. Last year several states passed legislation to collect sales tax that is due for out-of-state sales. Is that a trend that's continuing this year?

Max: Thanks Gene. This is a great question because it truly is a trend that's continuing. Four states last year passed legislation to aim to collect sales taxes they are owed from out-of-state purchases, and this year so far I count 28 states that have introduced some sort of legislation. Wyoming has already sent their legislation to the Governor and it's been signed into law, and I expect a few other states to actually enact their legislation soon. But over 50 bills out there across the entire country – this is definitely one of the main trends that is going on in state legislatures this year.

Gene: Okay. So what kinds of specific approaches are you seeing states considering now?

Max: Generally... I'm putting these... the issue is rather complicated, so I'm going to put these in three general buckets. One, you have economic nexus, which is what South Dakota did, which says that if you sell a certain amount of dollars into our state each year, regardless of whether or not you're physically present there, you have to collect and remit the state sales taxes. This is probably the most general way that states have gone after collecting these taxes.

On one hand you have states where this is a very easy way to explain it – it makes sense; it alleviates problems for small businesses; and by having a large enough dollar threshold. That being said, these measures can lead to court action as has happened in South Dakota.

The second avenue I've seen is what states have done for reporting and notification, which is that if you're selling into our state but aren't currently collecting and remitting the taxes on purchases that are sold into our state, you have two options: either 1) to actually collect and remit, or 2) to report to the Department of Revenue at the end of each year as well as to the consumer who bought from that business what was bought and the taxability that is owed, so that the Department of Revenue as well as the consumer can properly ensure that all the taxes were paid on those purchases.

The first state to really go after this was Colorado in 2010 and last year when the Supreme Court basically said we're not taking this up, states can do this, it really energized this avenue for multiple states that are out there.

The third avenue, which three or four states have gone after, is going after the marketplace itself; meaning that if you're a platform such as a website, that third-party retailer sells over such as eBay, if they're selling over that into our state, the entire platform has to collect and remit for every seller that's selling on that platform. No state has enacted one of these laws yet, but I do believe that the sheer size of these marketplaces that are out there... in fact I believe

that Amazon noted that in 2016 more than 100,000 sellers on their platform, the third parties, there were more than 100,000 of them that sold more than \$100,000 a year in sales.

So that's where I believe they're going to end up at some point and it will be very interesting to see how those laws are put into place should they be signed and enacted.

Gene: So Max, how much money are we talking about here that states potentially could be collecting?

Max: So it does vary by state and we won't know exactly what the actual dollar figure is each year state by state until states are given the full authority to collect. But our latest calculations have it over \$25 billion per year across the entire country. And we expect that number to continue to grow as e-commerce grows by 15 percent a year, which it has for the last five years, and now accounts for more than 10 percent of all retail sales. So as more and more people shop online, the amount of uncollected dollars that are owed continues to grow as well.

Gene: Now, you being based in D.C., you're obviously working with members of Congress and the Administration to try to get federal legislation approved to allow states to collect Internet sales taxes. What are you hearing on the Hill these days?

Max: States really have taken their own actions because Congress was directed by the Supreme Court in 1992 to address this and they still haven't. So when states started going out there, and South Dakota most chiefly passing their law, it really got a lot of attention on Capitol Hill. And members of Congress from the leadership down understand that if the Supreme Court ultimately acts and overturns the Quill decision and states are then given the ability to collect these taxes that they're owed, that states are no longer going to be asking Congress to actually pass any legislation. In fact, states will probably be opposing any efforts by Congress to remove authority they just got from the Supreme Court.

So that's got the attention that's out there and I think... well, Congress is really consumed right now with healthcare among other issues, and budgets and the fiscal deadline, so a lot of other issues including this one are a little on the secondary level. But as the South Dakota case nears its way to the Supreme Court, I really expect Congress to start really looking into this issue in the coming months.

Gene: So you mentioned the South Dakota case. How long do you think it will be before the Supreme Court decides to take it up or reject it?

Max: The South Dakota case is quite unique, especially the way the bill was drafted, and it basically was drafted to go to the Supreme Court. The decision a few weeks out of the court system in South Dakota, which basically the lower court said: We agree that the 1992 decision is outdated, but we don't have the legal authority to overturn it, and then moved it along to the State Supreme Court... So I expect... I'm not an attorney and I think it's pretty hard to prognosticate how quickly any litigation moves through, but I would expect it would be there in time for the state to be petitioning to the United States Supreme Court to take up this case by some point either in late summer or early fall.

Gene: So if the Supreme Court ultimately reaffirms the Quill decision, how would that impact the long-term viability of...

Max: Oh, that's not good news if that were to happen for states. If the Supreme Court ultimately keeps the law the way that it is now, I really fear for the future of all consumption taxes and sales taxes in the United States. Because so much is being delivered electronically, digitally, people are buying over the Internet, that if the Supreme Court basically says we're not going to take this up, I'm not sure that Congress is going to all of a sudden have the urge to address this. And then state budgets are going to be looking really (can't understand word...??) after that and states that rely very heavily on their sales taxes, especially the ones that don't have income taxes like Texas or Florida or Tennessee or South Dakota, then they're going to have to really be looking at revisiting the way that they raise revenue, and that might mean putting in an income tax or raising property taxes, because they're just not able to collect the revenue they need that they're already owed through their sales tax.

I don't believe that's what would happen, but if it did, it would be a huge blow to state budgets in the future.

Gene: Okay. And for state legislators out there that want to keep up on this issue, Max, what's the best way for them to do that?

Max: Sure, we have... the updated information is on the Budgets and Revenue Committee page for NCSL as well as my contact information, and I would be happy to provide an update of where that comes along.

Gene: I appreciate your time today. We've been talking with Max Behlke, the Director of Budget and Tax Policy at the state/federal office at NCSL. Max, thank you for your time today.

Max: Thank you, Gene.

Gene: And that ends this episode of Our American States. We encourage you to subscribe to this podcast on iTunes, Google Play or on the NCSL website, www.ncsl.org. Until our next episode, this is Gene Rose. Thanks for listening.