Between a Rock and a Hard Place

Class Action versus Qui Tam

NCSL Executive Committee Task Force on State and Local Taxation

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Overview

At the November 22, 2014 meeting of the Task Force, Steve Kranz, McDemott Will & Emery LLP and I gave a presentation on Vendor Liability Risks. The Task Force requested an update on the topic. I will briefly provide:

- Background on liability risks faced by vendors from administering and collecting transaction taxes on behalf of state and local governments; and
- Review and update of efforts to provide vendor liability protections.
- The prior presentation with more background and detail is available at: http://www.ncsl.org/documents/statefed/Vendor_Liability_Risks_11_22.pdf

Vendor Liability Risks

Unclear statutes and lack of guidance create two main liability risks for vendors collecting and remitting transaction taxes on behalf of state and local governments.

- Collect too little:
  - Audit Risk
  - Qui Tam
- Collect too much:
  - Class Action Lawsuits

Qui Tam Actions

- Typically brought under a state's or locality's False Claims Act (FCA) by an informer/relator who has knowledge of the commission of an act and receives an award and reasonable attorney fees.
- The FCA generally establishes a penalty for the commission or omission of certain acts. It takes the action outside of normal tax appeals process.
- The Federal FCA excludes taxes administered by the Internal Revenue Service which has a whistleblower process. State FCA's vary:
  - Some restrict Act to Medicaid and/or contractor type fraud.
  - Some explicitly bar "tax" actions: CA, DC, HI, MA, MD, NM, NYC, NC, TN, and VA. IL, IN and RI exclude income taxes. Some exclusions do not include fees.
  - Some have no restrictions: DE, FL, NV, NH and NJ.
  - NY became the first state to explicitly authorize the application of the FCA to tax claims.

Qui Tam Actions

Should a State or Local False Claims Act apply to tax?

- Removes tax administration decisions from taxing authorities.
- Leads to disparate tax treatment among taxpayers.
- Contravenes well-established procedures designed to ensure efficient resolution of tax disputes.
- Upends protections for taxpayer rights, including historical right to privacy in tax matters.
- Meant to combat fraud by incentivizing true whistleblowers (i.e. insiders) to bring suits on the government's behalf. Instead it has been used primarily by outsiders that play on the uncertainty of the tax laws.

Class Action Law Suits

- Customer liability actions fall under three main categories: Jurisdiction rate assignments, deciding which jurisdiction can tax the transaction and the taxability of the product sold.
- Vendors often can defend against the actions because they used due diligence and remitted funds to the jurisdiction but not without costs.
- State and local governments can also be parties to the class action law suits.

Current Vendor Protections and Efforts

Qui Tam Actions

- Specific exclusions from FCA for taxes are in place in a number of states. However, there are some proposals by firms filing FCA actions seeking to expand a State or Local FCA to specifically cover taxes.
- Multistate Tax Commission – The Executive Committee directed the uniformity committee project to develop a model bill that looks to whistleblower provisions following the precedent in the IRC instead of using FCA. At its meeting earlier this week MTC staff reported that they will be setting up a working group call to begin work on the model.

Current Vendor Protections and Efforts

Class Action Law Suits

- Streamlined Sales Tax Agreement – offers a number of protections that limit the risk of vendors including: the provision of databases and hold harmless for relying on them and customer remedy procedures.
- American Bar Association Model Transactional Tax Overpayment Act – sets forth purchaser recourse provisions and provides that the vendor should not be party to the action.
- Multistate Tax Commission – On July 29, 2015 the MTC full membership adopted a resolution that encourages the consideration of the ABA Model for adoption by the states.

Potential Task Force Action

Develop principles for states to consider when developing vendor liability protections that:

- Balance the needs of the State, vendors and consumers.
- Recognize that vendors are acting as agents of the state.
- Allows a process for consumers to receive refunds of overpaid taxes without unfairly requiring the vendor to refund to the consumer before the state refunds or commits to refund the money to the vendor.

Thank you.