Insights: Alerts

Georgia's New Economic Nexus Sales Tax Law - What You Need to Know

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Georgia enacted economic nexus sales tax legislation in the spring of 2018. The law just became effective on January 1, 2019. Modeled after the South Dakota law the United States Supreme Court declined to strike down in *South Dakota v. Wayfair*, Georgia's law has some unique features and enforcement mechanisms compared to the equivalent laws enacted by other states. For anyone who missed the legislation when it was passed, or needs a refresher now that the law has become effective, below is a high-level summary, along with a few observations.

What are the Thresholds?

Effective January 1, 2019, the term "dealer" –persons required to register to collect and remit Georgia sales and use tax – includes:

- Every person making over $250,000 in Georgia sales for the prior or current year[1]; and
- Every person making 200 or more separate Georgia sales for the prior or current year.[2]

Significantly, not all Georgia sales count towards the thresholds, but rather only "retail sales of tangible personal property" that are "delivered electronically or physically to a location" within Georgia for use within Georgia. [3] This favorable statutory language may be contrasted with other state statutes requiring that a broader array of sales count toward the thresholds.[4]

Suppose My Company Triggers the Thresholds, but Does Not Want to Collect and Remit Georgia Sales and Use Tax?

Georgia's law provides an alternative to registration and collection for persons that exceed the thresholds.[5] A person that exceeds the thresholds can opt to comply with notice and reporting requirements rather than collecting and remitting Georgia sales and use tax. Compliance with the notice and reporting requirement option entails the following:

- Informing potential purchasers, immediately prior to the completion of each Georgia retail sale that: "Sales or use tax may be due to the State of Georgia on this purchase. Georgia law requires certain consumers to file a sales and use tax return remitting any unpaid taxes due to the State of Georgia." [6]
- Sending a sales and use tax statement ("S&U Tax Statement") to each Georgia purchaser who purchased more than $500 from the seller in the prior year. The S&U Tax Statement must be mailed on or before January 31st, and must enclosed in an envelope with the words "IMPORTANT TAX DOCUMENT ENCLOSED." [7] It must contain the total amount paid by the purchaser for retail sales from the seller during the previous calendar year, as well as, if available, the dates of purchases, the amount of each purchase, and the category of each purchase,

including if, known by the seller, whether the purchase is exempt from taxation.[8]
- Filing a copy of each customer S&U Tax Statement with the Georgia Department of Revenue on or before January 31st every year.[9]

Companies exceeding the thresholds will need to decide for themselves which of the two options – collection and remittance or compliance with the notice and reporting requirements – is preferable.

Is there Significant Detection Risk?

As part of its 2018 sales and use tax legislation, Georgia modified its taxpayer confidentiality statute to permit data analytics firms to assist the Georgia Department of Revenue in locating non-compliant companies.[10] The statute specifically states that data analytics firms can be compensated "based on collections…attributable [to them].[11] Presumably, data analytics firms compensated based on collections will cast a wide net.

What if My Company Thinks the Georgia Law is Unconstitutionally Burdensome?

The legislation creates a mechanism under which the Georgia Department of Revenue can bring an action for declaratory judgment in superior court against a person the department believes meets the statutory definition of a dealer under the law (and is not complying with the statute).[12] The point of the proceeding would be to "establish that the collection obligation…is applicable and valid under state and federal law.[13] Accordingly, rather than proceed through the ordinary administrative channels, an out-of-state seller detected by a data analytics firm may have the option of challenging the law before a superior court judge, rather than fighting with an auditor or data analytics firm and proceeding through administrative channels.

Any company that receives a non-compliance notice will want to carefully consider the language in *Pike*[14] and *South Dakota v. Wayfair*[15] along with the company's facts and circumstances in considering a potential legal challenge. It would not be surprising if a data analytics firm working on a "bounty hunter" model attempts to push the envelope too far in at least some cases and chases after companies that are very differently situated than the retailers that challenged the South Dakota law in *South Dakota v. Wayfair*.

Conclusion

Georgia was one of the first states to enact economic nexus sales tax legislation. While the legislation was enacted last spring, it is only now becoming effective (January 2019). Any company impacted that is not already complying needs to carefully consider both the collection and remittance option, as well as the notice and reporting option. Any company receiving a non-compliance notice will need to decide whether to fold or to challenge the law, carefully taking into account the company's own facts and language in *Pike* and *South Dakota v. Wayfair*.

Footnotes

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[1] Ga Code Ann. § 48-8-2(8)(M.1).
[2] Ga Code Ann. § 48-8-2(8)(M.2).
[3] Ga Code Ann. § 48-8-2(8)(M.1); Ga Code Ann. § 48-8-2(8)(M.2).

[4] *See, e.g.*, N.J. Rev. Stat. § 54:32B-3.5.a.(1) (counting "gross revenue" from delivery of tangible personal property, specified digital products, or taxable services, when determining whether the thresholds are met, with no statutory carve-out for sales-for-resale and other "non-retail" sales).

[5] Ga Code Ann. § 48-8-30(c.2)(2).

[6] Ga Code Ann. § 48-8-30(c.2)(2)(A).

[7] Ga Code Ann. § 48-8-30(c.2)(2)(B).

[8] See Georgia Policy Bulletin SUT-2018-07 (October 1, 2018).

[9] Ga Code Ann. § 48-8-30(c.2)(2)(C).

[10] Ga Code Ann. § 48-2-15(e).

[11] Ga Code Ann. § 48-2-15(e)(1)(B)(ii).

[12] Ga Code Ann. § 48-8-30(c.1)(2).

[13] *Id*.

[14] *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018).

[15] *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970).