

Amazon Vendors, Call The NY Tax Dept. Before They Call You

By **K. Craig Reilly** (June 7, 2018, 2:16 PM EDT)

On May 15, 2018, Amazon Services LLC, which assists third parties selling their products through the online Amazon.com Inc. marketplace, sent an email^[1] notifying third-party sellers that “Amazon has received a valid and binding legal demand from the New York State Department of Revenue” (we assume the request came from the New York State Department of Taxation and Finance — the state agency responsible for administering tax laws in New York State). According to Amazon’s email, Amazon was planning to release the following information to New York regarding its third-party sellers by June 1, 2018:



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- Contact information (name, address and federal tax ID number);
- Total amount of Amazon.com sales made during the 2014 calendar year; and
- Total amount of Amazon.com sales made to New York customers during the 2014 calendar year.

Amazon plans to provide the requested information for all third-party sellers who have not elected to use Amazon’s tax calculation services for sales to customers in New York.

Amazon has received similar requests from other states (including a recent request by the Massachusetts Department of Revenue), and there are several reasons why New York may be looking to get its hands on Amazon’s third-party seller data.

First, New York state has failed to pass laws treating online marketplaces as “vendors” for purposes of the state’s sales and use tax laws. New York has for two consecutive years proposed draft legislation in the governor’s executive budget^[2] to treat large (that is, those managing \$100 million or more in annual sales) online marketplaces as “vendors” under New York state’s tax laws, thereby forcing the marketplaces to collect and remit sales and use taxes. This provision has not made it into law and the state may now be either gathering additional data in order to make another pass at enacting its new laws or turning its focus to the third-party sellers operating on the marketplaces or to customers making tax-free purchases through Amazon.

New York may, for example, be looking to collect unpaid tax from unregistered vendors with nexus under existing law. A state’s ability to impose sales and use tax collection or payment obligations on an out-of-state seller is dependent on whether the seller has sufficient contacts or “nexus” with the taxing

state. According to current U.S. Supreme Court precedent (more on that below), in order for a state to impose these obligations, the out-of-state seller's nexus with the state must satisfy both the due process and dormant commerce clauses of the U.S. Constitution. To satisfy the commerce clause, an out-of-state seller must have some type of physical presence in a state before the state can impose its sales and use tax collection obligations.

There are unsettled questions^[3] as to whether third-party sellers establish a physical presence in a state simply by Amazon storing the sellers' products at one of Amazon's fulfillment centers, but in the context of New York state, Amazon is scheduled to open its first New York fulfillment center on Staten Island later this year, so third-party sellers would not have had property stored in New York in 2014. Some large sellers, however, may have other contacts with New York such as remote employees or agreements^[4] with in-state residents under which the resident, for a commission or other consideration, refers potential customer to the seller via a click-through web link. Either of these scenarios could create nexus under existing law.

Any third-party Amazon seller concerned that it may currently have nexus with New York state should consider applying for the state's Voluntary Disclosure and Compliance Program, which offers eligible taxpayers the opportunity to avoid monetary penalties, and possible criminal charges, and also to limit past exposure by voluntarily paying the tax and interest owed during a limited look-back period (generally three years). Importantly, voluntary disclosure is only an option if the applicant is not currently under audit by the Tax Department and has not received a bill for the past due taxes that are being disclosed. Additional audit notices seem highly likely once Amazon delivers its third-party seller data to the state, so interested taxpayers should consider this option sooner rather than later.

New York state may also be anticipating an end to the physical presence nexus requirement. The current physical presence requirement for sales and use tax nexus comes from the U.S. Supreme Court ruling in *Quill Corp. v. North Dakota*^[5]. On April 17, however, the Supreme Court heard oral arguments in a case directly challenging Quill's physical presence requirement.

In *South Dakota v. Wayfair Inc.*^[6], South Dakota has asked the Court to review and overturn Quill's physical presence standard. According to South Dakota, the physical presence requirement is harmful to local governments, brick-and-mortar businesses, and to interstate commerce itself. A decision from the Court is expected later this year, but opponents to South Dakota's petition are wary of the possibility for retroactive application of any new sales and use tax nexus standard that eliminates the physical presence requirement. Although several states have filed briefs in the Wayfair case, claiming they are not interested in retroactively applying any new decision by the Supreme Court, sellers may have good reason to doubt this claim.

If a third-party seller receives an audit notice from the New York State Department of Taxation and Finance in the wake of either the U.S. Supreme Court's Wayfair decision or in reference to information the Tax Department received from Amazon, the sellers should consider their nexus and retroactivity arguments against any audit looking to impose tax on sales from prior periods.

Finally, New York state may be looking to collect unpaid tax from customers making tax-free Amazon purchases. States have long complained that Quill's physical presence standard leaves them in an increasingly untenable financial position, as remote retailers, invoking Quill, effectively receive a tax subsidy because of how unlikely it is that their customers will ever pay the corresponding use taxes that they owe. In New York, like most states, customers who purchase taxable items without paying sales tax at the time of purchase may owe a corresponding use tax if their purchase is delivered or used in New

York. Very few New Yorkers comply with this obligation and the state may be looking to send notices to and collect from purchasers who received a tax break on their recent Amazon buys.

We have seen New York state use other information sources, including U.S. Customs and Border Protection, to send similar notices to New York residents. If you are a frequent Amazon buyer and have ignored the state's sales and use tax on e-commerce purchases up until this point, you too may want to consider the state's Voluntary Disclosure and Compliance Program.

Regardless of New York's motives, it is clear that states (and President Trump's Twitter feed)[7] are increasingly focused on Amazon's online marketplace sales. Any marketplaces, vendors or purchasers active in this area must ensure they are fully aware of their obligations and have a plan in place to address any potential exposure. It should come as no surprise that technology moves faster than government bureaucracies, but in the ever-expanding area of online sales, the states are catching up.

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[1] <http://www.hodgsonruss.com/assets/htmldocuments/Disclosure%20to%20the%20New%20York%20State%20Department%20of%20Revenue.pdf>

[2] <http://www.hodgsonruss.com/newsroom-publications-10326.html>

[3] http://www.hodgsonruss.com/media/publication/1749_Noonan%2010.30.17.pdf

[4] http://www.hodgsonruss.com/assets/htmldocuments/1_2_1/TPN_Notes/2012/04_2013%20The%20Amazon%20Decision.pdf

[5] Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[6] South Dakota v. Wayfair Inc., et. al. (Docket No. 17-494).

[7] <https://twitter.com/realDonaldTrump/status/979326715272065024>