Supporting Action by Congress to Enact Remote Seller Collection Authority

RESOLUTION 2015-1

Background

Over two decades ago, the U.S. Supreme Court decided *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and invited Congress to resolve what Justice Alito has called the "quagmire" concerning the role of states in fairly taxing remote sellers.

Over the same period of time, online retailing and remote sales have exploded as the Internet has become the preferred way of doing business for many U.S. individuals and companies. The ubiquitous Internet and the rapid pace of technological innovation have resulted in fundamental changes to the way business is conducted, changes which have greatly simplified multistate tax administration. Online retailers have developed marketing and fulfillment systems fully capable of tracking sales and, therefore, taxes among the states. Similarly, vendors have emerged with robust solutions to perform these same functions, equipping sellers broadly with effective tools for multi-state sales tax collection and remittance.

Meanwhile, the States have worked individually and together, including members of the Streamlined Sales and Use Tax Agreement, to simplify their tax administration systems to encourage voluntary compliance and reduce the complexity and burdens faced by both in-state and out-of-state sellers.

The uncertain state of federal law continues to offer economic protectionism to some retailers and competitively discriminate against traditional brick-and-mortar retailers. Meanwhile, states continue to lose billions of dollars annually since *Quill* prohibits them from requiring all sellers to collect and remit sales and use taxes.

On March 3, 2015, the U. S. Supreme Court issued its opinion in *Direct Marketing Ass'n v. Brohl*, Docket No. 13-1032. In his concurrence, Justice Kennedy opined that "[g]iven the changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier." Justice Kennedy further noted that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." These comments shine a light on the immediate need to overrule these cases by either legislative action or judicial review.

Resolution

The Federation of Tax Administrators (FTA) finds the authority and ability of states to collect sales and use taxes on goods and services sold on-line to be of the highest importance. FTA supports the enactment of federal legislation that would resolve any constitutional uncertainty and authorize states to collect sales and use taxes on goods and services sold into their states by on-line retailers. Such legislation should be self-activating and not require additional federal authorizations, oversight, or rulemaking, and should respect the authority of the states to adopt and implement their own laws, requirements, and regulations. Federal legislation should not incorporate any language that limits state taxing authority.

Alternatively, FTA supports the right of any state to enact fair and reasonable taxation of on-line sales and test the limits of or seek to overturn the *Quill* decision.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed or replaced in the normal policy process. Passed by unanimous voice vote by the membership on June 18, 2015.

Federal Mobile Workforce Legislation

RESOLUTION 2015-2

Background

The fundamental principle of individual income taxation is that income is taxable where it is earned or where the services giving rise to the income are performed. In addition, the state of a taxpayer's residence may tax all income regardless of where earned, but is generally required to offer a credit for taxes paid to other states to assure that income is not subject to multiple taxation. This is the same tax policy embraced by the U.S. government and by all other income-taxing governments.

As United States work patterns shift to increasingly include interstate commuting, telecommuting and multistate travel, more workers find themselves with tax obligations to more than one jurisdiction. Likewise, employers are faced with an increased responsibility for withholding income taxes for multiple jurisdictions. State and local laws and practices vary with respect to de minimis thresholds for withholding. There also is variance in enforcement programs aimed at compliance among persons (and their employers) that are temporarily in the jurisdiction.

In response to bills introduced in previous Congresses, the Multistate Tax Commission developed a state model mobile workforce statute. The work product reflects input from industry and employer representatives.

S. 386 and H.R. 2315 (114th Congress), the Mobile Workforce State Income Tax Simplification Act of 2015 (the Act), would authorize a state or locality to impose an income tax liability and a withholding requirement only when a nonresident has performed services for an employer in the jurisdiction for at least 30 days in a calendar year. The bill contains an exception for professional athletes and entertainers.

Resolution

The ability to tax income where it is earned is fundamental to state tax sovereignty and state and local income tax systems. Moreover, this ability is absolutely necessary under our constitutional framework, where a state may choose to not employ an income tax. The Federation of Tax Administrators (FTA) finds the Act is not an appropriate balance between administrative simplification and adherence to fundamental state tax policies and inappropriately disrupts state and local revenue flows.

FTA does not support the Act for the following reasons:

- The Act represents a substantial preemption and intrusion into state tax authority;
- The 30-day threshold remains beyond a level necessary to deal with the vast majority of individuals who would be temporarily in a jurisdiction;

- The Act would substantially disrupt the current tax system in favor of a system based on taxation by the resident jurisdiction;
- The Act would substantially disrupt the revenue flows in certain states, particularly New York State;
- A simple "days threshold" will expose some jurisdictions to substantial revenue disruptions, so the addition of a "dollar threshold" that would limit the exposure of the states should also be applied.
- Independent state action is a viable and preferred substitute for federal legislation.

Congress should refrain from enacting measures, taking actions or making decisions that would abrogate, disrupt, or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. Congress should undertake an active program of consultation with states as it considers measures that would preempt state tax authority. In addition, states should actively pursue such uniformity and simplification measures as are necessary and effective to address concerns of administrative burden in complying with the tax laws of multiple states. FTA will encourage and support uniform actions by states as the preferred solution to issues that prompt federal preemption.

While federal preemption generally undermines states' sovereignty and is to be resisted, preemptive legislation can, at times, promote administrative issues such as simplification, uniformity, and taxpayer compliance, albeit at some cost to that sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria.

1. Has the preferred solution of uniform state action been pursued and exhausted?
2. Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce?
3. Does the proposed preemption address administrative issues such as simplification, uniformity, and taxpayer compliance?
4. Can meaningful simplifications and uniformity be achieved through state action?
5. Would preemption disrupt state and local revenue flows and tax systems?
6. Would preemption cause similarly situated taxpayers to be taxed differently -- specifically, does the proposal create advantages for multistate and multinational businesses over local business?
7. Does the preemption support sound tax policy?
8. Does the preemption create unknown or potential unintended consequences?
9. Have state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law?
10. Does the proposed preemption materially narrow the scope of state laws?

In addition, FTA makes the following specific comments on the Act and similar legislation.

1. Coordinated state action should be pursued and exhausted.
2. If Congress elects to take action in this area, any resolution of the issue should, at a minimum, meet the following criteria:
    a. The action should be clearly limited to wages and related remuneration earned by nonresident employees. The legislation must also be clear that it is not intended to impair the ability of states and localities to tax non-wage income earned from the conduct of other economic activities in the taxing jurisdiction.
    b. The action should provide that a state or locality may impose income tax liability on and a withholding obligation with respect to the wage and related remuneration of a nonresident if 1) the nonresident is present and performing services exceeding a de minimis threshold in a calendar year; and 2) the nonresident's earnings exceed a de minimis threshold in wages and related remuneration in the prior year.
    c. The action should provide that all persons paid on a "per event basis" are excluded from the coverage of the bill.
    d. The action should provide for the allocation of a day to a nonresident jurisdiction when services are performed in the resident jurisdiction and another jurisdiction in a single day.
    e. The action should cover wages and remuneration earned within a jurisdiction in a calendar year so as to not disrupt taxation of any deferred amounts. It should not, however, impair the ability of states and localities to tax income arising from the conduct of other economic activities in the taxing jurisdiction.
    f. The effective date of any action should be delayed until the beginning of the second calendar year following enactment to allow sufficient time for implementation by state and local governments and affected employers.

This resolution should not be interpreted to imply that FTA considers that a physical presence standard is in any way an appropriate standard for establishing jurisdiction to tax in other contexts, particularly for the imposition of business activity taxes on entities doing business in a state. FTA is firmly opposed to federal legislation that would establish a physical presence nexus standard for the imposition of business activity taxes.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed or replaced in the normal policy process. Passed by unanimous voice vote by the membership on June 18, 2015.

Supporting Reenactment of the Federal Estate Credit
Resolution 2015-3

Background

The Economic Growth and Tax Relief Reconciliation Act of 2001, Section 532, repealed the state estate tax credit for decedents dying after 2004 and replaced the credit with a deduction. The deduction was made permanent by the American Taxpayer Relief Act, Title 1, Section 101, which was signed into law on January 2, 2013. The federal estate tax credit had been part of the federal estate tax structure since its inception and estate taxes in several states relied on the credit.

Resolution

The Federation of Tax Administrators urges consideration of federal legislation to reinstate the credit for estate taxes paid to a state as it existed prior to the Economic Growth and Tax Reconciliation Act of 2001.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed or replaced in the normal policy process. Passed by unanimous voice vote by the membership on June 18, 2015.

Resolution 2015-4
Opposing Digital Goods and Services Tax Fairness Act

Background

The taxation of digital goods and services (or goods and services delivered electronically) is an emerging issue. The latest version of the Digital Goods and Services Tax Fairness Act (H.R. 1643 and S. 851) (114th Congress) would mandate which state is permitted to tax a sale of a digital good or service based on sourcing rules set out in the bill, and would also prohibit states from taxing digital goods and services differently from or to a greater extent than "similar" non-digital goods and services.

Because the bill's requirements permit a sale of a digital good or service to be taxed by only one particular state, generally the state where the customer takes delivery, but the bill does not grant to that state the authority to collect the tax from remote sellers, there is substantial support for the position that states will not be able to collect any tax at all on these sales. This is due to a Supreme Court's ruling from 1992 that states can only impose sales type taxes or collection duties on catalog and mail order sellers of tangible personal property who have some kind of physical presence in the state (see *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). While Congress has the power to remove this potential barrier, there is no provision in the proposed Digital Goods legislation to do so. Because digital goods and services, by nature, can easily be sold remotely, the bill would allow a substantial number of sellers to take advantage of the fact that the states' "hands are tied," and avoid taxes completely.

Further, the bill preempts taxes on digital goods and services that might apply differently or to a greater extent than taxes on "similar" non-digital goods and services. In addition to the problems that such a rule is likely to cause administratively — since there is no clear indication of what the term "similar" is intended to include — this is also a provision that is completely unwarranted. First, the Internet Tax Freedom Act already provides protection for goods and services sold through the Internet versus those same goods and services sold through some other means. Second, states may have sound policy reasons to treat what might be considered "similar" goods and services differently, depending on various factors including who is the seller, who is the buyer, what the good or service will be used for, etc., and the bill does not allow states to consider these factors. Third, there is absolutely no evidence that digital goods and services have been taxed in a discriminatory manner — in fact, they are generally taxed less than other goods and services. Fourth, this provision would give sellers of digital goods and services "most-favored taxpayer" status that may provide them with unwarranted advantages over other businesses.

In general, FTA opposes action by Congress and federal agencies that would abrogate, disrupt or otherwise restrict states from imposing taxes that are otherwise lawful under the U.S. Constitution or from effectively administering those taxes. Congress should undertake an active program of consultation with states whenever it considers measures that would preempt state tax authority. States should be allowed to actively pursue uniformity and simplification measures as are necessary and would be effective in addressing the administrative burden in complying with the tax laws of multiple states.

While federal preemption of state taxing authority is an extreme action, preemptive legislation can, at times, promote simplification, uniformity, and taxpayer compliance, albeit at some cost to state sovereignty. FTA will evaluate proposed federal legislation that preempts state taxing authority against several criteria:

> (1) Recognizing that the benefits of federalism will impose administrative burdens on commerce, is there disinterested evidence that the administrative burden and complexity posed by current state and local practices is impeding the growth of commerce?
> (2) Does the proposed preemption address issues of simplification and complexity?
> (3) Can meaningful simplifications and uniformity be achieved through state action without preemption?
> (4) Would preemption disrupt state and local revenue flows and tax systems?
> (5) Would preemption cause similarly situated taxpayers to be taxed differently; specifically, does the proposal create advantages for multistate and multinational businesses over local business?
> (6) Does the preemption support sound tax policy?
> (7) Does the preemption create unknown or potential unintended consequences?
> (8) Have state tax authorities and taxpayer representatives together agreed to a beneficial change in federal law?

So long as the Digital Goods legislation does not provide authority to states to collect tax from remote sellers, and also contains an unwarranted tax preferences for digital goods and services, the bill violates the principles above.

Resolution

The FTA opposes The Digital Goods and Services Tax Fairness Act. The bill would limit state taxation of digital goods and services and allow sellers who provide those goods and services remotely to effectively escape any tax or collection duty. The bill would also provide an unwarranted preference to digital goods and services vis-à-vis non-digital goods and services. Specific problems with the bills include:

- States are not granted any collection authority over sellers of digital products;
- The preemption extends beyond sales and use taxes;
- There are few tools or protections for the states and local jurisdictions to reduce the risk of tax avoidance;
- Despite its purported purpose, the bill is not limited to rate discrimination between specified digital products (e.g. digital movies, music, books) and their tangible equivalents;
- There is no recognition of the general use tax credit mechanism and federal constitutional tax-crediting principles to avoid multiple taxation; and
- There is no ability for state administrative agencies to issue binding regulations to implement the bill’s provisions.

Any discussions of desired uniformity or model rules or definitions should take place either through existing channels such as the Multistate Tax Commission's uniformity projects or through cooperative and inclusive meetings of representatives of both state governments and all affected taxpayers.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed or replaced in the normal policy process. Passed by unanimous voice vote by the membership on June 18, 2015.

Resolution 2015-5
Opposing Extending or Making the Internet Tax Freedom Act Permanent

Background

In 1998, Congress enacted the Internet Tax Freedom Act ("ITFA" or "the Act"), which placed a moratorium on new or increased state and local taxes on charges for Internet access and prohibited "multiple and discriminatory" taxes on electronic commerce.

The temporary moratorium has been extended multiple times. In 2004, the Act was expanded to preempt state and local taxation of purchases of telecommunications services that are "purchased, used, or sold by a provider of Internet access to provide Internet access." The Act was extended again until October 1, 2015. Seven states that imposed transaction taxes on charges for Internet access prior to 1998 are permitted to continue until the bill sunsets under a "grandfather" clause.

The "grandfather" provision covers all "taxes on Internet access" which is a defined term that means any tax on Internet access services or providers of Internet access – other than net income, property, and franchise taxes. The 2007 Act clarified that a "tax on Internet access" did not include a "State tax expressly levied on commercial activity, modified gross receipts, taxable margin, or gross income of the business enacted under specified terms." That said, the grandfather provision may still apply to an unknown number of state and local gross receipts or other general purpose transaction taxes that are levied against Internet service providers that are not covered by the 2007 Act's clarification. If the moratorium is made permanent without a grandfathering clause it is possible that taxpayers will challenge the imposition of many indirect taxes that apply to Internet Access. Bills are pending before the 114th Congress (H.R. 235 and S. 431) to make the Act permanent while allowing the grandfather clause to sunset.

The Government Accountability Office has reported that there is no statistically significant relationship between state taxation of charges for Internet access and the adoption of broadband by users or the deployment of broadband by providers. This means the moratorium is not effective in achieving its purported purpose of expanding the availability of Internet access to the American public. A study by economists at the University of Tennessee produced similar results, finding that other issues (e.g., household income and educational levels) were more important in the proportion of a state's population that had access to the Internet than whether the state imposed tax on access charges.

In 2010, class action suits were filed in a number of jurisdictions challenging taxes collected by AT&T Mobility Wireless Data Services as being prohibited by the Act. That litigation is ongoing and has had substantial negative effects on state and local governments.

In testimony before the Senate Finance Committee in 2012, Professor Walter Hellerstein characterized ITFA as federal legislation that "works poorly," describing it as “technically complex if not incomprehensible.” Professor Hellerstein went on to describe in detail the problems with the “discriminatory” and multiple tax provisions.

In previous discussions of the legislation, states have argued that: (a) the current definition of Internet access should be narrowed to remove the possibility that Internet Service Providers could bundle a wide range of digital products and services with access and claim exemption for the entire bundle; (b) any extension should be temporary to insure that Congress periodically evaluates the impact of the Act; and (c) the grandfather protection for pre-1998 taxes should be retained to avoid a disruption of the revenue flows of the states involved and to avoid unintended preemptions of taxes covered by the current definition of “tax on Internet access.”

Resolution

The Federation of Tax Administrators supports allowing ITFA to sunset. If the Act is not allowed to sunset, the definition of “Internet access” should be rewritten so as to eliminate the possibility that certain products and services could be bundled with Internet access and claimed as exempt Internet access. The definitions of “discriminatory” and multiple taxes should also be clarified to address concerns raised by Professor Hellerstein and others.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed or replaced in the normal policy process. Passed by unanimous voice vote by the membership on June 18, 2015.