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DEPARTMENT OF TREASURY
LANSING

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SALES AND USE TAX NEXUS STANDARDS FOR REMOTE SELLERS

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2018-16. This Revenue Administrative Bulletin (RAB) supplements RABs 1999-1 and 2015-22 and addresses “economic presence” sales and use tax nexus standards following the U.S. Supreme Court’s decision in *South Dakota v Wayfair*.¹

BACKGROUND

To impose sales or use tax on an out-of-state or remote seller² the Commerce Clause requires that: 1) the tax is applied to an activity with substantial nexus with the taxing state; 2) the activity, both in and out of the state, is fairly apportioned; 3) the tax does not discriminate against interstate commerce; and 4) the tax is fairly related to services provided by the state.³ In *Quill v North Dakota*, the Court held that substantial nexus requires a seller to have a “physical presence” in that state.⁴

However, on June 21, 2018, the Court issued its opinion in *Wayfair*, which overturned *Quill*. At issue in *Wayfair* was a South Dakota law that requires remote sellers, including those with no physical presence in the state, to remit sales tax for sales sourced to South Dakota if, in the previous calendar year, the seller’s sales exceeded \$100,000 or the seller had 200 or more separate transactions with customers in the state.⁵ The Court held that a seller has substantial nexus in a state if it “avails itself of the substantial privilege of carrying on business in that jurisdiction.”⁶ The Court found that an economic presence in a state may be sufficient for a remote seller to have nexus. The Court specifically found three factors important in finding

¹ *South Dakota v Wayfair, Inc. et al.*, _____ US ____; 138 S Ct 2080 (2018).

² For purposes of this RAB the phrase “remote seller” or “out-of-state seller” refers to sellers (including foreign sellers) that sell tangible personal property through the internet, catalogs, mail order, or any other similar method.

³ *Complete Auto Transit, Inc. v Brady*, 430 US 274, 279 (1977).

⁴ *Quill v North Dakota*, 504 US 298 (1992).

⁵ SDCL 10-64-2.

⁶ *Wayfair, supra* (internal quotations and citations omitted)

South Dakota's law constitutional. First, it had a safe harbor for smaller sellers (i.e., sellers with less than \$100,000 in sales and fewer than 200 separate transactions in the previous calendar year do not have nexus). Second, the law explicitly stated that it applied only on a prospective basis. Finally, South Dakota is a member of the Streamlined Sales and Use Tax Agreement (as is Michigan) and has standardized its sales tax to reduce administrative and compliance costs.

Consistent with *Wayfair*, Treasury now amends its nexus standards as described in this RAB.

ISSUES

- I. When is a seller required to report and remit Michigan's sales or use tax?
- II. When is tax remitted and reported as sales tax or use tax?
- III. What are the filing requirements for remote sellers that have nexus in Michigan?

CONCLUSIONS

I. Establishing Nexus

A seller that has substantial nexus in Michigan is required to remit sales or use tax on sales of taxable tangible personal property made into this state and file all required returns. Nexus can be established in several different ways. First, the seller can have physical presence in Michigan as described in RAB 1999-1. Second, the seller can have representational, attributional, or "click-through" presence under MCL 205.52b and MCL 205.95a (as described in RAB 2015-22); in general, these are variations of physical presence. Finally, a seller can have economic presence as discussed in *Wayfair*. The economic nexus standards described in this RAB have no effect on a seller that has nexus due to its physical, representational, attributional, or click-through presence in Michigan; those sellers must continue to report and pay tax as described by RAB 1999-1 and RAB 2015-22.

After September 30, 2018, a seller that has sales into this state (both taxable and non-taxable) exceeding \$100,000, or a seller that completes 200 or more separate transactions of sales into this state (both taxable and non-taxable) in the previous calendar year has nexus in Michigan and is required to remit sales or use tax on all of its taxable sales into Michigan and file all required returns.

Remote sellers must review their 2017 calendar year sales (i.e., January 1, 2017-December 31, 2017) to determine if they have exceeded either of the economic nexus threshold, and therefore have nexus in Michigan after September 30, 2018. Remote sellers that only have nexus due to exceeding either of these economic thresholds are not liable for any tax, penalty, or interest for any transactions occurring on or before September 30, 2018.

Example 1: Seller has no physical presence, representational, attributional, or click-through nexus in Michigan. Seller had \$100,001 of sales into Michigan between January 1, 2017, and December 31, 2017. Seller has nexus in Michigan effective after September 30, 2018, and must begin reporting and remitting tax on all taxable sales from October 1, 2018 forward.

Once a seller has nexus due to its economic presence it must remit tax until a calendar year passes in which it does not meet either of the economic nexus thresholds discussed in this RAB.

Example 2: Assume the same facts as Example 1; however, Seller has only \$10,000 of sales and fewer than 200 transactions into Michigan from January 1, 2018 through December 31, 2018. Seller must report and remit tax for all taxable sales made after September 30, 2018, through December 31, 2018. Seller no longer has nexus due to its economic presence beginning on January 1, 2019, and may therefore cease remitting and reporting tax after that date.

II. Sales or use tax

If a seller has nexus in Michigan and makes a taxable retail sale to a Michigan purchaser it must remit and report tax as sales tax. If a seller has nexus in Michigan and makes a taxable retail sale to a Michigan purchaser and transfer of ownership of the property occurs outside of Michigan the tax must be remitted and reported as use tax. If a seller does not have nexus in Michigan, but nevertheless voluntarily collects and remits Michigan tax, it must be remitted and reported as use tax. To the extent that RABs 1999-1 and 2015-22 are contrary or silent regarding whether tax should be remitted and reported as sales or use tax, this RAB controls.

III. Returns

Sellers that have nexus with Michigan for sales or use tax purposes are required to register and file applicable sales tax returns. For information regarding registration and return filing obligations, please visit <http://www.michigan.gov/taxes>.