Learning from the 2019 Bloomberg Tax Survey of State Tax Departments

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Bloomberg Tax

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- Areas of coverage:
  - Federal, state, and international tax
  - Estate planning
  - Financial accounting
  - Payroll
Who We Are & What We Do

René Blocker
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- Leads a team of editors for Sales and Use Tax and Property Tax analysis

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- Senior State Tax Law Editor
- Focuses on annual state tax surveys, nexus tools, individual income tax, and estates, gifts, and trusts
2019 Survey of State Tax Departments

- 19th annual survey and report
- Sent to senior state tax department officials in all 50 states, the District of Columbia and New York City
- Responses based on law as of Jan. 1, 2019
- Seeks to clarify grey areas in state taxation
- Updated annually to address current trends and emerging issues

Survey Coverage
- Nexus policies and nexus-creating activities
- Corporate Income Tax
  - State tax addbacks
  - Apportionment & sourcing
  - Combined reporting
  - Reporting federal changes
- Taxation of Pass-through Entities
- Sales and Use Tax
  - Sourcing receipts
  - Sharing Economy & Marketplace Facilitator Transactions
  - Refunds, qui tam and class action lawsuits
Today’s Focus

- Tips and Tricks for using the survey
- States’ responses to federal tax reform
- Economic nexus and shifted state responses after *Wayfair*
- Taxation of the sharing economy
- Transactions involving marketplace facilitators
• Learn how state revenue departments are interpreting your state’s tax laws
• Identify areas where your state’s policy could be developed or clarified
• Determine how other states treat a particular issue about which you are drafting legislation
• Use analysis to gain better insight into state tax trends
State Responses to Federal Tax Reform
States’ Responses to Federal Tax Reform

- Expanded questions on federal tax reform gauge states’ positions on major corporate tax provisions in the 2017 tax act (TCJA)

- States addressed whether they conform to 12 impacted code sections:
  - limited business interest expense deduction
  - expanded bonus depreciation
  - net operating loss limitations
  - increased asset expensing
  - repeal of the domestic production activities deduction
  - inclusion of global intangible low-taxed income (GILTI) in gross income of U.S. shareholders
  - other provisions relating to foreign-earned income
States’ Responses to Federal Tax Reform

- Majority of states conform to changes made to:
  - I.R.C. § 163(j), limiting business interest expense deduction
  - I.R.C. § 179, increasing asset expensing limitation amounts
  - I.R.C. § 199, repealing the domestic production activities deduction
  - I.R.C. § 951A, enacting inclusion of GILTI in gross income of U.S. shareholders
  - I.R.C. § 965(a), enacting inclusion of certain deferred foreign income

- States least likely to conform to changes made to:
  - I.R.C. § 172, amending NOL deduction
  - I.R.C. § 199A, creating a deduction for qualified business income
Key Takeaway: State conformity lacks consistency
- Only 9 states said they conform to all 12 changes
- Drastic variety noted for the number of sections, and to which specific sections, each state conforms

Are conformity decisions being made before the impact is known?
- Only 21 states said they have completed an analysis of the impact federal tax reform will have on their state
  - Last year, 2 states said they had started an analysis but this year said their analysis was not complete

More guidance is welcome!
- Just over half the states (29) said they issued guidance regarding their response to tax reform
Economic Nexus:
What’s happening after Wayfair?
• **South Dakota v. Wayfair, Inc.**
  
  – U.S. Supreme Court struck down its physical presence nexus standard for sales and use tax
  
  – *Suggested* South Dakota’s “economic nexus” standard would pass constitutional muster
  
  – In South Dakota, out-of-state sellers with no physical presence must collect sales and use tax when meet certain thresholds:
    
    • $100,000 in annual sales;
      OR
    
    • 200 separate transactions
Nexus policy based on **physical presence**

28 states

Nexus policy based on **economic presence**

33 states

**NOTE:** Some states provided more than one "yes" response. D.C. and NYC are treated as states for purposes of this chart. AK, DE, MT, NH, and OR do not impose a sales tax. NYC, OK, and SC did not participate in this portion of the survey. As a result, these 8 states are not included in this chart.

Source: Bloomberg Tax 2019 Survey of State Tax Departments
• We saw a dramatic shift in states’ sales tax nexus standards
  – 63% of states responding have a physical presence standard
    • Down from 88% last year
  – 75% have an economic nexus standard
    • Up from 39% last year
  – 9 states changed their responses entirely from last year
    • Previously said “Yes” to physical presence and “No” to economic nexus, now say “No” to physical presence and “Yes” to economic nexus
  – 8 states now say they have both physical presence and economic nexus standards, but last year only had physical presence standard

• What happens next?
Timing of Sales Made

- Responses show variety for timeframes used
  - Current or prior calendar year
  - Prior 12 months
  - Prior 4 quarters
  - Other time period

- Most states count sales made in the current or prior calendar year

Types of Transactions

- Sales for resale, tax-exempt sales of TPP, sales of services, and sales of electronically delivered items are generally included

- Fewer states count sales of intangibles
  - Only 14 states said “Yes”
Sharing Economy & Marketplace Facilitator Transactions
Sharing Economy Transactions: Who Must Collect?

Transportation Services (e.g., Uber or Lyft)
- Owner/Driver: 2 states
- Third Party: 10 states

Short-Term Accommodations (e.g., Airbnb)
- Owner/Driver: 26 states
- Third Party: 17 states

Short-Term Rental of Owners’ Vehicle (e.g., Getaround, Turo)
- Owner/Driver: 23 states
- Third Party: 11 states

NOTE: Some states provided more than one “yes” response. D.C. and NYC are treated as states for the purposes of this chart. AK, DE, MT, NH, and OR do not impose a sales and use tax. NYC, OK, and SC did not participate in this portion of the survey. As a result, these 8 states are not included in this chart.

Source: Bloomberg Tax 2019 Survey of State Tax Departments
Are Marketplace Facilitators Required to Collect & Remit Sales Tax?

13 states

Yes

17 states

No

2 states

Depends

12 states

No Response

3 states

Not Applicable

NOTE: DC and NYC are treated as states for purposes of this chart. AK, DE, MT, NH, and OR do not impose a sales tax. As a result, these 5 states are not included in this chart.

Source: Bloomberg BNA 2019 Survey of State Tax
• Marketplace seller is generally relieved of liability for the tax if the third-party marketplace facilitator is required to collect and remit tax on their behalf
  – 9 states said “Yes”
  – 3 states said “No”

• Why is this important?
For More Information...
- Expert Analysis
  - State-by-state coverage of a variety of tax types and topics

- Chart Builders
  - Summary of expert analysis

- Wayfair Decision
  - News, analysis
• State Tax Nexus Tools
  – Interactive tool that pulls content from the survey as well as our expert analysis and developments tracker

• News & Commentary
  – Daily news reporting
  – State Tax Developments Tacker
    • Identifies new legislation, regulations, cases, and administrative guidance daily
    • Provides summary of development, link to source document, and references to additional coverage
Looking for States’ Responses to Federal Tax Reform?

NEWS & COMMENTARY
- Daily Tax Report: State
- State Tax Developments Tracker
- 2019 State Tax Reform Legislative Roadmap
- State Tax Department Survey
- State Tax Special Reports
- Sales & Use Tax Monitor (Archive)

EXPERT ANALYSIS
STATE-BY-STATE
- Corporate Income Tax
- Credits and Incentives
- Estates, Gifts & Trusts
- Excise Tax
- Individual Income Tax
- Pass-Through Entities
- Property Tax
- Sales & Use Tax
- Unclaimed Property

MULTISTATE
- State Tax Portfolios
- Sales & Use Tax Portfolios

Show More
Looking for *Wayfair*/Economic Nexus Content?

**State-by-State**
- Corporate Income Tax
- Estate Tax
- Individual Income Tax
- Property Tax
- Sales & Use Tax

**Multistate**
- State Tax Portfolios
- Sales & Use Tax Portfolios

**State Sales & Use Tax Navigator**
- 3.1 State and Local Interpretation
  - 3.1.2 Standard for Substantial Nexus
  - 3.1.2.4 Economic Nexus

**Expert Analysis**

**The Wayfair Decision**
- Access the Day of Decision Webinar
- Read the Decision
- Visit the Wayfair Watch page
- Post-Wayfair Roadmap

**Multistate**
- State Tax Portfolios
  - Sales & Use Tax Portfolios
Questions?

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