



Vendor Liability Risks

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Overview

- Background on liability risks faced by vendors from administering and collecting sales taxes on behalf of state and local governments.
 - Qui Tam Actions
 - Class Action Law Suits
- Overview of protections currently in State statutes.
- Review of current efforts to develop vendor liability protections.



Part I: Background

Vendor Liability Risks

- Unclear statutes and lack of guidance create two main liability risks for vendors.
- Collect Too Little
 - Audit Risk
 - Qui Tam
- Collect Too Much
 - Class Action Law Suits

Between a Rock and a Hard Place



Qui Tam Actions

- Typically brought under a state's False Claims Act.
- Are brought by an informer or other "whistleblower."
- Establishes a penalty for the commission or omission of certain acts.
- Awards part of the penalty to the "whistleblower."

Qui Tam Actions

- Federal False Claims Act provides for private enforcement actions against those alleged to have defrauded the federal government. Does not apply to taxes collected by the IRS.
- State False Claim Acts:
 - Some restrict the Act to Medicaid and/or contractor-type frauds.
 - Some explicitly bar “tax” actions: CA, DC, HI, MA, NM, NYC, NC, TN, VA. Some states only apply limitations for income taxes: IL, IN, RI.
 - Some have no restrictions: DE, FL, NV, NH, NJ.
 - In 2010, NY became the first state to explicitly authorize the application of the FCA to tax claims.

Qui Tam Actions

- **Should False Claims Act be applied to tax?**
 - Removes tax administration decisions from taxing authorities.
 - Leads to disparate tax treatment among taxpayers.
 - Contravenes well-established procedures designed to ensure efficient resolution of tax disputes.
 - Upends protections for taxpayer rights, including historical right to privacy in tax matters.
 - Meant to combat fraud by incentivizing true whistle blowers (i.e. insiders) to bring suits on the government's behalf. In reality, a breeding ground for parasitic lawsuits.

Class Action Law Suits

- Customer liability actions fall under three main categories:
 - Jurisdiction rate assignments
 - Sourcing conventions
 - Product/Service taxability
- Vendors often can defend against the actions because they used due diligence and remitted funds to the jurisdiction but not without costs.
- State and local governments can also face class action lawsuits.

Tax Collection Liability Litigation

- Class actions can be brought against the government jurisdiction –
 - Arizona Department of Revenue v. Bernard J. Dougherty (29 P.3d 862) class action lawsuits against the State were permitted in Tax Court.
 - Granados v. County of Los Angeles, Court of Appeal of California, Second District, No. B200812, March 28, 2012 a taxpayer can file a class action claim for refund of CA local telephone users taxes paid. Before filing the claim the plaintiff must first file a claim that contains the information required by the Government.



Part II: Current Protections

Streamlined Agreement Provisions

- Customer Remedy Procedures – § 325
 - First course of remedy
 - Reasonable business practice to use state provided data.
- Taxability Matrix – § 328
- Definitions and sourcing rules -- §§ 314, 315 & Library of Definitions
- Database requirements – § 307
- Local rate and boundary changes – § 302

American Bar Association Model Act

- Major provisions:
 - Section 4 sets forth Purchaser Recourse provisions
 - Purchaser's relief is limited to a refund claim pursuant to §5
 - Seller should not be party to any action
 - Section 5 sets forth Refund Procedures
 - Purchaser may file a claim with the seller with time limits (90 days) for response
 - Purchaser may under certain circumstances file a claim with the taxing jurisdiction



Part III: Current Projects



Multistate Tax Commission

- Sales and Use Tax Uniformity Subcommittee Working group.
 - Includes participation for tax administrators, Attorney General staff, practitioners and taxpayers.
 - Developed resolution encouraging states to consider adopting the ABA model Act. Currently pending before the Executive Committee for vote at their December meeting.
 - Discussing issues and proposals for addressing False Claim Actions for tax. Goal to develop a model Act for states to consider.

Potential Action

- Develop principles for states to consider when developing vendor liability protections.
- ABA developed principles that can form a starting point for consideration:
 - Balance the needs of the State, vendors and consumers.
 - Vendors are acting as agents of the state and should not be subject to claims from collecting the taxes and remitting them to the state.
 - Consumers should be entitled to refunds of overpaid taxes.