

Connecticut Bets on "Kill Quill" Camp with New Amazon Tax

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A bill passed in Connecticut's 2018 legislative session and signed by Governor Malloy on June 14, 2018, seeks to expand the conditions under which certain out-of-state retailers must collect and remit Connecticut sales tax. Currently, Connecticut taxpayers are required to pay a 6.35% use tax on any purchases made outside of Connecticut or online where no sales tax is paid. However, few taxpayers are aware of such obligation and even fewer comply with it. Recent estimates suggest \$70 million of the use tax is evaded in Connecticut on an annual basis. [1]

In February of this year, Connecticut made headlines for collecting customer purchase information from Newegg, an online electronics retailer, and sending notices to Connecticut residents detailing their previous purchases and asserting a deficiency for the use tax the purchaser failed to remit to the State of Connecticut. Newegg, which was not responsible as an e-commerce retailer to collect and remit sales tax to Connecticut, was the target of a significant backlash from Connecticut customers. [2] Newegg, among other online retailers, provided the information on its customers to the Department of Revenue Service as a means of placating the Department in response to inquiries about sales and use tax liabilities. Following the outcry, Newegg has agreed to begin charging sales tax for purchases shipped to Connecticut as of July 1, 2018. [3] With enhanced record-keeping regulations expected to be issued by the Department of Revenue Services, Connecticut's method of using data from online retailers to collect unpaid sales tax from residents directly may remain a viable option.

In addition to pressuring e-commerce retailers to voluntarily collect sales tax, Connecticut is trying a new approach to compel the retailers to collect the tax. The new legislation is another version of the so-called Amazon tax which requires e-commerce retailers to collect state and local sales taxes from customers, even if they are not the seller themselves. Although nicknamed the "Amazon tax," the bill would impact all e-commerce marketplace facilitators, including those such as Etsy and eBay, as of December 1, 2018. Connecticut is the 6th state to pass such a tax, along with Minnesota, Oklahoma, Pennsylvania, Rhode Island, and Washington.

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To do this, *An Act Concerning the Department of Revenue Services' Recommendations Regarding State Taxation and Collection*, Public Act No. 18-152, expands the definition of "retailer" to include "marketplace facilitators." [4] Marketplace facilitators includes out-of-state companies which promote the sale of tangible personal property over the internet, software, or other form of electronic delivery. [5] Marketplace facilitators include online stores, web sites, catalogs, software, and apps where tangible personal property or taxable services are offered for sale. [6] Sec. 12-407(4)(a)(3). By targeting the larger "facilitator" sites, Connecticut can collect tax on sales by individual sellers, such as individual Etsy vendors or eBay retailers, which might not otherwise be required to collect sales tax to Connecticut due to the small volume of sales into the state. If the individual vendor or seller were already required to collect Connecticut sales tax under another provision of the statute, the purchaser would not be taxed twice, but if the vendor does not collect and remit the requisite sales tax, the facilitator may be liable for the unremitted amount. [7] Public Act. Sec. 5(b).

As a tradeoff, the bill also raises the minimum threshold for sales by other retailers which are not "marketplace facilitators" from 100 retail sales to either 200 retail sales or \$250,000 of gross receipts in the previous year from sales to destinations within Connecticut [8] and raises the minimum threshold for sales through referral services, including internet links, from \$2,000 to \$250,000 of gross receipts in the previous year by a person located in Connecticut. [9]

Kevin Sullivan, the former Commissioner of Connecticut's Department of Revenue Services, has lobbied consistently for e-commerce taxing authority, estimating that Connecticut loses between \$100 million and \$200 million a year in revenue from failure of online retailers to collect and remit sales taxes to the states. [10] It comes as no surprise, then, that Connecticut is at the forefront of devising creative approaches to collecting what it's owed.

Of course, this bill was passed in the shadow of *South Dakota v. Wayfair, Inc.*, argued before the United States Supreme Court on April 17, 2018, which challenges the holding in *Quill Corp. v. North Dakota* [11] that sales tax may not be charged on out-of-state retailers that lack a physical presence in the state. In its Petition for Writ of Certiorari, the State of South Dakota has asked the Supreme Court to abolish the physical presence requirement for charging sales tax to allow states to collect sales tax from internet sellers who may have no physical presence in the state.

If *Quill's* physical presence requirement is upheld, the new reach of the bill would almost certainly be considered to violate the Court's interpretation of the Commerce Clause of the Constitution. If, however, the Supreme Court takes the opportunity presented in *Wayfair* to strike down the physical-presence requirement for sales tax, then Connecticut will already be in position to require the collection and remittance of sales tax for out-of-state online retailers who exceed the 200 sales or \$250,000 gross receipts threshold. A decision in *Quill* is expected by the end of the month before the Supreme Court's summer recess.

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Connecticut's approach relies entirely on *Quill* being overturned, whereas other states, such as Rhode Island, Ohio, and Massachusetts, have instead attempted to bring online activity within the scope of "physical presence" by claiming that the use of software by in-state customers on their computer, smartphones, and other devices including cookies and data tracking tools—which are almost universally employed by online retailers—satisfies the "physical presence" requirement enunciated in *Quill*. Even if *Quill* is upheld, this so-called "cookie nexus" approach might survive initial review, whereas Connecticut's approach would almost certainly be overturned.

Connecticut's Department of Revenue Services will have less than six (6) months to roll out the infrastructure to tax e-commerce marketplace facilitators between the decision in *Quill* and the December 1, 2018 effective date. E-commerce retailers should be prepared in the event that *Quill* is overturned by the *Wayfair* decision to evaluate their potential liability and begin collecting and remitting sales and use tax in the midst of the 2018 holiday sales season.

[1] <http://www.courant.com/politics/hc-pol-online-sales-tax-20180214-story.html?referrer=https%253A%252F%252Fwww.google.com%252F&lastReferrer=www.avalara.com&sessionId=1529012878480>

[2] <http://www.courant.com/business/hc-biz-newegg-connecticut-sales-tax-apology-20180326-story.html>

[3] <http://www.courant.com/business/hc-biz-newegg-collects-sales-tax-20180328-story.html>

[4] Secs. 12-407(4)(a)(1) and 12-407(12)(M).

[5] Sec. 12-407(12).

[6] Sec. 12-407(4)(a)(3).

[7] Public Act. Sec. 5(b).

[8] (Sec. 12-407(15)).

[9] (Sec. 12-407(12)(L)).

[10] <https://ctmirror.org/2018/04/27/ct-tax-chief-slams-key-gop-lawmaker-online-sales-tax-issue/>

[11] 504 U.S. 298 (1992).

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