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Indirect Taxes in the Age of COVID-19

Over the past few months, COVID-19 has significantly altered many taxpayers' business operations and sales. In response to this pandemic, the federal government enacted the CARES Act, which contains a number of tax provisions aimed at ameliorating the economic fallout. Additionally, state governments are also adapting tax laws to help ease the strain on companies. This article will examine a few potential indirect tax considerations and liquidity planning. The topics discussed include a general discussion of state relief efforts along with possible indirect tax considerations for companies' sales and purchases.

What measures have state governments adopted in order to provide relief for taxpayers?
In an effort to relieve the burden on taxpayers, states have been extending filing and payment deadlines as well as waiving penalties and interest for a number of indirect taxes. For instance, the California Department of Tax and Fee Administration automatically extended the filing and payment due date for first quarter sales and use tax returns to July 31, 2020 for small businesses, *i.e.,* those filing a return for less than $1 million in tax.[1] The New York State Department of Taxation and Finance is abating penalties and interest for quarterly and annual filers who pay sales and use tax within 60 days of March 20, 2020.[2]

In addition, some states are incentivizing businesses to donate to COVID-19 relief efforts. For example, the Indiana Department of Revenue announced that manufacturers making donations of medicine, medical supplies or other eligible items as part of COVID-19 relief efforts will not incur a use tax obligation for those donations.[3] Similarly, California is exempting healthcare supplies sold or purchased by the state from sales and use tax.[4]

Both the CARES Act and a number of states provide indirect tax relief for alcohol distillers when the alcohol is used to produce hand sanitizer.[5] To the extent taxpayers' portfolios include breweries, wineries, or distilleries that are producing hand sanitizer, reviews of alcohol purchased can result in potential tax recoveries.

What are some indirect tax considerations surrounding the post COVID-19 working environment?
Sales considerations: The Supreme Court's *South Dakota v. Wayfair* ruling expanded the ability of states to collect sales tax from remote retailers by removing the physical presence requirement and allowing states to adopt a nexus standard based on economic activity.[6] Since this decision, 42 states and the District of Columbia use an economic nexus standard[7] for sales and use taxes and most states have passed marketplace-facilitator laws, which impose a duty to collect and remit sales tax on large websites that broker transactions.[8]

COVID-19 has caused an increase in the volume of online sales. As a result, a vendor's sales or a number of transactions with in-state customers may now exceed the threshold requirements and create economic nexus in jurisdictions where it previously did not have filing and remittance obligations. A number of companies have also adapted their business operations to the current circumstances. These new operating models can create taxable sales for companies whose sales were previously nontaxable. For example, businesses which previously sold nontaxable gym memberships may now be renting out equipment and selling classes through apps or software, all of which may be taxable in certain jurisdictions. As companies shift their operations and pursue customers in new jurisdictions, the patchwork of state and local tax rules can create an increased compliance burden.

Additionally, as states have ordered companies to close their offices, companies have adapted to new circumstances by requiring employees to work remotely. This raises the possibility of creating sales tax nexus in the jurisdictions where the employees are currently working. Some states have issued guidance stating that the presence of employees that are only working in the state due to COVID-19 will not create sales tax nexus.[9] However, many states have not issued guidance yet so taxpayers should consider the possibility that states will assert nexus for sales tax.

Purchase considerations: Companies should evaluate their purchases and software allocations under the current circumstances. For example, a beneficial sales and use tax reallocation may exist for purchasers who paid sales and use tax on the purchase of information services and software licenses to use in one location where, due to office shutdowns, the software is now subsequently used in another state and/or locality with lower tax rates. For instance, companies that were based in New York City continue to pay for monthly information services and software as if the software were still being accessed and used in New York City (at a rate of 8.875%).[10] In an effort to stop the spread of the pandemic, Governor Andrew Cuomo issued the "New York State on PAUSE" executive order which mandates that any businesses not deemed "essential" must keep 100 percent of their workforce home.[11] As a result, most employees are no longer commuting to New York City, and may be working from jurisdictions which have lower state and local sales and use tax rates. Therefore, companies may be able to beneficially reallocate such service and software charges to better reflect where they are being used.

Additionally, in an effort to protect their employees during this time, companies may be purchasing deep cleaning services or personal protective equipment. Businesses should determine whether these purchases may be exempt from sales tax in their respective jurisdictions. Furthermore, companies should also examine suspended or terminated taxable services to determine the appropriate sales tax treatment of any such charges or termination payments.

Marketplace reactions: In response to the pandemic, companies are rapidly adjusting their business models and operations. Companies may need to prioritize mitigating supply chain disruptions as well as maintaining cash flow. In addition to addressing immediate needs, companies should contemplate long-term considerations around recovery and what changes in operating models should continue to remain in place.

Due to the rapidly shifting multistate compliance framework, many companies have been co-sourcing or outsourcing sales and use tax compliance as a cost-effective solution to free time for them to focus on immediate needs and value-add projects.

How can Deloitte help?

In a rapidly evolving business environment, taxing jurisdictions are challenged with applying antiquated tax laws to today's emerging technologies and evolving services. Deloitte's Multistate Tax group has a team of indirect tax professionals across its network of member firms specializing in indirect tax services. Drawing upon our in-depth knowledge of each jurisdiction's tax laws, coupled with data analytics and other technology-based services, we offer distinct insights regarding how these laws apply to companies in various industries. Our professionals represent a mix of accounting, legal, industry, and state government backgrounds. The displacement of personnel and tightened budgets will likely cause many companies to rethink how they structure their tax departments and Deloitte offers scalable assistance to tax departments.

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[1] Governor Newsom Grants Additional Relief for Business Taxpayers – Small Businesses Now Have Until July 31, 2020 to File First Quarter Returns (Mar. 31, 2020), https://www.cdtfa.ca.gov/news/20-06.htm.
[2] NYS Dep't of Tax and Fin., Announcement Regarding the Abatement of Penalties and Interest for Sales and Use Tax due to the Novel Coronavirus, COVID-19 (Mar. 2020).
[3] Indiana Dep't of Rev., Indiana DOR Waiving Use Tax on Donated COVID-19 Supplies (April 6, 2020), https://content.govdelivery.com/accounts/INDOR/bulletins/285274c.
[4] California Executive Order No. N-46-20 (April 7, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/04/4.7.20-EO-N-46-20.pdf.
[5] See, e.g., Illinois Dep't of Rev., Department of Revenue Moves to Assist Distillers Making Hand Sanitizer (April 8, 2020), https://www2.illinois.gov/IISNews/21368-Department_of_Revenue_Moves_to_Assist_Distillers_Making_Hand_Sanitizer.pdf; Washington State Liquor and Cannabis Board, Guidance for Distillers Producing Hand Sanitizer (Mar. 24, 2020), https://lcb.wa.gov/sites/default/files/publications/temp_links/Coronavirus_Distillers_3-24-20.pdf.
[6] See generally South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).
[7] Most states define this nexus as a defined dollar amount of sales to in-state customers or a defined amount of transactions with in-state customers. See, e.g., Ga. Code Ann. §48-8-2(8)(M.1-.2); Me. Rev. Stat. Ann. tit. 36, §1754-B(1-B)(B).
[8] See generally Bloomberg Tax, Sales and Use Tax Chart- Economic Presence Nexus Standard; Bloomberg Tax, Sales and Use Tax Chart- Marketplace Facilitators or Referrers.
[9] See e.g., New Jersey Division of Tax., Telecommuter COVID-19 Employer and Employee (May 6, 2020), https://www.state.nj.us/treasury/taxation/covid19-payroll.shtml; https://otr.cfo.dc.gov/release/otr-tax-notice-2020-05-covid-19-emergency-income-and-franchise-tax-nexus.
[10] NYC Dep't of Fin., New York State Sales and Use Tax (2020), https://www1.nyc.gov/site/finance/taxes/business-nys-sales-tax.page.
[11] New York Executive Order No. 202.6 (March 18, 2020), https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

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