



Arizona's Wayfair Bill Compounds Burdens on Remote Sellers - Pt. 3

In this month's state and local tax (SALT) column, in consultation with Professor Richard Pomp, Busby explains how H.B. 2757, Arizona's response to Wayfair, actually will compound the state's burden on remote sellers, even though it will also dramatically simplify the state's overall sales tax structure. This is the third in a series of four articles addressing Arizona's response to the Wayfair decision.

In previous columns I explained that:

Arizona's Legislature recently amended the state's tax code to require remote sellers to remit sales tax on proceeds from sales to customers in the state based on economic nexus standards, adopted marketplace facilitator provisions, and preempted cities and towns from imposing retail sales taxes under their own tax codes.

I further wrote that:

Preempting cities and towns from imposing retail sales taxes under their own tax codes will dramatically simplify Arizona's sales tax structure under which 91 cities and towns currently impose retail sales taxes under their own tax codes but, even after these changes go into effect, there still will be numerous differences between the state tax base and the tax bases for various cities and towns in Arizona.

Ironically, even though H.B. 2757 preempted Arizona cities and towns from imposing retail taxes under their own tax codes and dramatically simplified Arizona's overall sales tax structure for retailers by eliminating all 91 municipal retail tax codes, the bill simultaneously compounded the burden the state imposes on remote sellers.

Arizona's Challenging Sourcing Rules

Arizona's challenging sourcing rules are not new but, because the state's response to Wayfair will require so many more remote sellers to comply with them, H.B. 2757 will compound the burdens the state imposes on remote sellers.

As Professor Pomp cautioned in a letter to the sponsor of H.B. 2757, the bill did not address a "troubling and constitutionally suspect provision of the Arizona transaction privilege tax." Pomp referred to the state's sourcing rules for remote vendors, which differ from the state's sourcing rules for in-state vendors.

In Arizona, "sales by in-state retailers are sourced to the seller's business location if the seller receives the order at a business location in the state, regardless of where



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the purchase is shipped. By comparison, sales by out-of-state vendors are sourced to the purchaser's location in this state if the seller receives the order at a business location outside this state, regardless of where that person resides," Pomp explained.

In his letter, Pomp posed a hypothetical in which "a resident of local Jurisdiction X shops at a store in local Jurisdiction Y and has the purchase shipped back to X. The local sales tax will be based on rates in Y. In contrast, if that same person were to order over the Internet, the remote vendor would charge tax based on rates in X, which could be higher than the Y rates." Citing the U.S. Supreme Court's decision in *Associated Industries v. Lohman*, Pomp warned that this type of "discrimination against interstate commerce has been held to be unconstitutional."

In addition, Pomp warned that "such discrimination would violate the In-

ternet Tax Freedom Act," in particular section 1105(2), a provision that defines a "discriminatory tax" as "any tax imposed by a state or political subdivision thereof on electronic commerce that ... is not generally imposed and legally collectible at the same rate by such state or political subdivision on transactions involving similar property, goods, services." Pomp further cited the Illinois Supreme Court decision in *Performance Marketing Association v. Hamer*.

To illustrate his point, Pomp shared an example using actual tax rates to demonstrate how dramatically Arizona's sourcing rules can discriminate against remote vendors. He wrote:

suppose a resident of Superior shops at a store in an unincorporated area of Pima County and has the purchase shipped back to his or her home in Superior. The in-state retailer would pay tax based on the total state and local rates that apply in unincorporated areas of Pima County: 6.1%.

By comparison, if that same person were to order over the Internet from an out-of-state vendor, the remote vendor would have to pay tax based on the total state and local rates in effect in Superior, 11.2% — a much higher rate than the rate the local vendor was required to pay.

Finally, Pomp pointed out that unlike local vendors who only have to apply the combined tax rate in effect at the location where they receive orders, remote vendors have to "apply up to 91 different municipal tax rates, and as many as 15 different county rates." Pomp concluded, "these are all serious defects in the existing law" that were not addressed by Arizona's response to *Wayfair*. ■

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