SB 1071

Department of Legislative Services

Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

Senate Bill 1071 (Senator Madaleno)
Budget and Taxation

Sales and Use Tax - Online Sales Presumption

This bill specifies that for purposes of determining whether a person is engaged in the business of an out-of-state vendor under provisions of the State sales and use tax law, a seller is presumed to have an agent, canvasser, representative, salesman, or solicitor operating in the State for the purpose of selling or taking orders, under specified circumstances. As a result, these sellers must collect the State sales and use tax from sales made to Maryland consumers.

The bill takes effect June 1, 2009.

Fiscal Summary

State Effect: General fund and Transportation Trust Fund (TTF) revenues may increase by a significant amount beginning in FY 2010. The amount of the increase depends on the number of affiliates and the amount of sales in Maryland. Under one set of assumptions, general fund revenues may increase by $7.4 million and TTF revenues may increase by $414,500. Any expenditures associated with licensing can be handled with existing budgeted resources.

(in dollars)	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
GF Revenue	$7,405,500	$7,405,500	$7,405,500	$7,405,500	$7,311,700
SF Revenue	$414,500	$414,500	$414,500	$414,500	$508,300
Expenditure	0	0	0	0	0
Net Effect	$7,820,000	$7,820,000	$7,820,000	$7,820,000	$7,820,000

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: A seller is defined as a person making sales of tangible personal property or a taxable service. For the purpose of a person engaged in the business of an out-of-state vendor, a seller is presumed to have an agent, canvasser, representative, salesman, or solicitor operating in the State for the purpose of selling or taking orders for tangible personal property or a taxable service if (1) the seller enters into an agreement with a resident of the State under which the resident, for a commission or other consideration, directly or indirectly refers potential customers to the seller, whether by a link on an Internet web site or otherwise; and (2) the cumulative gross receipts from sales by the seller to customers in the State who are referred to the seller by all residents having an agreement with the seller is greater than $10,000 during the preceding four quarterly periods ending on the last day of February, May, August, and November.

The presumption under the bill may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the State on behalf of the seller that would satisfy the nexus requirement of the United States Constitution during the four quarterly periods in question.

The bill may not be construed to narrow the scope of the terms of agent, canvasser, representative, salesman, and solicitor for purposes of any other provision of law.

Current Law: To engage in the business of an out-of-state vendor means to sell or deliver tangible personal property or a taxable service for use in the State. This includes (1) permanently or temporarily maintaining, occupying, or using any office, sales or sample room, or distribution, storage, warehouse, or other place for the sale of tangible personal property or a taxable service directly or indirectly through an agent or subsidiary; (2) having an agent, canvasser, representative, salesman, or solicitor operating in the State for the purpose of delivering, selling, or taking orders for tangible personal property or a taxable service; or (3) entering the State on a regular basis to provide service or repair for tangible personal property.

To engage in the business of a retail vendor means to sell or deliver tangible personal property or a taxable service in the State. This includes liquidating a business that sells tangible personal property or a taxable service, when the liquidator holds out to the public that the business is conducted by the liquidator.

Persons engaged in the business of either an out-of-state vendor and retail vendor must be licensed by the Comptroller.

Background: For over a decade, pursuant to a 1992 U.S. Supreme Court ruling (*Quill Corp. v. North Dakota*), Internet and mail-order retailers were only required to collect sales tax from out-of-state customers if the retailer maintained a physical presence (*e.g.*, a store, office, or warehouse) in the customer's home state. In an effort to ensure parity with bricks-and-mortar booksellers, the state of New York passed a law that provided that affiliate sellers (*e.g.*, independent web sites that link to an online retailer's products in return for a percentage of the sale) were included within the definition of "physical presence," thereby, requiring out-of-state web retailers to collect sales taxes from buyers in the state if the web retailers have New York-based representatives referring businesses to them. This law was recently upheld by the New York Supreme Court. According to a spokesperson for the New York Division of the Budget, the state of New York expects to receive $23 million in the current fiscal year from newly collected online sales taxes.

State Fiscal Effect: The sales and use tax is the State's second largest source of general fund revenue accounting for $3.6 billion in both fiscal 2009 and 2010, according to the March 2009 revenue forecast. In addition, the TTF is projected to receive $0.2 billion in sales and use tax revenues in both fiscal 2009 and 2010.

The bill requires out-of-state web retailers to be licensed by the Comptroller and to collect sales taxes from buyers in the State if the web retailers have Maryland-based representatives referring businesses to them. As a result, sales and use tax revenues will increase by a significant amount beginning in fiscal 2010. The amount of the increase depends on the number of affiliates located in Maryland and the amount of sales made to Maryland consumers.

For illustrative purposes, State sales and use tax revenues may increase by approximately $7.8 million annually beginning in fiscal 2010 based on the following facts and assumptions:

- New York State estimates collecting $23 million from newly collected online sales taxes.
- A similar proposal in California is estimated to result in $55 million in new sales and use tax collections.
- Maryland's population is 29% of New York's population and 15% of California's population.
- The Streamlined Sales and Use Tax Agreement estimates that New York has $1.3 billion in uncollected sales and use tax revenue from out-of-state transactions; California has $3.6 billion in uncollected sales and use tax revenue; and Maryland has $501.1 million in uncollected sales and use tax revenue.

Chapter 10 of 2008 altered the distribution of sales and use tax revenues by requiring that, for fiscal 2009 through 2013, 5.3% of revenues be distributed to the TTF. Beginning in fiscal 2014, the amount distributed to the TTF increases to 6.5%. Accordingly, general fund revenues may increase by approximately $7.4 million and TTF revenues may increase by $414,500.

To the extent that Internet sellers, such as Amazon.com and Overstock.com, reduce or eliminate Maryland affiliates, State revenues will be less than estimated. In addition, to the extent the bill is challenged in court (as was done in New York), the timing of when revenues begin to be collected will be affected.

Small Business Effect: Small Maryland retailers that are not affiliated with large Internet sellers may realize increased sales if consumers have less incentive to shop online to avoid the State sales tax. Some small businesses could be negatively affected if the change in the law results in Internet sellers altering or terminating affiliate agreements with Maryland retailers.

The *2006 Statistics of U.S. Businesses* reports that there are 11,058 retail firms in Maryland with fewer than 20 employees and 1,076 retail firms with between 20 and 99 employees.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland Chamber of Commerce, Comptroller's Office, Department of Legislative Services

Fiscal Note History: First Reader - April 1, 2009
mam/hlb

Analysis by: Michael Sanelli

Direct Inquiries to:
(410) 946-5510
(301) 970-5510