

## Georgia Poised to Require Out-of-State Online Retailers to Collect Georgia Sales Tax

By Jim McCarten

April 2018

Friday March 30<sup>th</sup> marked the end of Georgia's 2018 Legislative Session. For out-of-state online retailers, though, the session lasted two (2) days too long. Thursday morning, March 29<sup>th</sup>, Georgia's House and Senate passed HB 61 and sent it to Governor Nathan Deal. Should the Governor sign the legislation (and he is expected to do so), Georgia law will require certain out-of-state online retailers to collect Georgia sales tax on transactions with Georgia consumers beginning next January. That obligation will exist even if the retailer does not have a physical presence in the state.

Pursuant to HB 61, effective January 1, 2019, out-of-state online retailers which generate gross sales exceeding \$250,000 from Georgia consumers or conduct 200 or more separate retail transactions with Georgia consumers will be required to collect and remit Georgia sales tax. HB 61 alternatively allows online retailers the option of sending a "tax due" notice (the "Tax Due Notice") to its Georgia consumers who purchased \$500 or more during the year. Exactly what must be included in the Tax Due Notice is yet to be determined; the Legislature instructed the Georgia Department of Revenue ("GDOR") to set the standards for such notices by regulation.

Georgia's new legislation begins by adding two (2) more definitions to the provisions describing which taxpayers are to be treated as "dealers" for sales and use tax purposes. Those definitions are added to paragraph 8 of O.C.G.A. § 48-8-2 and set forth the monetary threshold (in excess of \$250,000 of gross sales) and volume of transactions threshold (200 or more separate retail transactions) which will apply next January for purposes of determining when an out-of-state retailer is deemed to be a "dealer" for Georgia sales and use tax purposes. If a "dealer," that taxpayer is required to collect and remit sales tax on transactions with customers in the state of Georgia or to notify all potential Georgia customers that: "Sales or use tax may be due to the state of Georgia on [said] purchase. [Further,] Georgia law requires certain consumers to file a sales and use tax return remitting any unpaid taxes due to the state of Georgia." This is a separate obligation from the Tax Due Notice and it is not yet clear how that communication must be accomplished; will putting it up on the website when a Georgia address is entered as either the billing or shipping address be sufficient? Will a separate email to the Georgia consumer be required, or will the GDOR impose some other form of required notification?

For those out-of-state retailers electing to provide Georgia consumers with the Tax Due Notice (as opposed to collecting the tax), the retailer must also, on or before January 31 of the following year, send a sales and use tax statement (a "Taxable Transaction Statement") to each Georgia consumer whose transactions with the retailer totaled, in the aggregate, at least \$500. Further, the Taxable

Transaction Statement must be sent via first-class mail in an envelope on which the phrase "IMPORTANT TAX DOCUMENT ENCLOSED" is clearly printed. In addition to sending year-end summary statements to Georgia consumers, the online retailer must also, on or before that same date, file a copy of the Taxable Transaction Statement with the GDOR. Should an out-of-state online retailer fail to provide the Taxable Transaction Statement to a Georgia consumer, a penalty of \$5 per failure will be due. The failure to file a copy of that statement with the GDOR subjects the online retailer to an additional penalty of \$10 per failure.

When HB 61 becomes law, Georgia will join its neighbors, Alabama, South Carolina and Tennessee, as well as a number of other states, in directly challenging the *physical presence* test previously imposed on the states by the Supreme Court in its 1992 decision in *Quill Corp. v. North Dakota* (504 U.S. 298) (which held that *physical presence* in the state is a constitutional prerequisite for the state to require non-resident taxpayers to collect and pay over sales tax). In part, Georgia's new law (the Tax Due Notice provisions) models a similar Colorado statute which itself was the subject of a 2015 federal court challenge in response to which the federal courts found for the state. *Direct Marketing Association v. Brohl*, 814 F. 3d 1129 (10th Cir. 2015), cert. denied, 137 S. Ct. 591 (2016) (a decision which upheld the constitutionality of Colorado's law requiring certain out-of-state sellers to report specific information regarding sales made in Colorado).

While these changes to Georgia's sales and use tax regime do not become effective until next January, taxpayers may, even as early as the Fall, find that the Supreme Court has preemptively brushed away constitutional challenges to Georgia's new rules if the Court has issued its opinion in *South Dakota v. Wayfair*, et al. by then. *South Dakota v. Wayfair* centers on South Dakota's challenge to Quill's physical presence by passing law requiring out-of-state retailers to collect South Dakota sales tax even when a traditional physical presence was lacking; the South Dakota case was accepted for certiorari this past January, and arguments are scheduled for April 17, 2018, roughly 2 weeks from the release of this Alert.

---

If you have any questions about Georgia's new sales and use tax statute, to discuss the application of any of those concepts to you or your business, or if you want more information on any other tax matter, please feel free to contact any of the following tax lawyers directly:

**Burr's Tax Team:**

- [Ed Brown](#) and/or [Jim McCarten](#) in Atlanta at (404) 815-3000;
- [Jim McCarten](#), [Josh Ehrenfeld](#), [Tucker Herndon](#) or [Maureen Beaver](#) in Nashville at (615) 724-3200;
- [Allen Sullivan](#) or [Bruce Rawls](#) in Birmingham at (205) 251-3000;
- [Warren Matthews](#) in Montgomery at (334) 241-7000; and
- [Scott Miller](#) in Orlando at (407) 540-6600.

*No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.*