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TREASURER

STATE OF CALIFORNIA

The Honorable Andrew N. Kim
Chairman
U.S. House Committee on Small Business
Subcommittee on Economic Growth, Tax and
Capital Access
2361 Rayburn HOB
Washington, DC 20515

The Honorable Kevin R. Hern
Ranking Member
U.S. House Committee on Small Business
Subcommittee on Economic Growth, Tax and
Capital Access
2361 Rayburn HOB
Washington, DC 20515

Written Testimony of

Fiona Ma, California State Treasurer

Hearing on *South Dakota v. Wayfair, Inc.*: How Mainstreet is Faring and Whether Federal Intervention is Necessary

March 3, 2020

Chairman Kim, Ranking Member Hern, and Members of the Subcommittee, thank you for holding this hearing on state taxation. I am honored to offer my testimony as California State Treasurer.

Introduction

The California State Board of Equalization (SBOE) was created in 1879 to oversee property taxes. In the 1930's, income tax, sales tax and fuel tax were added to the duties of the SBOE. I was elected as the 34th California State Treasurer in November 2018. Prior to becoming State Treasurer, I served as an elected member of the SBOE representing District 2 from 2014-2018, and served as Chairperson from March 2016 to March 2017. As Chairperson, I asked for three outside audits, asked the Governor to assign a trustee, asked the Attorney General to assign us legal counsel, and testified at Assembly and Senate hearings. On July 1, 2017, the Legislature and the Governor transferred all tax/fees administration to a new agency called the California Department of Tax and Fee Administration (CDTFA).

Nexus

I believe Amazon and other online retailers/marketplace facilitators that have sold products into California since September 2012 had the obligation to assess and collect sales taxes. Regarding Amazon sales, Amazon had nexus since they stored inventory in their warehouses; as well as packaged, delivered, and provided other customer services and returns. The third-party supplier that participated in the Fulfillment by Amazon (FBA) program did not know where their products went, who or where the products went to, the amount that was ordered, or when the products were purchased. Similar to consignment stores, the retail store (consignee) that sells products is the party responsible to collect and remit the sales tax to the taxing authority and then remits the agreed-upon amount back to original owner (consignor).

Historical Perspective

In September 2011, AB155 (C. Calderon) was signed into California law that required online sellers to collect sales taxes starting in September 2012. In May 2016, I was contacted by a Fulfillment by Amazon (FBA) retailer based in Delaware that complied; however, he felt he was being punished unfairly for being billed for 3 years in back taxes that he did not charge/collect but should have according to the SBOE. This retailer felt this was “unequal” treatment since most FBA retailers who had orders fulfilled by Amazon in California were not remitting California sales taxes.

On January 13, 2017, members of SBOE leadership, members of my team, and I travelled to Amazon’s Seattle Headquarters to meet with Amazon’s tax executives. After the transfer of the tax/fees authority from the SBOE to the new CDTFA, I felt compelled to write to Governor Brown’s Cabinet Secretary on August 31, 2017, summarizing our Seattle meeting on January 13, 2017 and recommended Governor Brown request Amazon to:

1. Assess/collect sales tax on ALL of the FBA retailers who are fulfilling orders with Amazon in the State of California.
2. Assess/collect/remits the LOCAL sales taxes on all Amazon-owned products. It is our understanding that Amazon only assess/collects/remits the 7% California state level tax portion.

Sometime after July 1, 2017, Amazon confirmed at a legislative hearing that they turned over the personal information of all its FBA merchants whose inventory wound up in California. CDTFA then sent letters to those merchants assessing current and back taxes (going back 6 to 8 years) including threats of criminal incarceration. I again felt compelled to write a letter to the new Governor Newsom, dated March 8, 2019, stating how I felt the action by the CDTFA against third party sellers that utilized online retail platforms were unlawful, unconstitutional and impractical. **As a part of my official testimony for the record before this Subcommittee, I am including a copy of my letter to the Governor, as well my letter to his Cabinet Secretary, for your reference.**

After the South Dakota v. Wayfair, Inc. case on June 21, 2018, I sponsored AB 147 with Assemblywoman Autumn Burke and Senator Mike McGuire requiring all retailers and marketplace facilitators, whether located inside or outside of California, to collect all local and state sales/use taxes for sales exceeding \$500,000 effective April 25, 2019. I urged the Governor to sign AB 147 and apply the assessment/collection law prospectively only since AB 147 clarified the intention of state law moving forward. Unfortunately, the Governor signed the bill, but then incorporated a provision that allowed the CDTFA to assess/collect back taxes up to 3 years in his 2019 Budget. This has caused more angst and confusion amongst third party sellers who never collected the sales/use tax to begin with and are now seemingly on the hook for extraordinarily high current and back taxes. These sellers do not even have control over which states Amazon ships their products to, so they would never know they were not complying with states’ laws in the first place.

Finally, please know that California is not the only state to take this back tax position against sellers. I have received reports of small merchants in California being subject to similar tax assessments from Washington, Massachusetts, Minnesota and Wisconsin. Therefore, I urge you to take action that would guarantee small merchants the right to seek injunctive relief from erroneous tax assessments, in their respective home states.

Thank you for the opportunity to share my comments.

In peace and friendship,



Fiona Ma, CPA
California State Treasurer