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Amnesty Under The Streamlined Sales And Use Tax Agreement: Use It Or Lose It!

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With the effective date of the Streamlined Sales and Use Tax Agreement (“SSUTA”) fast approaching on October 1, 2005, sellers that may have potential liabilities in any of the “streamlined” member states may want to consider taking advantage of the SSUTA’s broad amnesty provisions. Section 402 of the SSUTA provides that in exchange for registering and collecting tax, a member state “shall provide amnesty” for any “uncollected or unpaid sales or use tax.” Since these provisions are intended to apply to all businesses regardless of nexus, streamlined amnesty will prove most useful to those companies that have potential tax exposure in the states at issue. But this deal won’t be around forever -- sellers must take advantage of streamlined amnesty by registering within 12 months of the effective date of the particular state’s participation in the SSUTA. And the clock will most likely start ticking in a number of states on October 1st.

Which States Have Streamlined Amnesty?

There are eighteen streamlined member states, including eleven full members and seven associate members. Full member states include **Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, North Carolina, Oklahoma, South Dakota and West Virginia.** (**Nevada** has not yet formally petitioned for membership, but it is expected to do so soon). These states have petitioned for streamlined membership and have conformed their sales and use tax laws to the provisions of the SSUTA. Representatives from each state will become part of the SSUTA Governing Board, which is slated to come into effect when the Agreement is operative on October 1st. Each of these eleven full member states have laws adopting the streamlined amnesty provisions.

In addition to the full member states, there are also seven associate members.¹ These states have not yet become full members of the SSUTA, but are expected to do so at a specific time in the future. Associate member states include **New Jersey and North Dakota** (both of which are expected to become full members effective October 1, 2005),

¹ Associate membership was a new class of membership designed to help meet the threshold requirements needed before the SSUTA could go into effect. Associate members cannot vote on amendments and interpretations of the SSUTA and taxpayers registering under the SSUTA need not collect and remit taxes in associate member states.

Utah (July 1, 2006), **Tennessee** (July 1, 2007), **Ohio** (January 1, 2008), **Arkansas** and **Wyoming**.

What is Streamlined Amnesty?

Section 402 of the SSUTA provides that in exchange for registration and collection under the streamlined agreement, a member state “shall provide amnesty” for “uncollected or unpaid sales or use tax.” Thus, streamlined amnesty has the same effect as a “prospective only” voluntary compliance agreement.

Like a typical prospective-only agreement, a seller that registers under the streamlined agreement and begins collecting tax will not be subject to liability for past failure to register and collect the tax. Unlike the typical prospective-only situation, however, past nexus with the state will not be a factor in determining whether or not amnesty will be provided. Amnesty applies across the board to all sellers that register under the agreement. Streamlined amnesty, therefore, is most attractive to sellers that may have inadvertently created nexus in a state, but that are not currently registered and collecting tax. The broad-based amnesty provided under the SSUTA wipes out any potential back liabilities and provides an attractive inducement to registering under such circumstances.

The specifics of the streamlined amnesty provisions include the following:

- ▶ Amnesty precludes assessment for uncollected or unpaid sales and use tax, plus penalty and interest, for all periods during which sales were made while the seller was unregistered;
- ▶ The seller must register and begin collecting tax under the Streamlined Agreement;
- ▶ The seller must remain registered for at least 3 years;
- ▶ Registration must occur within 12 months of the effective date of the state's participation in the SSUTA.

Although the amnesty provisions are intended to apply to all businesses regardless of nexus, amnesty is **not** available in the following situations:

- ▶ Amnesty is not available to those matters for which a seller has already received notice of commencement of an audit²;

² There is no clear definition indicating exactly what constitutes “notice of the commencement of an audit” for purposes of disqualifying a seller from amnesty. In an Amnesty Survey undertaken by the Streamlined Sales Tax Project last year, most states responded that a letter advising the seller of an audit constitutes notice for these purposes. However, some states indicated that the mailing of a nexus questionnaire would be sufficient notice and two states would also include a phone call as sufficient notice. See “Streamlined Sales Tax Project Amnesty Survey Summary” (May 2004).

- ▶ Amnesty is not available to matters currently open on audit, including those matters pending in an administrative or judicial appeal;
- ▶ Amnesty is not available with respect to sales and use taxes already paid or remitted;
- ▶ Amnesty does not apply to use taxes due from a seller in its capacity as a buyer;
- ▶ Amnesty does not apply in cases of fraud or misrepresentation.

How Long Will This Deal Last?

Amnesty will preclude any assessment for back taxes, “provided registration occurs within twelve months of the effective date of the state’s participation in the Agreement.” See SSUTA § 402A(2). It is unclear exactly what date will be used to determine the “effective date of the state’s participation.” This will need to be clarified and determined by the Governing Board, when it comes into existence on October 1st. At a minimum, however, sellers seeking to take advantage of streamlined amnesty should act sooner rather than later in those states that are full members of the SSUTA when it becomes effective on October 1st. After the 12-month period expires, sellers will no longer be eligible for amnesty in these states.

Conclusion

Streamlined amnesty will provide broad-based relief to any seller that may have exposure for uncollected sales and use taxes. Companies should carefully review their own nexus situation in all participating streamlined member states and evaluate any potential exposure in those states where they are not currently registered and collecting tax on sales. If there is a risk of liability, such sellers should consider registering under the SSUTA in order to take advantage of the broad-based amnesty relief.

Once a state formally comes on board with the SSUTA, amnesty is available only for a 12-month period. After the 12-month period expires, sellers will no longer be eligible for amnesty. As an initial matter, therefore, timing becomes important with respect to the initial full member SSUTA states. (These states include Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, North Carolina, Oklahoma, West Virginia, with Nevada, New Jersey and North Dakota expected to become full members on October 1st as well). Taxpayers should therefore closely review operations in these states to see if streamlined registration and amnesty makes sense. ■



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