INDIANA

Lawmaker Introduces Marketplace Facilitator Bill

by Jad Chamseddine

Marketplace facilitators would be required to collect and remit Indiana sales taxes on behalf of third-party sellers under a recently introduced bill.

S.B. 322, filed January 7 by Travis Holdman (R), chair of the Senate Tax and Fiscal Policy Committee, would require marketplaces to collect and remit the state sales tax as a retail merchant on third-party transactions it facilitates starting July 1.

Since October, Indiana has required remote sellers to collect and remit sales taxes if they sell more than $100,000 worth of goods or have 200 or more transactions into the state per year. However, the bill would require marketplace facilitators to collect tax on third-party sales whether they meet the threshold or not.

> ***Starting July 1, the bill would require marketplaces to collect and remit the state sales tax as a retail merchant on third-party transactions it facilitates.***

Under the bill, third-party sales made through a marketplace are not counted toward the seller "for purposes of determining whether the seller has met the threshold." According to a November 2018 Multistate Tax Commission study, several states have struggled with this issue.

S.B. 322 would also protect marketplace facilitators from refund claims if they collect more taxes than required. The bill provides that a customer who has overpaid taxes may file a refund claim with the state Department of Revenue but will have no cause of action against the marketplace facilitator for recovery or for launching a class action suit.

Marketplace facilitators could collect $55.8 million to $71.6 million in fiscal 2020 and $67 million to $86 million in fiscal 2021, according to a fiscal note accompanying the bill.

The bill also retains language requiring accommodations facilitators to collect sales taxes on behalf of sellers that "rent or furnish rooms, lodgings, or accommodations" in Indiana. ■

KENTUCKY

No Consolidated Return for Parent, Sub, Appeals Court Holds

by Andrea Muse

The Kentucky Court of Appeals ruled that a parent corporation is not eligible to file a consolidated corporate income tax return with its wholly owned in-state subsidiary, denying a refund of over $1 million.

The court held January 4 in *World Acceptance Corp. v. Finance and Administration Cabinet* that the parent corporation is not an "includible corporation" under the statutes, rejecting the taxpayer's argument that there was a separate, alternative definition of the term that it met. The court also ruled that the state Department of Revenue was not bound by an anonymous advisory letter provided to the company's tax adviser.

World Finance Corp. of Kentucky is a wholly owned subsidiary of World Acceptance Corp., a South Carolina corporation, and provides consumer loans and tax preparation services. The subsidiary filed separate state corporate income tax returns for tax years ending March 31, 2007, through March 31, 2010.

World Acceptance, however, discovered it had business activities in Kentucky and believed that it was required to file a consolidated return with its subsidiary, and hired EY to make inquiries with the DOR. EY requested an anonymous letter ruling from the DOR asking if two employees working in the state for approximately 45 to 60 days each year and the receipt of management fees from an in-state subsidiary were enough to give the parent company nexus with Kentucky and require consolidated return filing.

In a March 25, 2011, reply letter, the DOR said the parent corporation should file a consolidated return if it directly owned 80 percent or more of the voting power or value of the total stock, but added a disclaimer that the answer was based on the information presented and that additional facts could change the answer.

The subsidiary, World Finance, amended its returns and filed consolidated returns with its parent corporation and sought a refund of $1,356,714. The DOR denied the request.

After finding that only one employee of the parent corporation — a Tennessee resident — worked in Kentucky, the DOR determined that the employee's payroll should be allocated to either Tennessee or South Carolina — where the corporation is headquartered. The DOR also determined that the management fees were not a sale in Kentucky because the fees were based on costs of performance from services performed in South Carolina.

Because the parent company had no property in the state, the DOR determined that under KRS 141.200(9)(e)(8), it was not an includible corporation because its Kentucky apportionment factors were zero. The DOR also determined that the parent was not an includible corporation under KRS 141.200(9)(e)(7) because it realized net operating losses in the years at issue and its state apportionment factors were de minimis.

> ***Although an opinion letter lacks the force of law, it should 'at a minimum, have persuasive effect,' Lloyd said.***

The taxpayer argued that even if it did not meet the definition under KRS 141.200(9)(e), it met an alternative definition in the term "affiliated group" under KRS 141.200(9)(b) because it was a common parent corporation.

Under KRS 141.200(9)(b), an affiliated group is defined as one or more chains of includible corporations connected with a "common parent corporation which is an includible corporation if" the common parent owns stock equaling at least 80 percent of the voting power and value of all stock of an includible corporation.

The taxpayer also claimed that the DOR was bound by its 2011 opinion letter that the parent corporation was required to file a consolidated return.

The state Board of Tax Appeals upheld the denial of the refund and the company appealed the decision to the Franklin Circuit Court. Though the circuit court initially ruled in favor of the company, it vacated its previous opinion and ruled in favor of the DOR in November 2015.

The circuit court ruled that the amendment adding the language in the definition of affiliated group was intended to clarify the term "affiliated group" and was not intended to be a separate definition for includible corporations. It also found that the DOR was not bound by its prior anonymous letter ruling.

The court of appeals agreed, holding that the DOR had "successfully asserted" that the parent corporation was not an includible corporation under KRS 141.200(9)(e). It also rejected the taxpayer's alternative definition argument, adding that it doesn't believe that the General Assembly would place "a separate, an entirely alternative definition" for a term within a section defining another term.

Noting that DOR opinion letters "lack the force of law," the court said that even if an opinion letter could be binding on the DOR, "the additional and differing facts that came to light in this particular instance make the letter ruling non-controlling and non-binding."

Mark A. Loyd of Bingham Greenebaum Doll LLP told *Tax Note*s January 11 that the court did not address the taxpayer's argument that its apportionment factors were not de minimis or zero based on its business activities in the state, wondering if this meant that other taxpayers with similar facts could make a similar argument to claim that they don't have nexus with the state.

Loyd argued that although an opinion letter lacks the force of law, it should "at a minimum, have persuasive effect." But he added that the "degree of persuasion of such an opinion is obviously directly related to how closely the facts" match. ■